



Macharia (Suing as the Administrator of the Estate Of The Late Peter Macharia Marianjugu) v Kenya Railways Corporation (Environment & Land Case E026 of 2020) [2023] KEELC 20676 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E026 OF 2020
LA OMOLLO, J
OCTOBER 12, 2023**

BETWEEN

**MONICA WAMUHU MACHARIA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PETER
MACHARIA MARIANJUGU**

AND

KENYA RAILWAYS CORPORATION DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide a Complaint dated 23rd November, 2020.
2. The Plaintiff avers that land parcel No. Nakuru Municipality Block 6/141 is registered in the name of the late Peter Macharia Marianjugu her deceased husband.
3. The Plaintiff also avers that the deceased was issued with a certificate of lease for a period of 99 years from the year 1992.
4. The Plaintiff further avers that after the deceased was issued with the Certificate of Lease, he embarked on developments on the suit property.
5. It is her averment that in the year 1993 the Defendant began to lay claim over the suit property and so the late Peter Macharia Marianjugu filed Nakuru HCC No. 470 of 1993.
6. It is also her averment that the said case was heard and the court declared that the suit property was the property of the deceased.



7. It is further her averment that she has been in occupation of the suit property until March, 2020 when the Defendant sent a group of people to find out if they had encroached onto its land.
8. The Plaintiff avers that after conducting a survey, they found out that the suit property was in the name of her late husband and so she had the right to occupy it.
9. The Plaintiff also avers that on 11th October, 2020 the Defendant through its agents invaded the suit property and made claims that it was a railway reserve and that the building on it ought to be demolished.
10. The Plaintiff further avers that the Defendant through its agents demolished the building on the suit property which action amounted to an act of trespass.
11. It is her averment that the Defendant maliciously demolished the house on a Sunday so that she could not seek redress in court and that as a result of the said demolition she has suffered loss & damage.
12. The Plaintiff prays for judgement against the Defendant for;
 - a. General and exemplary damages for trespass on Nakuru Municipality Block 6/141.
 - b. Special damages in the sum of kshs. 132,500,000/= (Kshs. One Hundred and Thirty-Two Million, Five Hundred Thousand) being the value of the buildings and the machinery demolished on Nakuru Municipality Block 6/141.
 - c. Lost rent accruing from the parcel of land known as Nakuru Municipality Block 6/141 from the date of demolition to the date of termination of the leases over the property.
 - d. Costs of the suit.
13. The Defendant filed its statement of defence on 25th January, 2021.
14. The Defendant denies the averments in the Complaint and states that it is entitled by law under the [Kenya Railways Corporation Act](#) Cap 397 to construct and maintain railway level crossings on both public and private roads in the manner described both in the Act and the East African Railways and Harbours Engineering Manual Volume 1(1962).
15. The Defendant states that there is a mandatory legal requirement for the maintenance of what is known as the 'Visibility Diamond' that stretches 300 feet on each of the four directions along the diagonals of the crossing.
16. The Defendant also states that the law prohibits any constructions or erection of any structures and even growth of any plants beyond 9 inches within the 'Visibility Diamond'.
17. The Defendant further states that the aim of the legal requirement is to maintain a distance standard visibility that will enable a motorist, when he is at least 300 feet from the crossing, to see the leading component of the train when it is also at least 300 feet from the crossing.
18. The Defendant states that the alleged suit premises was within the 'Visibility Diamond' on a rail road level crossing and that if indeed the Plaintiff's husband acquired title to the said property and constructed a storied building without the approval of the Defendant's Managing Director, then the said act was illegal and created a danger to the general public.
19. The Defendant also states that any structures built on the 'Visibility Diamond' without the necessary approval, ought to be removed as they are a danger to the level crossing and would not be entitled to any compensation.



20. The Defendant denies any knowledge of Nakuru HCC No. 470 of 1993 and denies participating in the said suit.
21. The Defendant seeks orders that the Plaintiff's suit be dismissed with costs.

Plaintiff's Evidence.

