



**Peony Management Company Ltd v Oyatsi (Environment & Land
Case 79 of 2020) [2024] KEELC 1506 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 79 OF 2020**

JO MBOYA, J

MARCH 4, 2024

BETWEEN

PEONY MANAGEMENT COMPANY LTD PLAINTIFF

AND

DESTERIO OYATSI DEFENDANT

RULING

Introduction and Background:

1. The Defendant/Applicant has approached the Honourable court vide Notice of Motion Application dated the 15th June 2023; brought pursuant to the provisions of Section 3 and 3A of the [Civil Procedure Act](#); Section 57 of the [Physical and Land Use Planning Act](#), 2019 and Order 51 (1) of the [Civil Procedure Rules](#) 2010; and in respect of which the Applicant has sought for the following reliefs;
 - i. That this Honorable court be pleased to assess the compensation payable by the Plaintiff to the Defendant in terms of item (e) of the decree issued herein on 19th May 2021.
 - ii. The costs of this Application be provided for.
2. The instant Application is premised on the various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of Desterio Oyatsi, who is the Defendant/Applicant; and which affidavit is sworn on the 15th June 2023.
3. Essentially, the application beforehand invites the Honourable court to proceed and ascertain the requisite quantum of compensation payable to and in favor of the Applicant pursuant to and in compliance with clause (e) of the Judgment of the court rendered on the 30th November 2020.
4. On the other hand, it is instructive to point out that though served with the Application beforehand, the Plaintiff/Respondent neither filed any Grounds of opposition nor Replying affidavit.



For coherence, it is common ground that the Plaintiff/Respondent does not oppose the instant Application, save for the question of the quantum due and payable.

5. Additionally, it is worthy to point out that the Defendant/Applicant has placed before the Honourable court two [2] sets of annexures relating to the survey works that were done and/or undertaken over and in respect of the portion of the Defendant's land which has since been encroached upon by the Plaintiff/Respondent.
6. On the other hand, the Plaintiff/Respondent has placed before the Honourable court a valuation report, which highlights the extent of the land encroached upon and thereafter provides the value arising from the valuation exercise.
7. Be that as it may, it is important to point out that the subject Application came up for mention on the 30th November 2023; whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently and in this regard, the court circumscribed the timeline[s] for the filing and exchange of written submissions.
8. Furthermore, it suffices to underscore that thereafter the Applicant proceeded to and filed two [2] sets of written submissions dated the 26th January 2024 and 8th February 2024, respectively; whereas the Plaintiff/Respondent filed written submissions dated the 13th February 2024.
9. For clarity, all the three [3] sets of written submissions, [whose details have been highlighted in the preceding paragraphs], are on record.

Parties Submissions:

a. Applicant's Submissions:

10. The Applicant herein has filed two [2] sets of written submissions dated the 6th January 2024 and the 8th February 2024, respectively; and in respect of which the Applicant herein has adopted and reiterated the grounds contained at the foot of the Application.
11. Furthermore, the Applicant herein has thereafter proceeded to and highlighted and canvassed four [4] pertinent issues for consideration by the Honourable court.
12. Firstly, Learned counsel for the Applicant has submitted that the decree which was issued by and on behalf of the court and arising from the Judgment rendered on the 30th November 2020, confirmed that the Applicant herein was the successful Party. Consequently and in this regard, Learned counsel for the Applicant has submitted that the Applicant is the decree holder and not otherwise.
13. Secondly, Learned counsel for the Applicant has submitted that pursuant to and by dint of the Judgment of the court, it was found and established that the Plaintiff/Respondent had encroached upon a portion of the Applicant's land; and as a result of the encroachment [read, Trespass], the court ordered that the Plaintiff/Respondent does compensate the Applicant for the offensive encroachment.
14. Thirdly, Learned counsel for the Applicant has submitted that the Judgment and decree of the court did not provide for the partitioning of the Applicant's land [suit property], either as contended by the Plaintiff/Respondent or at all.
15. To the contrary, Learned counsel for the Applicant has submitted that the Plaintiff/Respondent's claim for, inter-alia, the Right of Easement over and in respect of a portion of the suit property was dismissed.



