



**Muhoro v County Government of West Pokot (Environment & Land Case 103 of 2016) [2022] KEELC 14830 (KLR) (16 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14830 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 103 OF 2016  
FO NYAGAKA, J  
NOVEMBER 16, 2022**

**BETWEEN**

**JOSEPH GICHINA MUHORO ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF WEST POKOT ..... DEFENDANT**

**JUDGMENT**

1. By way of a Plaint dated June 23, 2016 and filed on even day, the Plaintiff sought the following reliefs:
  - a. A declaration that the Defendant had no proprietary rights whatsoever over land parcel No West Pokot/Keringet 'A'/44.
  - b. Loss and damages as prayed in paragraph 14 above.
  - c. General damages for trespass and mental torture.
  - d. A permanent injunction restraining the Defendant, its servants and/or agents from trespassing upon and/or in any way interfering with the Plaintiff's peaceful use and possession of land parcel No West Pokot/Keringet 'A'/44.
  - e. Costs of the suit together with interest.
  - f. Any other relief this Honorable Court may deem fit to grant.
2. The Defendant entered appearance on July 13, 2016 and filed its statement of Defence on August 8, 2016. The Defendant raised denials on the averments raised in the Plaint.
3. By order of this Court on November 30, 2021, leave was granted to the Administrator of the estate of the deceased that is, Robinson Mwangi Gichina, who had testified as PW1 by the time of his death, to take over the conduct of the matter following the Plaintiff's death. The suit proceeded, with two witnesses testifying for the Plaintiff and none for the Defendant.



## **The Plaintiff's Case**

4. Before his death, the deceased person, Joseph Gichina Muhuro, became the registered proprietor of all that parcel of land namely West Pokot/Keringet 'A'/44. That was on April 9, 1984. He produced in evidence a certified copy of title issued on February 25, 1986 and a certificate of official search dated August 2, 2017 as P Exhibit 1 & P Exhibit 2 respectively.
5. His testimony was that during his lifetime he planted approximately one hundred (100) cypress trees. He also erected roughly ten (10) permanent houses. The deceased gained income from those houses by way of rental payments due to him.
6. He gave further evidence that in 2014, the Defendant sent its agents and/or servants to the said parcel of land and curved out an access road. For this exercise, the Defendant used machines known as Caterpillars, Bulldozers and other heavy machinery.
7. From then on, members of the public continue to utilize the said property to date. It was his evidence that as a result of the Defendant's actions, he suffered psychological torture and substantial loss. The actions of the Defendant caused him to issue several letters of demand seeking due compensation following the acquisition. The letters dated June 24, 2014, July 10, 2014 and July 17, 2014 were produced in evidence and marked as P Exhibit 6, P Exhibit 5 and P Exhibit 7 respectively.
8. In 2016 the deceased person approached Pavidia Property Consultants Limited for purposes of conducting a valuation on his property. Francis Kariuki Njagi, who was a valuer working in the said company prepared a report on his findings. He testified in this matter as PW2. In support of his licence to practice, he produced a copy of his practicing certificate as P Exhibit 8. He stated that he prepared a report, produced in evidence as P Exhibit 3, on his findings. That was upon payment of his requisite fees which he evidences as P Exhibit 4.
9. PW2 testified further that in preparing the report, he conducted an official search to ascertain ownership, he obtained a registry index map (RIM) to use to delineate the existence and extent of the road. PW2's findings revealed that the suit land measured 1.7 acres (0.69 Ha). The area under valuation, that is the excised part creating the road, measured 0.22 Ha. PW2 testified that in creating a picture of his findings, he valued the suit land at Kshs 3,000,000.00. The figure was arrived at based on the market value of estimates of surrounding parcels of land sales at the time and the cost of materials used to construct.
10. He stated that he found that the parcel of land is situate about 250 meters off Makutano - Kacheliba road within the vicinity of the Makutano Central Business District (CBD). The parcel of land was irregular in shape and bore a road frontage to the north and south. The road that had been opened connected the two (2) roads on the western side of the parcel that was adjacent to plot Nos 45, 426 and part of 591. It was a straight road.
11. As a result of the process, the suit land suffered destruction of one hundred (100) mature cypress trees and houses estimated to value at Kshs 9,000,000.00. The Plaintiff urged this court to grant the reliefs sought.