22. Monica Wamuhu Macharia testified as PW1. She prayed that her witness statement dated 23rd November, be adopted as part of her evidence which prayer the court acceded to.
23. It was her testimony that the suit property is Nakuru Municipality Block 6/141 and it is registered in the name of her late husband Peter Macharia Marianjugu.
24. She also testified she had letters of administration in respect of his estate which she produced as Exhibit P1.
25. She further testified that the suit property belongs to her late husband and she narrated that they previously lived in Eldama Ravine, Baringo for forty years.
26. It was her evidence that the former president expressed his intention to expand Baringo High School and so they gave up their land. She went on to state that subsequently, the Plaintiff was given the suit property as compensation.
27. It was also her evidence that they received the certificate of lease for the suit property. The same was produced as Exhibit P2.
28. It was further her evidence that in the year 1993, a dispute arose between them and Kenya Railways which led to so her late husband filing HCC No. 470 of 1993. She produced the judgement in the said suit as Exhibit P3.
29. She testified that the they have always had a problem with the Defendant and that they often held talks with it in an attempt to resolve the dispute. She stated that whenever these talks would be held, the Defendant would leave the suit property. She testified that in March, 2020, the Defendant's agents went to the suit property and made enquiries as to the ownership of the suit property and after this enquiry, she was summoned to the Defendant's offices. It is her testimony that when she arrived, she showed a copy of her late husband's title to one Tobias Wagara and that Tobias Wagara informed her that the suit property was marked for demolition.
30. It was her evidence that she showed Tobias Wagara the judgement of the court and that Tobias Wagara then wrote the letter dated 12th March, 2020. The said letter was marked and produced as Exhibit P4.
31. It was her further evidence that in October, 2020, a group of young men went to the suit property and put 'XKR' marks on the building.
32. It was further her evidence that on 10th October, 2020 some people and a tractor appeared at the suit property and told her that they had orders for demolition.
33. She went on to testify that the said people allowed her to remove some things from the building and stated that they would come back on Monday to continue the demolition. She narrated that they returned on the said Monday and demolished the building. She produced the photographs of the building at the commencement of demolition and at the end of the demolition as Exhibit P5 (a), (b), (c) & (d).



34. She further testified that after the demolition, she sued the Defendant and issued it with a Notice of Institution of Suit dated 19th October, 2020 and added that it was received by the Defendant on 23rd October, 2020. The said notice was produced as Exhibit P6.
35. It was also her evidence that she did a valuation of the building which report she produced as Exhibit P7.
36. It was also her evidence that she had a tenant who was occupying part of the building. She stated that the tenant is Royal Feeds and that it was manufacturing animal feeds. It was further her evidence that Royal feeds & her entered into a lease agreement for a period of ten years. She produced the lease agreement as Exhibit P8.
37. She testified that the Defendant did not have the right to demolish her property because she was not given any notice. She added that they informed her of the demolition by word of mouth and only put marks on the suit property. She explained that the markings were done with red paint.
38. She further testified that the Defendant's agents called her to their office and engaged in talks for a period of time. She stated that she is sure that it was the Defendant who demolished her property because they also demolished the wall around Kenya Co-operative Creameries and repaired it.
39. PW1 stated that she wanted to be compensated for her building and for loss of income because her tenant (Royal Feeds) used to pay her Kshs. 200,000/= as rent.
40. Upon cross examination, she confirmed that she took out letters of administration but did not have the confirmed grant.
41. She also confirmed that the title is yet to be transferred to her name and added that she did not see it necessary to change it.
42. She stated that she was not aware that she could not enter into a lease agreement with Royal Feeds before confirmation of grant.
43. She admitted that she did not have the documents to show how her husband came to acquire the suit land.
44. She also admitted that Njenga who was the Commissioner of Lands was informed by the late president Moi to give them land as compensation for the land they had given up for the expansion of Baringo High School.
45. She admitted that she did not have the allotment letter and also admitted that the suit property was near a railway line.
46. She confirmed that the Defendant had been going to the suit property and they were in communication over the years.
47. She also confirmed that she had land elsewhere and further confirmed that the Defendant did not visit the other parcel of land.
48. She further confirmed that Royal Feeds were her tenants as evidence by Exhibit P8. She also admitted that Maria Njugu Enterprises Limited was the name of the building and that it is her late husband who gave it the name. She also confirmed that no company had been incorporated.
49. PW1 admitted that the suit property is in the name of her late husband and that the lease agreement does not say that she was contracting as the administrator of the estate of her late husband.



50. She admitted that she did not have any evidence of payment of Kshs. 200,000/= . For rent she confirmed that she did not have the receipts or bank deposit slips as all the documents were destroyed during the demolition.
51. PW1 confirmed that the valuation report includes the machines of Royal Feeds and it doesn't distinguish between the value of the building and the machines.
52. Upon re-examination, she stated that she had the certificate of title but no allotment letter. She explained that she entered into a lease agreement with Royal Feeds, because she had not transferred the title to the suit property to herself. PW1 confirmed that she was the administrator of the estate of her late husband.
53. PW 1 stated that the machines did not belong to her and all she wanted was compensation for the building.
54. On 25th May, 2022 the parties agreed by consent to have the County Surveyor Nakuru County visit the suit property and establish its proximity to the Nakuru -Kisumu Railway Line.
55. The said report was filed on 7th October, 2022 and was produced as Exhibit P9 by consent.
56. This marked the close of the Plaintiff's case.