16. Consequently and arising from the foregoing, Learned counsel for the Applicant has submitted that the Plaintiff/Respondent cannot now be heard to lay a claim for registration of the right of easement over and in respect of a portion of the suit property or at all.
17. Fourthly, Learned counsel for the Applicant has submitted that the only outstanding issue, which this court is called upon to engage with and determine, relates to the computation and assessment of the requisite compensation [recompense] payable to the Applicant.
18. Furthermore, Learned counsel for the Applicant has ventured forward and submitted that arising from the Judgment, same [Applicant] engaged a Land surveyor and Quantity surveyor [QS], to ascertain, inter-alia, the extent of the area encroached upon and the requisite costs for restoration of the area to its status ante the offensive encroachment.
19. To this end, Learned counsel for the Applicant has submitted that the two [2] named Experts, who were engaged by the Applicant, proceeded to and ascertained the requisite costs in the sum of Kes.65, 900/= only; Kes.92, 000/=; and Kes.10, 000/= only, respectively.
20. In a nutshell, Learned counsel for the Applicant has implored the Honourable court to award the sum of Kes.167, 900/= only [details in terms of paragraphs 25, 30 and 38 of the supporting affidavit sworn on 15th June 2023].

b. Respondent's Submissions:

21. The Respondent filed written submissions dated the 13th February 2024; and in respect of which same has raised, highlighted and canvassed two[2] pertinent issues for consideration by the Honourable court.
22. First and foremost, Learned counsel for the Respondent has submitted that vide Judgment of the court which was rendered on the 30th November 2020, the Honorable court found and held that the Plaintiff/Respondent was entitled to an easement over and in respect of the portion of the suit property which the Respondent had hitherto been using to access Hatheru Road.
23. Additionally, Learned counsel for the Respondent has also submitted that other than the aspect of the Judgment that spoke to the registration of an Easement, the Honorable court also ordered and directed that the Respondent does compensate the Applicant herein as pertains to the portion of the Applicant's land which had been encroached upon by the Plaintiff/Respondent.
24. Arising from the foregoing, Learned counsel for the Respondent has submitted that what is pending before the court is the assessment and ascertainment [quantification] of the value of the portion of the Applicant's land, which has been encroached upon by the Respondent's development.
25. Secondly, Learned counsel for the Respondent has submitted that towards and in a bid to ascertain the value of the portion of the Applicant's land which has been encroached upon, the Respondent herein proceeded to and retained a registered valuer, who thereafter ventured forward and generated a valuation report.
26. Further and in addition, Learned counsel for the Respondent has submitted that arising out of the valuation report, the value of the Applicant's land that was encroached upon, was computed and ascertained in the sum of Kes.11, 500, 000/= only.
27. In any event, Learned counsel for the Respondent has pointed out that the value captured and reflected at the foot of the valuation report filed by and on behalf of the Respondent's valuer has not been challenged nor controverted by the Applicant.



28. In the circumstances, Learned counsel for the Respondent has therefore submitted that the Honourable court should proceed to and adopt the value alluded to and espoused at the foot of the Valuation Report by the Respondent's valuer. In this regard, Learned counsel for the Respondent has invited the court to decree and award compensation for the sum of Kes.11, 500, 000/= only.

Issues for Determination

29. Having reviewed the subject Application and the Response thereto; and upon taking into consideration the written submissions filed by and on behalf of the respective Parties, the following issues do arise [emerge] and are thus worthy of determination.
- i. What was the import, meaning and tenor of the Judgment of the Court and the consequential Decree.
 - ii. What is the reasonable compensation[Recompense] that is due and awardable to the Applicant on the basis of the suit property that was/has been encroached upon.

Analysis and Determination:

Issue Number 1

What was the import, meaning and tenor of the judgment of the court and the consequential Decree.

