



**Kibuange v County Government of Mombasa (Environment & Land
Case 69 of 2020) [2023] KEELC 17311 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 69 OF 2020**

NA MATHEKA, J

MAY 10, 2023

BETWEEN

ZAKAYO MICHUBU KIBUANGE PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MOMBASA DEFENDANT

JUDGMENT

1. It is the plaintiff's claim that he was on February 13, 2006, by written authority of the defunct Municipal Council of Mombasa allocated for exclusive use space 59 Kongowea Mitumba Market, where he laid money by erecting a two storeyed structure comprising eight (8) shops on the ground floor and a conference hall on the first floor. The premises have all along been let out for commercial use and at the moment they fetch an annual rent of Kshs. 1,320,000/-. The Plaintiff was to pay and has faithfully paid Kshs. 1000/- per month by way of house and stall (ground) rent. As at the time of coming to court rent was paid up to December 31, 2020. On Friday June 12, 2020, without warning, or notice, or a revocation or withdrawal of licence, or even a resolution of the County Government of Mombasa, the defendant wrongfully and illegally partly demolished the premises erected on space 59 Kongowea Mitumba Market, thereby rendering it unsafe, and effectively and abruptly terminating the tenancies between the plaintiff and his tenants.
2. The defendant did the acts complained of wrongfully, maliciously, at night, without authority, or a warning or notice of revocation or withdrawal of the lease/licence, and without affording the Plaintiff an opportunity to state his case whatsoever, and has thus contravened the plaintiff's right under articles 10 and 40 of the *Constitution* of Kenya. The action has also breached the contract or caused a breach of contracts between the plaintiff and his tenants; and has caused loss and damage. the defendant threatens and intends, unless restrained by this honourable court, to repeat the acts complained of, and complete the demolition to remove any physical evidence that the structure ever existed. By reason of the matters aforesaid, the plaintiff has suffered loss, and damage and he claims a declaration that the defendant's entry upon and partial demolition of the premises/structure aforesaid was illegal, wrongful



and a continuing violation of the natural justice principle audi alteram par-tern and the plaintiff's property rights under articles 10 and 40 of the *Constitution* of Kenya.

3. The Plaintiff further prays for a preservatory order or an injunction to prevent further demolitions and for an order of restitution to compel the Defendant to restore at its expense to the state it was in, the premises owned by the Plaintiff on space 59-Kongowea Mitumba Market, even though the Defendant has derived no direct benefit by demolishing the property. The Plaintiff prays for redress by way of compensation and restitution in integrum of space 59 Kongowea Mitumba Market, which restitution is estimated (without current valuation) at over Kshs. 30 Million, as he could not have invested his money had he not been encouraged by the Municipal Council of Mombasa. This gives rise to equity of expectation in favour of the plaintiff which the court is invited to protect and enforce. the plaintiff prays for;
 - a. A declaration that the defendant has no legal authority and is not entitled to enter upon and demolish the building on space 59 Kongowea Mitumba Market and its action is wrongful, unconstitutional and a violation of the Plaintiff's rights under the natural justice principle audi alteram partem and the *Constitution*, 2010;
 - b. A preservatory order to restrain the defendant (by itself, its agents, servants, employees or otherwise howsoever) from continuing to demolish the building on space 59 Kongowea Mitumba Market and requiring the defendant to restore the building as it was before June 12, 2020.
 - c. Exemplary and compensatory damages to be assessed by the court.
 - d. Further or other relief, to give effect to the order of restitution in integrum and stem the loss of rental income.
 - e. Costs of the suit.
4. The defendant states that sometimes in February 2020 instructions from County Chief Officer for Trade, Tourism and Investment sent instructs that a notice be given to the traders located at Makaburini-Kongowea Market Exit gate road to proceed and demolish and or move their structures constructed along that road to pave way for the construction of the Emergency access road. DW1 Mr. Hamisi Kombe Mwidani the Market Master informed the affected traders of the notice to Demolish and/or move their stalls for the impending Construction of the Emergency access road. That when they did not move the stalls were demolished. The communication was verbal through the Committee. DW1 confirms the demolition was done at 11pm at night and during the curfew. DW2 the Market Superintendent incharge of Retail Markets Mr. Shadrack Ndambuki testified that DW1 was to give the traders the notice to demolish along Makaburini-Kongowea Market Exit gate road. That the Plaintiff's building was demolished by mistake and it was collateral damage. That the building is operating upto today. Both DW1 and DW2 confirm they did not give the Plaintiff a written notice and no written notice was adduced in evidence.
- 5 This court has considered the evidence and the submissions therein. Section 38(1) of the *Physical Planning Act* which provides that;
- 6 When it comes to the Notices of a Local Authority, that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained or that any of the conditions of a development permission granted under this Act has not been complied with, the Local Authority may serve an Enforcement Notice on the owner, occupier or developer of the land”