## **The Defendant's Case**

12. The Defendant elected not to call any witnesses to testify on its behalf. Consequently, the Defendant closed its case.



## Submissions

13. The Plaintiff's submissions were filed on July 7, 2022. He concluded that since the Defendant failed to call any witnesses, the Plaintiff's claim was uncontested. The Plaintiff submitted that the Defendant's actions of failing to notify the deceased of the acquisition of a portion of his property was in violation of his right to private land and its use, and amounted to public acquisition without compensation. He relied on *Halsbury's 4<sup>th</sup> ed, Vol 45 at paragraph 26, 1503* to fortify that contention that the Defendant was guilty of trespass therefore entitled to damages for trespass. He urged this Court to award the sum of Kshs 10,000,000.00 in general damages and Kshs 10,000,000.00 in exemplary damages.
14. The Defendant on its part filed its submissions on October 28, 2022. The Defendant dismissed all claims for damages and loss of income. On general damages for trespass, the Defendant submitted that the Plaintiff did not furnish any survey report in support of the allegations. On damages for loss of trees and the houses, the Defendant submitted that the Plaintiff failed to plead and prove specifically. It further stated that the valuation report relied on was capricious as it was prepared two (2) years after the alleged trespass. It further observed that there was no conclusive proof to evidence demolished structures and trees. To this end, it submitted the Court could not award Kshs 3,000,000.00 for loss of income. On exemplary damages, the Defendant submitted that there was no proof in support of the same. It urged this Court to dismiss the suit on account of failing to meet the standard of proof threshold.

## Analysis and Disposition

15. I have carefully analyzed the pleadings and the documents relied on. I have also considered the rival submissions and authorities relied on. It cannot be gainsaid that the Plaintiff proved that he, now deceased, was the registered proprietor of all that parcel of land namely Land Parcel No West Pokot/ Keringet 'A'/44 which parcel has now devolved in his estate.
16. I am also satisfied and I hold that as at the time of determination of this suit, there was a public access straight road passing through the suit land used by the public. The Plaintiff's uncontroverted evidence was that in 2014, the Defendant sent its agents and/or servants to the said parcel of land and curved out an access road. The Defendant used heavy duty machinery that included the use of Caterpillars and Bulldozers. A registry index map (RIM) was further obtained to delineate the existence of the road. The excised portion of the deceased's property creating the road measured 0.22 Ha. This evidence remained uncontroverted.
17. The descriptive attributes of the suit land are that it is situate about 250 meters off Makutano - Kacheliba road within the vicinity of the Makutano Central Business District (CBD). The public access road connected the two (2) roads on the western side of the parcel that was adjacent to plot Nos 45, 426 and part of 591.
18. The deceased, unhappy with the Defendant's actions, wrote several letters raising complaints, evidenced herein as P Exh 5, 6 and 7, inviting prospective negotiations following the acquisition of a portion of his property. It was further testified that members of the public continue to utilize the access road to date.
19. The evidence adduced by the Plaintiff was that the said land, used for the public, was not a road reserve. It vested in private interests as long as the deceased person remained the registered proprietor and he did. Since the property vested in the deceased person, which property subsequently devolved by way of law to his estate after his demise, the taking away of a portion or of it was mandatorily subject to legal procedures being followed but they were not.