30. Though the Judgment rendered and/or delivered by the court [differently constituted] appear[s] to be explicit, clear and devoid of ambiguity, there appears to be misconstruction by and on behalf of the Parties and essentially, by the Defendant/Applicant.
31. I say that there appears to be misconstruction of the terms of the said Judgment, because time and again, the Applicant herein seems to suggest that the court did not decree the registration of an Easement over a portion of the suit property, belonging to and registered in the name of the Defendant/Applicant.
32. Furthermore, there is yet another aspect of the Judgment/decree of the court which is also generating mis-interpretation. In this respect, it suffices to take cognizance of limb/ clause (e) of the Decree extracted on the 19th May 2021.
33. Given the contradictory interpretation and the attendant misconstruction arising from the Judgment and consequential Decree of the court [differently, constituted], it is therefore important to reproduce the entirety of the decree that was extracted by the Parties.
34. For the sake of brevity, the terms of the decree extracted on the 19th May 2021; are reproduced as hereunder;
- a. The Defendant's Mense profit fails
 - b. The Plaintiffs claim to right of easement or adverse possession over the Defendants land brought up under the limitation of actions fails.
 - c. In light of the nature of the Plaintiffs development on the land and without any other access to Hatheru Road, it would not be fare to grant the relief sought by the Defendant.
 - d. The order that commence itself to the court is for the parties to have an easement created in favor of the Plaintiff for the portion of the defendant land which the Plaintiff has been using to



access Hatheru Road in accordance with Section 98 of the *land Registration Act*. The Plaintiff will pay for the consideration of the easement.

- e. For the portion of the Defendants land that the Plaintiff development that has encroached on the parties do undertake a valuation within sixty (60) days of the date of this judgment, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If the parties do not agree on the value of the portion affected within this time frame, they will file submissions for the court determine the reasonable payable to the Defendant.
 - f. The Defendant is awarded cost of the suit.
 - g. The Plaintiff will also meet the cost of the valuation and preparation and registration of the easement.
35. From the terms of the decree, [whose details have been reproduced herein before], it is evident and apparent that the Honorable Judge [differently constituted] found and held that the Plaintiff/ Respondent herein shall be entitled to the registration of an Easement pertaining to and concerning the portion of the Applicant's land, which, the Respondent has hitherto been using to access Hatheru Road.
36. Additionally, the Learned Judge ventured forward and directed that the Easement in question shall be registered in accordance with the provisions of Section 98 of the *Land Registration Act*, 2012.
37. In any event, it is also discernable from the words deployed by the Honorable Judge that the Plaintiff/ Respondent herein was obliged and/or obligated to bear the costs/consideration for the creation and registration of the Easement.
38. Secondly, the Honorable Judge also ventured forward and decreed that the Plaintiff/Respondent herein shall compensate the Applicant as pertains to the portion of the Applicant's land [suit property], which has been encroached upon by the Plaintiff's development.
39. Furthermore, the Learned Judge proceeded to and intimated that the Parties herein, [namely, the Plaintiff and the Defendant], were to agree upon the requisite compensation; and in default, same were to engage a valuer within a circumscribed timeline to undertake the requisite valuation, as a precursor to determining the quantum of compensation payable to the Applicant.
40. Suffice it to point out that upon the valuation of the portion of the suit property encroached upon by the Plaintiff, the Plaintiff was called upon [obligated] to pay the determined compensation to and in favor of the Defendant/Applicant herein.
41. To my mind, the import and tenor of the Judgment under reference, were clear, explicit and devoid of ambiguity.
42. Nevertheless, it is imperative that this court be pleased to venture forward and disabuse the Parties' of the contention that the Judgment in question is capable of more than one meaning/ interpretation.
43. Further and in any event, it is also worthy to point out that the Learned Judge used the term "Compensation"; and thus upon the payment of due compensation, then the Plaintiff/Respondent would be entitled to designated portion encroached upon and/ or containing her [Plaintiff's] Development.
44. For coherence, it is appropriate at this juncture to interrogate and discern the true meaning of the term Compensation.



45. To this end, it suffices to cite and adopt the definition provided for under the *Black's Law Dictionary*, 2nd Edition; which states as hereunder;

Due Compensation

This term applies to the recompense that a person is entitled to receive.