- 7 If the Plaintiff was carrying out business on the road, could the defendant have given them licences? The court finds that article 47 (1) of the Constitution grants every person right to fair administrative action. It reads as follows;
- 8 Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that “if a right on fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”
- 9 PW1 testified that he was allocated the plot by the defendant and he put up shops and a hall. His building was partly demolished without notice. The plaintiff adduced evidence of the allotment letter and payment receipts of the house and stall rent. I find that if the plaintiff’s business was on a road reserve, the defendant thought to have cancelled their licences and charged them with contravening the provisions of the Physical Planning Act. I find that resolving to demolition of their structures at night was a draconian act which was inhuman and a breach of enjoyment of the Plaintiff’s right to own properties. Article 40 (3) of the Constitution provides that;
- 10 The state shall not deprive a person of property of any description, or in any interest in, or right over property of any description “
- 11 By demolition of the Plaintiff’s building, the Defendant herein which is a Local Government breached the Plaintiff’s right as enshrined in article 40 of the Constitution. What is clear from the above provisions is that private property is protected and may not be taken arbitrarily or destroyed without due process. In the case of Dry Associates Ltd vs Capital Markets Authority & another Petition No.328 of 2011, the court held that:
- 12 Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law..... but is to be measured against the standards established by the Constitution”
- 13 This court finds that by resorting to demolish the Plaintiffs structures instead of taking other measures as provided by the laws, the Defendant breached the Plaintiffs right as enshrined in the Constitution and therefore the Defendant’s actions are not justified.
- 14 From the foregoing, it is not in doubt that the subject premises were demolished without giving the plaintiff any notice leave alone adequate notice. The plaintiff was also not served with an enforcement notice as required by section 72 (1) and (2) of the Physical and Land Use Planning Act No. 13 of 2019. In the circumstances, it is my finding that the demolition was not only unjustified and unlawful but it amounted to a violation of the Plaintiff’s Constitutional right to fair administrative action enshrined in article 47 (1) of the Constitution. In the absence of any explanation from the defendant regarding why its agents picked on the plaintiff’s premises for demolition without any legal basis (and saying that it was collateral damage) I find that the said demolition was motivated by malice. And as the unlawful demolition was perpetrated by the defendant, I find the defendant liable for the loss occasioned to the plaintiff as a result of the demolition. Having found that the plaintiff’s premises were unlawfully and maliciously demolished and that his property as specified in his pleadings were destroyed in the process, I find that he suffered loss and damage for which he is entitled to an award of damages.
- 15 In his submissions, the plaintiff prayed for compensation of Kshs. 30,000,000 as the value of the destroyed building in the demolition and Kshs. 3,000,000 exemplary damages. It is an established principle of law that special damages must not only be specifically pleaded but must also be strictly proved. See the case of Paul Audi Ochuodho v Joshua Ombura Orwa, (2014) eKLR. In paragraph 6 (a) and (b) of the plaint, the plaintiff specifically pleaded the special damages claimed from the defendant.



The Plaintiff has produced a valuation report on the renovation of the building and loss of rental income.

- 16 I find that a valuation report similar to invoices cannot be used as evidence of payment in a claim for special damages. This position was emphasized by the Court of Appeal in the case of Jamal Mohamed Bandira v Owners of the Motor Vessel "Nasibu", (2020) eKLR where the court held as follows;

...an invoice or a proforma invoice is not evidence of payment of the quoted sum. In *Total (Kenya) Limited v Janevams Ltd* [2015] eKLR, this Court, citing its earlier decision in *Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority* [2019] eKLR 720 held that: -

"...A proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made... "A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods..."

- 17 The plaintiff also sought for exemplary damages. As stated by this court in Godfrey Julius Ndumba Mbogori & another v Nairobi City County (2018) eKLR

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".

- 18 In the circumstances of this case, I am not satisfied that the defendant's actions were so arbitrary and oppressive so as to justify an award of exemplary damages.

- 19 I am fortified in this finding due to the fact that the bottom floor of the building was still occupied. The loss of rental income has not been specifically proved and the same will not be awarded. PW2 the Quantity Surveyor produced a report dated June 22, 2022 indicating the cost of restoration of the said building as Kshs. 6,312,160/=. The same was not challenged by the defendant. Even though trespass is actionable per se, it is clear from the evidence adduced by the plaintiff that he suffered loss and damage as a result of the defendant's actions. I find that plaintiffs are therefore entitled to general damages for trespass.

- 20 Having now carefully considered the available evidence, the exhibits produced in court, the written submissions and the relevant provision of law, the court finds that the plaintiffs have proved their case against the defendant on a balance of probabilities. In the case of Isaac Gathungu Wanjobi v The Attorney General & others, HCC Petition No.154 of 2011, the court awarded the plaintiff a sum of 2,000,000/= as general damages for breach of article 47 of the Constitution. Taking into account all the circumstances of this case I am of the opinion that an award of general damages in the sum of Kshs. 3,000,000.00 would be adequate compensation to the plaintiff for the loss suffered as a result of the defendant's act of trespass and demolition. Costs of this suit are awarded to the plaintiff.

- 21 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF MAY 2023.

N.A. MATHEKA



JUDGE

