



Mutunga v Director of Criminal Investigations & 2 others (Environment & Land Petition E058 of 2021) [2023] KEELC 20528 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E058 OF 2021
EK WABWOTO, J
OCTOBER 5, 2023**

BETWEEN

JOHN NJARIA MUTUNGA PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

OFFICER IN CHARGE KAYOLE POLICE STATION 3RD RESPONDENT

JUDGMENT

1. The Petitioner filed the suit vide a Petition dated 11th November 2021 supported by an affidavit sworn by John Njaria Mutunga of even date and sought the following reliefs;
 - a. An order of injunction restraining the respondents or their agents, servants, officers, and/or their subordinates from further occupying, taking over, entering, remaining in and/or possessing the Petitioner’s property known as plot 75 on LR Number 12979/2 situated in Ruai area of Nairobi City County.
 - b. A declaration that the Respondent’s act of storming, invading and taking over the petitioner’s property known as plot number 75 on LR number 12979/2 situated in Ruai area of Nairobi City County and chasing tenants on 16/07/2021 and preventing them from accessing the property was an is unlawful, unreasonable and a breach of the Petitioner’s constitutional rights.
 - c. A mandatory injunction directing the Respondents to unconditionally hand over all that property known as plot number 75 on LR number 12979/2 situated in Ruai area of Nairobi City County to the Petitioner and remove all



barriers, padlocks, locks, fastening and markings they have placed on any part of the property.

- d. An order that the Respondents do pay damages to the petitioner assessed at Kshs 140,000 per month or such amount as the court shall find due from 16/07/2021 until such a time as the Respondents shall release, vacate and hand back to the Petitioner property known as plot number 75 on LR number 12979/2 situated in Ruai area of Nairobi City County
 - e. General damages to be assessed by this Court for and as compensation for infringement and violation of his constitutional rights.
 - f. The Respondents do bear the costs of this petition.
 - g. Any other order or relief this Court may deem just to grant
3. The Petitioner also filed a supplementary affidavit sworn by John Njaria Mutunga dated 25th November 2022 in which it was averred that he had never claimed to be a director of Embakasi Ranching Company Limited and never rented out the office to them. It was also submitted that this was the first time he was hearing such disclosures of the 2nd Respondent yet up until now the inquiry letter dated 30th August 2021 had never been responded to.
 4. It was reiterated that the claimed disturbances were not in his property but one of the plots belonging to Embakasi Ranching Company Limited. In any event, of the alleged Gabriel Gitonga and others had committed an offense, his property was not one of the perpetrators and the closure makes the respondents to be prosecutors, judges and executors
 5. The Petitioner posited that it was illogical how a crime scene can be closed for over one and a half years. Additionally, the Respondents had not told the court what processes of investigations have been done for the 16 months.
 6. The Petitioner also filed written submissions dated 17th August 2022 in support of his Petition.
 7. The Respondents opposed the Petition. They entered appearance on 14th November 2022 and a Replying affidavit by CI Arwings Otieno Nyamburi dated 17th November 2022 in which the Petitioner's claim was denied and sought for the dismissal of the Petition with costs. They also filed written submissions dated 13th December 2022.
 8. It was averred that the police officers involved were instructed to visit the suit property to ascertain the status following a complaint that was made in relation to the running of a parallel Embakasi Ranching Company Office. In the course of the preliminary investigation it was discovered that there was a parallel Embakasi Ranching Company Office.
 9. Relying on Section 24 of the *National Police Service Act*, it was submitted that the police officers carried out their statutory mandate by preventing breach of peace between the two rival groups of Embakasi Ranching Company Limited. It was further argued that failure of the police to intervene would have resulted in greater harm even for the Petitioner
 9. Relying on the case of *Charles Murigu Murithii & 2 others v Attorney General* [2015]eKLR, the Respondents urged Court to appreciate the difficulty in balancing their right to undertake their statutory duties vis a vis upholding the rights of citizens. They also relied on the case of *Kenya Hotel properties vs Wildesen Investment Limited* [2013] eKLR and submitted that they had acted on the complaints of extortion and double land allocation from the members of the public and as such public interest overrides individual interest.



10. The Court having considered the pleadings of the parties, evidence tendered and written submissions that were filed is of the view that the following issues are for determination in respect to this Petition;
 - i. Whether the Petitioner’s constitutional rights have been infringed?
 - ii. Whether the Petitioner is entitled to the prayers sought?
 - iii. Who bears the costs of the petition?
11. I shall now proceed to analyze the said issues sequentially.
12. It was contended by the Petitioner that the following constitutional rights have been infringed:
 - a. The right to property under Article 40 (3) due to deprivation of use of his property.
 - b. The right to fair administrative action under Article 47 due to Respondents’ failure to explain to him the reasons for taking his property.
 - c. The right to livelihood and freedom from hunger under Article 10 due the breach on the premises without court warrants which amounts to sabotage of economic development of the Petitioner.
 - d. Right to fair hearing under Article 50 due to extreme delay of the investigation processes.
12. On the other hand, the Respondents submitted that they had acted well within their statutory duty under the *National Police Service Act* and *the Constitution* of Kenya. This petition is largely centered on the impact of the police officers’ actions and consequent administrative process followed, or the lack thereof.
13. *The Constitution* at Article 243 establishes the National Police Service and at Article 245(1) the office of the Inspector– General of the National Police Service is created. Article 245(4) and (5) are relevant to this petition. They stipulate as follows: -
 - “(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector- General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
 - (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons...”
 12. Section 51 of the *National Police Service Act*, Cap. 84 provides the powers of a police officer as follows:-
 - “(1) A police officer shall—
 -(d) maintain law and order;
 - (e) protect life and property;
 - (f) preserve and maintain public peace and safety;



- (g) collect and communicate intelligence affecting law and order;
- (h) take all steps necessary to prevent the commission of offences and public nuisance;
- (i) detect offenders and bring them to justice;
- (j) investigate crime; and
- (k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists....”