Percentage Compensation

the term that applies to money paid to a trustee based on profits earned by business administrators.

INcentive Compensation

This term applies to payments in excess of agreed wages, a bonus and profit sharing as an incentive for a good performance.

Just Compensation

the term used when a payment is given for taking over private property and using it for public use.

Compensation Case

the case where a worker claims that his accident or illness is a result of his employment and is entitled to compensation money.

Accrued Compensation

The compensation that is awarded and is due and payable.

Compensation Claim

the name given to a claim in a compensation case.

46. Arising from the definition attributed to the word compensation, [in terms of the foregoing paragraph], it is my finding and holding that the compensation that was envisaged by the Honorable Judge was due compensation, which was to place the Defendant/Applicant in the position same [Defendant/Applicant], would have been were it not for the encroachment.
47. Further and in addition, I hold the view that due compensation also operates as an indemnity and thus upon payment of same, the Defendant/Applicant herein would not continue to lay a claim to the portion of land for which compensation has been rendered.
48. Consequently and in view of the foregoing, my answer to issue number one [1] is threefold. Firstly, the terms of the Judgment under reference decreed the registration of an Easement in favor of the Plaintiff/Respondent, as pertains to a portion of the Applicant's land which has hitherto been used by the Plaintiff/Respondent to access Hatheru Road.
49. Secondly, the terms of the Judgment, [in accordance with clause (e) thereof decreed due compensation in favor of the Defendant/Applicant], as pertains to the portion of land which has been encroached upon by the Plaintiff.
50. Thirdly, upon payment of the requisite recompense[Compensation] to and in favor of the Defendant/Applicant, the Defendant/Applicant shall forfeit his rights to and/or interest[s] over and in respect of the encroached portion of the suit property, for which compensation shall have been rendered.



Issue Number 2

What is the reasonable Compensation that is due and awardable to the Applicant on the basis of the suit property that was/has been encroached upon.

51. As pertains to the second issue herein, there is no gainsaying that what the Learned Judge envisaged was the valuation of the portion of the suit property which had been encroached upon by the Plaintiff/ Respondent; and upon such valuation, payment of due compensation.
52. In my humble and considered view, the Honorable Judge directed both Parties to either agree on the quantum of compensation [recompense], or in default, to engage a registered valuer to undertake the exercise.
53. Suffice it to point out that the Honorable Judge did not speak to survey and/or assessment of the costs that would be required towards [sic] undertaking any demolition or, restoration of the portion of the suit property encroached upon, to the status quo ante.
54. For the avoidance of doubt, what the Learned Judge spoke to was that the Parties herein were to engage a mutual valuer or in default, either party was to engage a separate valuer with a view to undertaking the requisite valuation.
55. Notwithstanding the clear import of clause (e) of the Judgment and consequential decree, the Defendant/Applicant herein neither engaged nor retained any registered valuer or at all.
56. To the contrary, what the Applicant did was to engage a Land surveyor and a Quantity surveyor, who thereafter proceeded to and generated two [2] reports, which ascertained, inter-alia, the acreage of the portion encroached upon and (sic) the costs of demolition and restoration of the status quo ante, in respect of the portion encroached upon.
57. On the other hand, the Plaintiff/Respondent proceeded to and retained registered valuer, who undertook due inspection and valuation of the designated portion of the suit property and thereafter returned a value of Kes.11, 500, 000/= only.
58. Suffice it to point out that the valuation report, which has been filed by and on behalf of the Plaintiff/ Respondent herein has neither been challenged nor controverted by any other valuation report.
59. Pertinently, it is not lost on this Honourable court that where one, the Defendant/Applicant not excepted, desires to challenge the contents of a valuation report, then same is called upon to procure and avail a contrary report and not otherwise.
60. In this respect, it suffices to take cognizance of the holding by the Court of Appeal in the case of *Criticos versus National Bank of Kenya Limited (as the successor in Business to Kenya National Capital Corporation Limited "KENYAC") & another* (Civil Appeal 80 of 2017) [2022] KECA 541 (KLR) (28 April 2022) (Judgment), where the court held thus;
 37. In the result, subject to what we shall shortly state with regard to the crops, we find the appellant's valuation report to be solid in content and uncontroverted. It was not to be merely wished away. And we are on balance persuaded by the appellant's contention that the suit property was sold at an undervalue.
 38. In the circumstances, is the appellant entitled to an award of damages for the sale of the suit property at an undervalue and for loss of future profits? In addressing this question, we are guided by the recent decision of the Supreme Court in *Attorney General -vs- Zinj Limited*