20. It is clear and beyond any form of peradventure that the Defendant entered on the Plaintiff's private property and constructed a public access road. 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 the access road remains for public use.
21. The Defendant filed a Statement of Defence on August 8, 2016 in which, at paragraph 5 it stated that did not send the so called caterpillars and bulldozers to the Plaintiff's property and in paragraph 6 that it did not destroy any trees of the Plaintiff. At paragraph 8 it denied infringement of the Plaintiff's rights.
22. The Defendant's actions squarely fell within the ambit of compulsory acquisition. The *Land Act* defines compulsory acquisition as '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'.
23. Article 40(3) of the *Constitution* acknowledges that compulsory acquisition remains a necessary tool towards progressive communal development of government projects in Kenya. 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 in line with the dictates of the *Constitution* and any Act of Parliament in conformity with the *Constitution*.
24. Compulsory acquisition necessitates that the person deprived of his property is promptly paid in full by way of just compensation. Additionally, any person with a vested interest in, or right over, that property, has a right of access to a Court of law especially in instances where the said person is aggrieved.
25. The *Land Act* lays the prescription, scope and manner of compulsory acquisition within the Republic of Kenya. The relevant provisions are to be found in Section 117 through to Section 133.
26. Its process was extensively enumerated in the case of *Patrick Musimba -vs- The National Land Commission and 5 Others [2016] eKLR* as follows:

' Under Section 107 of the *Land Act*, the National Land Commission (the 1<sup>st</sup> 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 [Constitution](#) itself only provides for just compensation being made promptly.

27. Compulsory acquisition is a constitutionally regulated process. From the dictates of the [Constitution](#), its procedure must accord with the [Constitution](#), being the grund norm of the State, and by statute that adhere to the [Constitution](#). In fact, the Court of Appeal in [Commissioner of Lands & Another vs Coastal Aquaculture Ltd Civil Appeal No 252 of 1996 KLR \(E&L 264\)](#) emphasised that compulsory acquisition must fastidiously comply with the provisions of [Constitution](#) and the Land Acquisition Act (now repealed by the [Land Act](#)).
28. In the present case, it is evident that the Defendant failed to accord with the [Constitution](#) and the [Land Act](#). For instance, the Defendant made no preliminary inquiries for acquisition by involving the Plaintiff yet it was its intention to acquire a portion of the Plaintiff's property compulsorily. Additionally, the said acquired portion was not a reserve land. The culmination of proper procedure with the [Constitution](#) and statute would have led to adequate compensation upon the Plaintiff. I am of the view that this dispute would not be in existence had the process been followed. It is inexcusable to say the least that the process of compulsorily acquiring the deceased property was marred with glaring irregularities and unconstitutional mechanisms. I endorse the sentiments of the court in [Arnacherry Limited v Attorney General \(2014\) eKLR](#) that 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.'



29. 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, a process akin to compulsory acquisition but that fell short of it. For this reason, the Plaintiff is indeed entitled to compensation.
30. The Plaintiff produced P Exhibit 3, a Valuation Report dated June 9, 2016. The instructions are indicative that the valuation was conducted for litigation purposes. It was carried out in 2016, two years after the destruction of the Plaintiff's properties took place.
31. On the affected developments, PW2 stated that the affected plot contained developments including mature cypress trees and buildings, 'which fact is also alluded to in the documents made available to the valuer.' Curiously, not only were the documents referred to not listed, but they also were not attached to the report. The Report further stated that as at the date of inspection, there was no evidence of existing improvements.
32. The valuation was based on the market value defined as the estimated amount which an asset should exchange on the date of the valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing where the parties act knowledgeably, prudently and without compulsion. Based on this, the excised portion of the suit land was valued at Kshs 3,000,000.00.
33. I have made several observations in light of the above findings. Firstly, I note with great concern that the instructions were inspired by the need to proceed with this matter litigiously. I say so because the valuation may well have been compromised to suit the Plaintiff's narrative. In fact, no photographs or any iota of evidence was adduced to establish that there were demolitions and destructions as intimated by the Plaintiff; let alone the fact that they ever existed ab initio. It is evident that he was simply fine tuning the Plaintiff's story. Again, the valuation was carried out two years after the alleged destruction, which begs no rocket science to infer that there was a possibility that by then the character of the destruction and even the properties alleged to have been destroyed must have substantially changed or lost. Therefore, what would be presented in form of the report, unless supported by actual structures or relics of the same is but a mere 'story' based on inadmissible hearsay evidence.
34. Secondly, PW2 indicated that the affected plot contained developments which fact was captured in documents made available to him. One would have expected these documents made reference to would form part of the Plaintiff's evidence. Again, how was this court to arrive at the veracity of the claims in favor of the Plaintiff without the benefit of perusing the documents relied upon? Additionally, as repeated above, at the date of inspection, there was no evidence of existing improvements. This Court could not imagine about the nature and contents of the documents. Courts rely on proven facts. Section 107(1) of the *Evidence Act* is clear on proof of facts. Perhaps, had the documents been available, they would have given an indication or painted a picture of the extent of damage the Plaintiff now alleges occurred.
35. Lastly, while PW2 defined what market value was, he did not clearly demonstrate how he arrived at that figure. It behooved him to demonstrate that, for instance, he compared several sale agreements entered into by vendors and buyers of properties within the vicinity. He would also have made confirmations by way of furnishing documentary evidence, from government valuers for instance, to establish that he made comparative analysis to arrive at the said figure.
36. In light of the above, I am not satisfied that the said figure of Kshs 3,000,000.00 was arrived at based on cogent evidence. To me, it appeared that PW2 was potentially compromised to create a figure that suited the Plaintiff's desired outcome. It was purely based on conjecture and had not backed by evidence in law. For these reasons and those discussed above, I dismiss the claim for a sum of Kshs