Defendant's Evidence.

57. Engineer Mwanja Mativo testified as DW1. He prayed that his witness statement dated 22nd January, 2021 be adopted as part of his evidence and it was so adopted.
58. He stated that he has worked for Kenya Railways Corporation (The Defendant) for a period of twenty-nine years.
59. He produced the documents on the Defendant's list of documents dated 22nd January, 2021 as follows;
 - a. A copy of the Kenya Railways Corporation Vesting Order of 1906 as Exhibit D1.
 - b. A copy of the Railways & Harbours Engineering Manual Volume 1 (1162) as Exhibit D2.
60. In his witness statement, he reiterates the contents of the Defendant's Statement of Defence and states that it is not true that the Defendant trespassed onto and demolished the Plaintiff's property.
61. He states that the prayers sought in the Plaint have been overtaken by events and that since the structures that were allegedly demolished were either on a railway reserve or a visibility diamond, they formed a danger to the general public safety and so the balance of convenience does not tilt in favour of the Plaintiff.
62. He states that the Plaintiff ought to demonstrate how she acquired the suit property that was reserved for Railway Level Crossing Visibility Diamond which acquisition jeopardized the safety of the general public.
63. Upon cross examination, he confirmed that he was trained as an engineer and studied the course of Engineering survey.
64. He also confirmed that he did not know what "FR" stands for and further confirmed that he was not familiar with the term Folio Registry Map.
65. He further confirmed that he was aware that this suit arose from demolition of a building and admitted that he did not supervise the demolition.



66. DW1 stated that his work is 60% in the office and 40% outside the office and that on 11th October, 2020 he did not supervise any demolitions.
67. He admitted that according to paragraph 3 and 4 of his statement, he maintains lines and level crossings.
68. He confirmed that no structure is allowed within the visibility diamond of the level crossing and added that any structure that falls within the visibility diamond ought to be demolished. He stated that that is the justification for demolition of the structure on the suit property.
69. He admitted that he did not know about the Survey Act and further stated that he did not know whether the Kenya Railways Act defines the term Visibility Diamond.
70. He also admitted that the Visibility Diamond is a creation of the Engineering Manual that was produced as Exhibit D2.
71. DW1 admitted that the technical directions were directed to Kenya Railway Technical Staff and employees.
72. He confirmed that the technical directions are incorporated into the Physical Planning with County Governments where the Railway Line passes and they are in the minutes of the meeting attended.
73. He also confirmed that he was aware that before a title deed is issued, the Physical Planning & Survey Department are involved.
74. When referred to Exhibit P2 which was the Certificate of Lease, he confirmed that it was in the name of Peter Macharia Maria Njugu and further confirmed that the Certificate of Lease was in respect of land parcel No. Nakuru Municipality Block 6/141.
75. He admitted that he was not aware of any meetings in respect to the suit property but was aware that a structure on the suit property was demolished.
76. When referred to Exhibit P3, the judgement that was delivered in HCC 470 of 1993, DW1 confirmed that the 2nd Defendant in the said suit is Kenya Railways Corporation.
77. He also confirmed that the court held that the land belongs to the Plaintiff who was Peter Macharia Marianjugu. He further confirmed that he was not aware if the Defendant appealed against the decision or applied to have it set aside.
78. He reiterated that the structure on the suit property was within the visibility diamond when it was put up ten years ago.
79. He admitted that the said building ought not to have been put up and that he was not aware if a suit was filed requesting for demolition. He stated that according to him, anything falling within the visibility diamond was on the Defendant's land or reserve.
80. DW1 stated that if the government was to allocate the land falling within the visibility diamond then it would be wrong. He confirmed that the issue of allocation is a matter that would come up in meetings but the defendant would not necessarily be in attendance.
81. He confirmed that it was not mandatory that the Defendant is informed of the deliberations at such meetings. He confirmed that as an engineer, his role is to advise on safety in request of land near the railway lines. He went on to state that his role is to offer advice to the department that allocates land.