[2021] eKLR, where the apex Court upheld the trial court's reliance on the valuation report of a private valuer in assessing the quantum of special damages. The Court held;

“30. Having determined that the respondent's right to property had been violated by the Government, the Trial Court, and later the Appellate Court, made orders for compensation in favour of the respondent. Both Courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior Courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the Trial Court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to this Court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned one, Counsel for the appellant stated that no such Report was ever tabled at the Trial Court.

The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the Trial Judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report”. (Emphasis ours)

61. Additionally, it is also imperative to take cognizance of the position highlighted by the Supreme Court of Kenya [the apex Court] in the case of *Attorney General -vs- Zinj Limited* [2021] eKLR, where the court stated as hereunder;

In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.

62. From the foregoing exposition, what is evident and apparent is to the effect that if one seeks to contradict the contents of a valuation report, like the one placed before the court by the Plaintiff/ Respondent, then such an adverse Party is obliged [obligated] to procure and obtain a counter report.

63. On the other hand, it is also discernable that where there is no counter report, then the court is obliged to take into account and to adopt the contents of the valuation report filed, unless there be exceptional circumstances that negate the reliance on the said report.

64. Be that as it may, I beg to underscore that no exceptional circumstances, has been adverted to and/or highlighted by the Defendant/Applicant or at all, to negate the propriety and validity of the valuation report on record.

65. Arising from the foregoing analysis, my answer to issue number [2], is to the effect that the value of the portion of the suit property, which has been encroached upon by the Plaintiff/Respondent, has been duly ascertained and quantified.



66. Notably, the value that has been spoken to [underscored] at the foot of the valuation report is Kes.11, 500, 000/= only, which the court deems to be due recompense and/or compensation.

Final Disposition:

67. Having analyzed the twin issues that were highlighted and enumerated in the body of the Ruling, it must have become evident that the Defendant/Applicant herein is indeed entitled to due Compensation in accordance with the prescription contained vide clause (e) of the Judgment of the court rendered on the 30th November 2020.

68. Nevertheless and before speaking to the final orders, it is appropriate to invite and draw the attention of both Parties to the clear contents of clauses (d) and (e) of the Decree signed and sealed on the 19th May 2021. For coherence, the Decree speaks to compensation payable to the Applicant.

69. Be that as it may and for the avoidance of doubt, it behooves both Parties' [Plaintiff/Respondent and Defendant/Applicant] to cooperate and actualize the terms of the decree.

70. Other than the foregoing, the court finds and holds that the Application dated the 15th June 2023; is meritorious and same be and is hereby allowed on the following terms;

- i. The Quantum of Compensation due and payable to the Defendant/Applicant in terms of clause (e) of the Decree extracted and sealed on the 19th May 2021; be and is hereby assessed in the sum of Kes.11, 500, 000/= only.
- ii. The said Recompense [kes.11, 500, 000/= only] shall be paid to and in favor of the Defendant/Applicant within 60 days from the date hereof.
- iii. In default to pay recompense [details in terms of clause (ii) hereof] the Defendant/Applicant shall be at liberty to execute.
- iv. The Defendant/Applicant is directed to adhere to and comply with clause (d) of the Decree extracted on 19th May 2021.
- v. Similarly, the Defendant/Applicant shall be obliged to facilitate compliance with clause (e) of the decree rendered on 19th May 2021 within 60 days from the date of payment of the requisite compensation in terms of clause (ii) hereof.
- vi. Each party shall bear own costs of the Application.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Ms. E Akello for the Defendant/Applicant

Mr. Muma Nyagaka for the Plaintiff/Respondent