3,000,000.00. Instead, it is only lawful that compensation be accomplished after due process. I shall elaborate further on the process in my final orders after discussing the other reliefs the Plaintiff seeks.

37. The Plaintiff urged this court to award the sum of Kshs 10,000,000.00 in general damages. I hesitate give such a blanket sum and blindly. The Supreme Court of Kenya in *Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR)* (Civ) (3 December 2021) (Judgment) when discussing damages held as follows:

' It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts. The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused'.

38. The main aim of general damages is to restore the aggrieved party to the position he was in had the damage not occurred. It is not intended to punish a violator. The Plaintiff submitted that a sum of Kshs 10,000,000.00 in general damages was sufficient as the Defendant unlawfully encroached on his land. The unlawful compulsory acquisition entitles the Plaintiff to general damages. I exercise my discretion and award the Plaintiff general damages in the sum of Kshs 500,000.00 owing to the Defendant's breach.
39. The Plaintiff in his submissions further prayed for Kshs 10,000,000.00 in exemplary damages. I, however, note that the said prayer was not pleaded in his Plaint. It is trite law and practice that submissions cannot and will never take the place of pleadings. A party is bound by its pleadings and a Court will not overlook that aphorism. Going by these sentiments, I will decline to grant the prayer for exemplary damages.

### **Orders and Disposition**

40. Having found that the Plaintiff has proved his case on a preponderance of the evidence adduced, I make the following orders:
- a. A declaration be and is hereby made that the Defendant had no proprietary rights whatsoever over land parcel No West Pokot/Keringet 'A'/44.
  - b. A declaration be and is hereby made that the Plaintiff's protected right to property was violated by the Defendant's acts of encroachment onto and trespass upon the Plaintiff's property known as Land Parcel No West Pokot/Keringet 'A'/44.
  - c. A declaration be and is hereby made that the encroachment onto and trespass upon the Plaintiff's property known as Land Parcel No West Pokot/Keringet 'A'/44 by the Defendant for the creation of a public access road without consultation of the Plaintiff was illegal and unconstitutional.
  - d. The Plaintiff is entitled to compensation over Land Parcel No West Pokot/Keringet 'A'/44 and the same to be ascertained and paid for after a re-survey and valuation of the property by an independent valuer of the parties' choosing within sixty (60) days, and if they fail to agree on one, the Surveyor in charge of the relevant County, upon being paid fees by the Plaintiff.
  - e. The Plaintiff is awarded Kshs 500,000.00 in general damages.



f. The Plaintiff is awarded costs of the suit with interest thereon at court rates and on the sums awarded.

41. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS  
16<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