82. He admitted that he was aware of the building on the suit parcel was put up ten years ago. He also admitted that he did not have a copy of the advisory opinion to Kenya Railways and neither did he know about compulsory acquisition.
83. When referred to Exhibit P4, which was the letter dated 12th March, 2020, DW1 admitted that he knows Tobias Wagala who is a retired Regional Security Officer. He confirmed that the said Tobias worked in Nakuru and that he had a better knowledge of the property in dispute.
84. He further admitted that the said letter says that they were investigating encroachment on railway land and the author (Tobias Wagala) states that the property belongs to Peter Marianjugu. He went on to confirm that the said letter is copied to Monica and makes reference with the suit property.
85. DW1 stated that the said letter was never brought to his attention and admitted that Mr. Tobias Wagala had no obligation to report it to him.
86. He reiterated that he was an officer of the Defendant and when referred to the judgment in HCC 470 of 1993, he stated that he was not aware of an eviction order that had been issued against the Plaintiff.
87. With regard to paragraph 6 of his witness statement, he admitted that a person must seek approval from the defendant if they are to put up any structure on railway land. He stated that this however did not apply to private land.
88. DW2 explained that if the structure was on railway land and it affected visibility, then it would be demolished but if it was on private land, then they did not have authority to interfere with it except in cases of emergency as provided in the Railways Act.
89. He emphasized that other than during an emergency, they had authority invading private property and if they did, it was against the law.
90. Upon re-examination, and with regard to the judgement delivered in HCC 470 of 1993, he confirmed that he had been shown that the Defendant was Kenya Railways. He stated, however, that he was not aware if the Defendant participated in the hearing or if they were served.
91. DW1 reiterated that the Visibility Diamond and Railway Reserve were for the safety of the general public and for railway equipment.
92. He explained that the stopping distance of a train is 300 feet (100 m) so that a train can start breaking if there is an emergency at the railway crossing.
93. He referred to Exhibit P2 DW1 stated that he did not know how an individual could have acquired land within the visibility diamond and put up structures on it.
94. He stated that paragraphs 4, 5, 6 and 7 of his witness statement were on demolition of property on private land.
95. He reiterated that Kenya Railways had a right to remove structures within the visibility diamond and that in the present case, they did not remove the structure on the suit property.
96. He stated that Tobias Wagala was a senior security officer and did not have authority to comment on land issues and that it was a preserve of the Estates Department.
97. This marked the close of the Defendant's case.



Issues for Determination.

98. The Plaintiff filed her submissions on 21st March, 2023 while the Defendant filed its submissions on 12th April, 2023.
99. The Plaintiff in her submissions sets out the background of the suit and submits on the burden of proof.
100. On the question of burden of proof, the Plaintiff relies on Section 104 and 107 of the *Evidence Act*, the cases of Alice Wanjiru Ruhiu Vs Messiac Assembly of Yahweh [2021] eKLR, Ahmed Mohammed Noor Vs Abdi Aziz Osman [2019] eKLR and submits that each party to a dispute bears a burden of proof.
101. The Plaintiff submits that she was present when the Defendant demolished the building on the suit property on 11th October, 2020 and that the Defendant in its defence stated that the demolition was justified.
102. The Plaintiff also submits that the Defendant justifies the demolition of the building on the suit property on the ground that the house was within the railway reserve and/or visibility diamond.
103. The Plaintiff relies on the cases of Republic Vs Institute of Certified Public Secretaries of Kenya Ex-Parte Mundia Njeru Geteria [2010] eKLR and Royal Ngao Holdings Limited Vs N.K Brothers Limited & another (Civil Case 156 of 2019) [2021].
104. The Plaintiff makes reference to the report prepared by the Nakuru County Surveyor which shows that the Defendant ought to have given valid reasons to warrant the demolition.
105. On whether the demolition was legal, the Plaintiff relies on the cases of William Musembi & 13 Others Vs Moi Educational Center Co. Limited & 3 Others [2021] eKLR, Mike Maina Kamau Vs Attorney General [2017] eKLR and submits that there is no justification for evicting a party without a court order regardless of whether or not the occupation of the land is legal or illegal.
106. On whether the Defendant was justified in demolishing her property, the Plaintiff submits that the Defendant ought to have obtained a court order for eviction and demolition before doing the demolitions.
107. The Plaintiff relies on the cases of Mike Maina Kamau Vs Attorney General [2017] eKLR, Municipal Council of Eldoret Vs Titus Gatitu Njau [2020] and submits that she should be awarded Kshs. 15,000,000/= as general and exemplary damages.
108. The Plaintiff seeks that she be awarded special damages of Kshs, 132,500,000/= as per the valuation report she produced and kshs. 24,000,000/= as lost rent.
109. The Defendant, in its submissions, sets out the background of the suit, a summary of the Plaintiff's and it's case and submits that the Plaintiff's pleadings are defective as the Plaintiff did not establish any other cause of action apart from seeking an order of permanent injunction to restrain the Defendant from trespassing on her property.
110. The Defendant submits on the prayers sought in the Plaint i.e the claim of general and exemplary damages and special damages and states that the Plaintiff did not set a basis for the grant of the said prayers.