12. In the case of *Republic v Commissioner of Police & another Ex parte Michael Monari & another* [2012] eKLR with regards to power of police to investigate, It was held as follows;

“...It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...”

12. The powers given to the police is hinged upon a social contract to ensure public interests are considered and protected. In this instance, the Respondents made no mention of their failure to respond the Petitioner’s letters inquiring on reasons for the closure of the premise and updates of the investigations. The inaction of the Respondents is an affront to their statutory duty to “collect and communicate intelligence affecting law and order”.
13. The Petitioner’s letter dated 2nd January 2022 addressed to Mr. Gabriel Gitonga confirms that indeed he was a tenant on the premise. In the application of reasonableness, the officers ought to have informed the Petitioner, as landlord of the premise. In view of the foregoing and having carefully analyzed and evaluated the evidence adduced herein, it is the finding of this court that indeed the actions of the Respondents herein amounted to a violation of the Petitioner’s rights as pleaded in the Petition.
18. The Petitioner sought several reliefs as were stipulated in the Petition. With regards to prayers for injunction, having found that there was a violation of the Petitioner’s rights herein, the same is for granting.
19. In respect to the prayers of special damages, the Petitioner prayed for special damages of Ksh 140,000 per month from the 16th July 2021 until such time the Respondents shall release and vacate the premises and hand it over to the Petitioner. In respect to this relief, I wish to state that my perusal of the five letters produced in evidence by the Petitioner in respect to the collection for monthly rent payment from tenants namely Gabriel Gitonga, Njamka Security Services, Mohammed Abdi, Francis Munuhe and Samuel Kihui shows only an amount of Kshs 70,000 being received as rent. It is trite law that special damages must be pleaded and specifically proven, for this reason. I will only allow special damages to the Petitioner assessed at Kshs 70,000.
20. In respect to general damages sought, Articles 22 and 23 of *the Constitution* grants this Court authority to enforce and uphold the Bill of Rights in claims of infringements of rights, and to grant appropriate relief, including an order for compensation. *The Constitution* does not define the term compensation, and recourse is in this regard had to the definition in Black’s Law Dictionary Tenth Edition at page 343 which is the “payment of damages or a other act that a court orders to be done by a person who has caused injury to another”.



- a. It is notable in this respect that comparative jurisprudence limits the award of general damages in constitutional cases to only proven damages and not presumed damages. The US Supreme Court in *Carey vs Phipus*, 435 U.S. 247 (1978) ruled that while presumed compensatory damages may not be awarded in an action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance. Presumed compensatory damages in this regard are general damages that are recoverable without proof of actual loss. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows: “When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”
21. The Petitioner in referring to the case of *Ann Njoki Kumena vs KTDA Agency Ltd* [2019] eKLR urged this court to award general damages of Ksh 3,000,000/- since in the said case, the court awarded general damages for Ksh 1,500,000/-. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss. Being guided by the foregoing, I will proceed to award general damages of Ksh 500,000/- which is deemed to be sufficient in the circumstances.
22. In respect to costs, although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event. A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. However, in the instant Petition, I will direct that each party to bear own costs of these proceedings.
23. From the foregoing analysis, it is the finding of this court that the Petitioner has proven his case to the required standard and this Court makes the following final orders:
 - i. An order of injunction is hereby issued restraining the respondents or their agents, servants, officers, and/or their subordinates from further occupying, taking over, remaining in and/or possessing the Petitioner’s property known as plot 75 on LR Number 12979/2 situated in Ruai area of Nairobi City County.
 - ii. A declaratory order is issued that the Respondents’ actions of storming, invading and taking over the Petitioner’s property known as plot number 75 on LR number 12979/2 situated in



Ruai area of Nairobi City County on 16/07/2021 and preventing the Petitioner from accessing the property was unlawful, unreasonable and a breach of the Petitioner's constitutional rights.

- iii. An order that the Respondents jointly do pay special damages to the Petitioner assessed at Kshs 70,000 per month due from 16/07/2021 until such a time as the Respondents shall release, vacate and hand back to the Petitioner property known as plot number 75 on LR number 12979/2 situated in Ruai area of Nairobi City County.
- iv. General damages in favour of the Petitioner of Kshs 500,000.
- v. Each party to bear own costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER 2023.

E. K. WABWOTO

JUDGE

In the Presence of:

N/A for the Petitioner.

Ms. Kubai for the Respondents.

Court Assistant: Caroline Nafuna