111. The Defendant also submits that as per the valuation report produced by the Plaintiff, the value of the land is Kshs. 95,000,000/= and the value of the buildings site works are indicated as Kshs. 37,500,000/=.
112. The Defendant submits that the Plaintiff seeks that she be compensated for the value of machinery and yet in her pleadings and evidence she stated that the tenants were allowed to remove the machinery before the alleged demolition.
113. On the claim for loss of rent, the Defendant submits that the Plaintiff produced a tenancy agreement dated 1st January 2017 between Maria Njugu Enterprises Ltd and Royal Animal Feeds Ltd but failed to establish a nexus between the lessor which was a Limited Liability Company Limited and herself.
114. The Defendant submits that the claim for lost rent was not specifically pleaded and so the said claim is not sustainable.
115. The Defendant relies on the cases of Herbert Hahn Vs Amrik Singh [1985] eKLR, Banque Indosuez Vs DJ Lowe & Co Ltd [2006] eKLR, Caltex Oil (K) Ltd vs Rono Limited [2016] eKLR among other cases and reiterates that the Plaintiff is not entitled to the orders sought as they were not specifically pleaded.
116. The Defendant submits that the Plaintiff has demonstrated that the suit property was previously government land and that she ought to demonstrate that due process was followed in the alienation of government land.
117. The Defendant relies on the case of Henry Muthee Kathurima Vs Commissioner of Lands & another [2015] eKLR and seeks that the suit be dismissed with costs.

Analysis and Determination.

118. After considering the pleadings, evidence and rival submissions filed in this suit, the issues that arise for determination are:
 - a. Whether the Plaintiff is entitled to the orders sought in the Plaintiff and
 - b. Who should bear costs of the suit.

a. Whether the Plaintiff is entitled to the orders sought in her Plaintiff.

119. The Orders sought have been set out in the preceding paragraphs but I will nonetheless reproduce them for purposes of interrogating and making a finding on each of them. They are as follows:
 - a. General and exemplary damages for trespass on Nakuru Municipality Block 6/141.
 - b. Special damages in the sum of kshs. 132,500,000/= (Kshs. One Hundred and Thirty-Two Million, Five Hundred Thousand) being the value of the buildings and the machinery demolished on Nakuru Municipality Block 6/141.
 - c. Lost rent accruing from the parcel of land known as Nakuru Municipality Block 6/141 from the date of demolition to the date of termination of the leases over the property.
 - d. Costs of the suit.



120. The Plaintiff's case is that she is the legal representative of the estate of the late Peter Macharia Marianjugu. It is also her case that the late Peter Macharia Marianjugu was the registered owner of land parcel No. Nakuru Municipality Block 6/141.
121. It is further the case of the Plaintiff that her late husband was allocated the suit property in the year 1992 and in 1993, the Defendant begun to lay claim over it.
122. The Plaintiff's case is that her late husband filed Nakuru HCC 470 of 1993 wherein the court gave a declaration that the suit property belonged to him.
123. The Plaintiff states that despite of the said judgement, the Defendant demolished a building on the suit property without any notice and without any court order.
124. In support of her case, the Plaintiff produced a Grant of Letters of Administration Intestate (Exhibit P1) issued by the Nakuru High Court in Succession Cause No. 49 of 1999 to her i.e. Monica Wamuhu Macharia in respect of the estate of Peter Macharia Marianjugu on 1st April, 1999.
125. A copy of the Certificate of Lease (Exhibit P2) of land parcel No. Nakuru Municipality Block 6/141 issued to Peter Marianjugu Macharia on 31st May 1996 was also produced. It shows the size of the property as 0.4143 Ha; the lease is for a term of 99 years from 1st August 1992 and the rent payable is Kshs. 10,000/=.
126. A copy of the judgement delivered by the High Court of Kenya at Nakuru in HCC No. 470 of 1993 (Exhibit P3) was also produced.
127. The parties in the said suit are Peter Macharia vs Attorney General and Kenya Railways Corporation. On perusal of the Judgment, it can be seen that, Peter Macharia sought the following orders;
 - a. A declaration that LR Nakuru Mun. Block 6/141 belongs to the Plaintiff.
 - b. A declaration that the purported cancellation of the letter of allotment dated 23/7/92 by that of 19/1/93 is null and void.
In the alternative; -
 - i. An order of general damages for unlawful cancellation.
 - ii. The first defendant be ordered to pay adequate compensation to the plaintiff for the value of the suit plot together with all the buildings and other developments.
128. Judgment was entered in favour of Peter Macharia in the following terms;
 - a. LR No. Nakuru Municipality/ Block 6/141 belongs to the Plaintiff.
 - b. The 1st Defendant has not adduced any evidence whatsoever to support the cancellation letter (Exhibit 6) dated 19/1/93 and the same is of no effect, having been written after the Plaintiff had already developed the plot.
 - c. A case for compensation could have been considered had the court had the opportunity of hearing the Defendants.
 - d. Both Defendants shall pay to the Plaintiff the costs of this suit with interest at court rates.
129. A copy of the letter written by Tobias Wagala, an employee of the Defendant, addressed to the Security Services Manager, Kenya Railways Corporation was produced as Exhibit P4. The said letter makes



- reference to HCC No. 470 of 1993 which declared Peter Macharia as owner of the suit property. The said letter in its “recommendation” states that the Plaintiff is the bonafide owner of the suit property.
130. Copies of the photographs of the building before and after demolition were also produced (Exhibit P5 (a)- (d)). It is therefore a fact that the building was demolished.
 131. A copy of a Notice of Intention to sue dated 19th October, 2020 (Exhibit P6) was produced, it is drawn by Githui & Company Advocates and addressed to the Managing Director, Kenya Railways Corporation.
 132. A copy of the lease agreement between Monica Wamuhu Macharia (Marianjugu Enterprises Limited) and John Ngugi Mwaura (Royal Animal Feeds) (Exhibit P8) was produced. Question were put as to whether the plaintiff had authority to enter into the lease agreement in her name.
 133. The lease agreement was for land parcel No. Nakuru Municipality Block 6/141 and the building thereon that was known as MariaNjugu Enterprises. The lease is for twenty years commencing from 1st January, 2017. The rent payable was Kshs. 200,000/= . Kshs. 120,000/= was to be paid every month and kshs. 80,000/= was to be the cost of making an extension behind the said building.
 134. A copy of a valuation report dated 19th October, 2020 (Exhibit P7) was produced. It is made by Chrisca Real Estates and is for land parcel No. Nakuru Municipality/Block 6/141. The suit property was valued at Kshs. 95,000,000/= and the value of the buildings and the site works was valued at Kshs. 37,500,000/=. This brings the total value to kshs.132,500,000/=.
 135. The Defendant’s case on the other hand is that it is mandated to maintain what is known as “Visibility diamond” which is 300 feet on each of the four directions along the diagonals of the railway crossing.
 136. The Defendant’s case is also that the law prohibits any constructions within the “visibility diamond” and if a structure is constructed thereon then it must be demolished.
 137. It is also the Defendant’s case that the structures that were demolished were either on a railway reserve or within the “visibility diamond”.
 138. In support of its case, the Defendant produced a copy of the Kenya Railways Corporation (Vesting) Order 1986 (Exhibit D1) and a copy of the Railways and Harbours Engineering Manual Volume 1(1962) (Exhibit D2).
 139. The Railways and Harbours Engineering Manual Volume 1(1962) at paragraph 7.08 under visibility provides that;

“...Where speed on the railway is likely to be high or the road carries fast traffic, consideration shall be given to increasing the sighting distance over 300 feet, particularly from the road to the railway...”
 140. By consent the parties agreed that the surveyors report filed on 7th October, 2022 be produced as Exhibit P9. The report was done by Robert Otiti the Head of Survey Nakuru County in the presence of the Plaintiff, her surveyor and surveyors from the Defendant.
 141. The Nakuru County Surveyor observed that the structures/wall along boundary F2—N4-KC2-KCA were demolished and made the following recommendations;

“Since FR 226/156 is approved and authenticated by the Director of Surveys, Kenya Railways should give valid reasons as to what warranted demolitions on that parcel and if not, they should compensate for the demolitions done within the cadastral boundary of parcel 141.



Kenya Railways should be compelled to carry out civic education on boundaries of Railway land throughout the nation, aspect in question, “The Diamond” and its legality.

Since there was an oversight in capturing the rail track accessing parcel 68, a resurvey should be done/ a cancellation of the previous survey”

142. The suit property Nakuru Municipality Block 6/141 is registered in the name of the late Peter Macharia Marianjugu. The Plaintiff is the administrator of his estate.
143. It is not disputed that the building on the suit property was demolished and that the Plaintiff has filed the present suit seeking for compensation.
144. The Defendant on the other hand alleges that the suit property is within the “Visibility Diamond” and therefore the Plaintiff has to demonstrate how the late Peter Macharia Marianjugu acquired it.
145. Despite alleging that the suit property is within the “Visibility Diamond”, the Defendant did not produce any evidence to demonstrate that the suit property was within the said “Visibility Diamond”.
146. The Nakuru County Surveyor in his report whose contents have been set out in the preceding paragraph stated that the Defendant should give valid reasons as to why they demolished the building on the suit property and if not, they should compensate the Plaintiff. There have been subtle attempts by the Defendant to state that they did not demolish the Plaintiff’s building. They however state that any construction that falls within the visibility diamond must be demolished. This can be read from the statement of defence and was expressly stated by DW1 in his evidence.
147. The report of the surveyor confirms the fact of demolition by the Defendant and recommends compensation to the Plaintiff. Proof in civil cases is on a balance of probability. Taking the documents and evidence into consideration it is more probable than not that the demolition was carried out by the Defendant. Any finding to the contrary would, in my view, be absurd.
148. A court of competent jurisdiction rendered itself on the question of ownership of the suit property. No appeal has been preferred against that decision. As things remain, the suit property belongs to the late Peter Macharia Marianjugu and any attempts by the Defendant to claim ownership or rights over it cannot and should not be sustained.
149. The defendant has gone to great lengths on the issue of the visibility diamond. The basis for this argument is the East African Railways and Harbours Engineering Manual of 1962. The Defendant only gave excerpts of the manual and particularly, paragraph 7.08 which speaks to visibility. I have looked up and found the complete copy of the said manual. It was printed at D. L. Patel Press LTD Nairobi.
150. Section I deals with the introduction and is as follows:

“The instructions contained in this Manual will come into force immediately and supersede all relevant instructions contained in the publications Engineering Department circulars – revised 1940 of the Kenya and Uganda Railways Harbours and Engineering Manual, Vol.1 -Technical Instructions, -1925 Tanganyika railways.

Circulars on administration matters will be provided in Volume II.

The instructions contained in this book must be read in conjunction with and not in lieu of, the regulations contained in the following publications they in no wise (sic) supersede.

General Rules



General Appendix to the Working Time Table and General Rules.

Sectional Appendix to the Working Time Table and General Rule book.

Accident Instructions.

Working Time Table.

Each employee placed in possession of a copy of this Manual must make thoroughly acquainted with and act upon the instructions contained in it. In the event of a contingency arising which is not provided for in the Manual, he will exercise all necessary discretion or follow implicitly orders received from his superior officers. (Emphasis is mine)

The instructions contained herein are subject to amendment from time to time any such amendments will be notified by the chief Engineer and issued in the form of printed slips numbered consecutively. The slips must be pasted or neatly written in ink in the appropriate places and their receipt recorded in the page Register of Amendments...”

151. It is clear that this manual is meant for the employees of the Defendant and not the general public. The instructions are meant to provide guidance to engineers concerned with building and design of harbours and railways in East Africa.
152. The Defendant has provided a sketch drawn by it to show that the suit parcel falls within the visibility diamond. There are however, no official documents or records to show that the suit parcel or part of it belongs to the Defendant and that it was therefore erroneously allocated to the Plaintiff. In any even the High Court pronounced itself on the question of ownership and declared the suit parcel as belonging to the Plaintiff's deceased husband.
153. The Defendant has committed grave injustice to the Plaintiff and there is no doubt in my mind that the Plaintiff has made a case for compensation for demolition of the suit property.
154. The Plaintiff seeks orders of general and exemplary damages for trespass on Nakuru Municipality Block 6/141.
155. Section 3 (1) of the [Trespass Act](#), Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
156. In *Park Towers Ltd Vs John Mithamo Njika et al* (2014) eKLR, the court held as follows;

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”
157. On the award of general damages for trespass, the court in the case of *Philip Ayaya Aluchio Vs Crispinus Ngayo* [2014] eKLR held as follows;

“ The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the



costs of restoration, whichever is less. See *Hostler – Vs – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).”

158. The court in the case of *Willesden Investments Limited Vs. Kenya Hotel properties limited NBI* H.C.C. No. 367 of 2000 held as follows;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10, 000, 000 is a reasonable award for general damages”.

159. Given the circumstances of this case, it is my view that an award of Kshs. 3,000,000/= as general damages for trespass would be sufficient.

160. The Plaintiff is also seeking exemplary damages for trespass. The court in the case of *Mikidadi –vs- Khaigan and Another* [2004] eKLR 496 held as follows;

“Exemplary damages are only to be awarded in limited instances namely, (a) oppressive arbitrary or unconstitutional action by servants of government, (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the Plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

161. In *Ajit Bhogal Vs Kenya Power and Lighting Co. Ltd* [2020] eKLR, the court held as follows;

“38. The Plaintiff has also asked for award of exemplary and aggravated damages. In the case of *Rookes –v- Barnard* (1964) 1 ALL ER 367 cited by Munyao J in the case of *Titus Gatitu Njau –v- Municipal Council of Eldoret* (2015)eKLR, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the Defendant’s conduct was calculated to procure him some benefit, not necessarily financial at the expense of the Plaintiff. That English case received approval of the East African Court of Appeal in the case *Obongo & Another –v- Municipal Council of Kisumu* (1971) EA 91 and has been applied in various decisions. The basis of awarding exemplary damages is to punish the Defendant for his conduct. At the same time, punitive damages should not be awarded to enrich the Plaintiff. The court in awarding such damages or not should look at the circumstances of each case.

39. In the case of *Obongo and Another –v- Municipal Council of Kisumu* (supra), the Court of Appeal stated:

“Exemplary and punitive damages are appropriate in two classes of cases;

oppressive, arbitrary, or unconstitutional action by the servants of the government and conduct by a Defendant calculated to make a profit for himself which may well exceed the compensation payable to the Plaintiff.... It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is



making a general award, it may take into account factors such as malice or arrogance on the part of the Defendant and this is regarded as increasing the injury suffered by the Plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of are regarded as still being essentially compensatory in nature.”

162. In *Stelco Properties Limited & another Vs Njugi Ventures Limited & another* [2021] eKLR the court awarded Kshs. 10,000,000/= as exemplary damages and in doing so held as follows:

“47. The Plaintiffs did not demonstrate that they had suffered any specific loss as a result of the 1st Defendant’s acts of trespass. The Plaintiffs had submitted that the structures that were destroyed by the 1st Defendant during the trespass were valued at Kshs. 3,000,000/-. No evidence was placed before the court in proof of this allegation. In any event, such claim is in the nature of special damages and such ought to have been pleaded with the necessary particulars and specifically proved. The loss was neither pleaded nor proved at the trial. The Plaintiffs however proved that the 1st Defendant entered the suit property forcefully having obtained a fraudulent title and threw out the 1st Plaintiff’s employees who were in occupation. The 1st Defendant’s actions were arbitrary, oppressive and were carried out with impunity with the aim of achieving pecuniary benefit for the 1st Defendant. This in my view is an appropriate case in which exemplary damages should be awarded.” (Emphasis is mine)

163. It is my view that the conduct of the defendant, who is a government department was completely unwarranted.

It was not only oppressive and arbitrary but violated the Plaintiff’s right to property as enshrined under Article 40 of *the Constitution* of Kenya, 2010. The demolition carried out by the Defendants is akin to unconstitutional action by the servants of the government. The Plaintiff is therefore deserving of an award of exemplary damages. I find that an award of Kshs. 5,000,000 as exemplary damages is adequate.

164. The Plaintiff is also seeking an award of kshs. 132,500,000/= as the value of the buildings and the machinery destroyed and/or demolished.

165. As aforementioned, the Plaintiff produced a valuation report which valued the suit property at Kshs. 95,000,000/= and the value of the buildings and the site works at Kshs. 37,500,000/=. This brought the total value to kshs.132,500,000/=.

166. It has already been established that the Defendant demolished the Plaintiff’s building on the suit property. My view is that the Plaintiff’s is entitled to claim only the value of the building and not land. The valuation report provides as follows;

- a. Value of land.....KSHS. 95,000,000/=
 - b. Value of Buildings including site works.... KSHS. 37,500,000/=
- Total Kshs 132,500,000/=

167. While the Plaintiff seeks 37,500,000 for building and machinery, the valuation report does not mention machinery. It provides only for the value of the buildings including site works. She is therefore only entitled to be awarded Kshs. 37,500,000/= being the value of the buildings including site works and I find so.



168. The Plaintiff is also seeking to be awarded lost rent accruing from the suit property from the date of demolition to the date of termination of the lease over the property.

169. The court in the case of Roy Properties Limited & another Vs Attorney General [2019] eKLR held as follows;

“74. The Plaintiffs did not produce evidence of the rent paid by Naivas Supermarket or the other prospective tenants who were to take up space in the 1st Plaintiff’s building. The leases produced by the 1st Plaintiff were not registered. The letter dated 19/5/2008 from Naivas Supermarket notified the Plaintiff that it was suspending the lease due to the claim that the premises were on a road reserve. The court declines to award the Plaintiffs the sum sought for loss of future earnings as these were not proved.” (Emphasis mine)

170. Similarly, in the present case, the Plaintiff did not adduce any evidence of the rent paid by Royal Animal Feeds. The lease entered into between them is not registered. I find that the Plaintiff has not proved her claim for the award of lost rent.

B. Who should bear the costs of the suit

171. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

172. In the result, I find that Plaintiff’s suit succeeds. Consequently, I enter judgement in the following terms:

- a. A sum of Kshs 3,000,000 as General damages for trespass on Nakuru Municipality Block 6/141.
- b. A sum of Kshs 5,000,000 as Exemplary damages for trespass on Nakuru Municipality Block 6/141.
- c. A sum of Kshs 37,500,000 as Special damages being the value of the buildings including site works demolished on Nakuru Municipality Block 6/141.
- d. The plaintiff shall have the costs of this suit.

173. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF OCTOBER, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr Githui for the Plaintiff.

Mr Mutei for the Defendant

Court Assistant; Ms. Monica Wanjohi.

