



**Kubai v Ministry of Public Health & 2 others; National Land Commission (Interested Party)
(Environment & Land Petition 145 of 2018) [2022] KEELC 15 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 15 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 145 OF 2018**

FM NJOROGE, J

MAY 5, 2022

BETWEEN

CHRISTINE KUBAI PETITIONER

AND

MINISTRY OF PUBLIC HEALTH 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

COUNTY GOVERNMENT OF NAKURU 3RD RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

1. The petitioner in this case, Christine Kubai, filed a further amended petition dated 10/10/2017 on 13/10/2017. The further amended petition states on its face that it is supported by an affidavit of the petitioner sworn on 8/8/12 which is supposed to be attached thereto but which is not. Despite this element of inadvertence, succour is sought and obtained by this court from the original affidavit attached to the original petition. The summary of what the further amended petition and the original affidavit state is as follows: that the petitioner is the proprietor of parcel numbers LR Nos Kijabe / Kijabe Block 1/4037 and Kijabe /Kijabe Block 1/4038; the petitioner’s husband, now deceased, and former Member of Parliament for Naivasha Constituency, had during his lifetime allowed the 1st respondent to enter into possession of the suit lands on the understanding that the 1st respondent would compensate the petitioner with a pecuniary amount equal to the open market value of the properties, which is now said to be an estimated Ksh 407,000,000/=; that the 1st respondent developed the said parcel and built a public health centre; that the petitioner’s husband, who was following up on the compensation issue, passed on in 1996 before compensation was paid; that the petitioner was by then a housewife and was not aware of how far the process of compensation had gone; that after



her husband's demise she followed up with various government offices regarding the issue in vain. She states that the suit lands were forcefully acquired, that her rights under Article 40 of *the constitution* to enjoyment and use of the properties has been contravened and she terms it as an act of trespass for which the 1st respondent should compensate her. The petitioner asserts that the 2nd respondent failed to protect the violation of her rights by the 1st respondent. It is also the assertion of the petitioner that the 3rd respondent has been joined as a party in the petition due to devolution of health services under *the constitution*, and that this court should therefore decide who between the 1st and the 3rd respondents should bear liability for the petitioner's claim.

2. I will set out verbatim the prayers that the petition seeks; they are as follows:

1. A declaration that the act of trespassing into the petitioner's properties and the threatened forceful acquisition of the petitioner's parcels of land registered as LR Nos Kijabe /Kijabe Block 4037 and 4038 is a gross violation of her constitutional rights to private properties and infringement of protection afforded by article 40 of *the constitution*;
2. A declaration that the respondents have no right in law to interfere with the petitioner's private properties without following the due process of law in compulsory acquisition as set out in article 40(3) of *the constitution*;
3. A declaration that the respondents are liable to compensate the petitioner for unlawful trespass to property, illegal acquisition and deprivation of her properties LR No Kijabe /Kijabe Block 4037 and 4038;
4. The court do assess and make an award of compensation damage for unlawful acquisition and trespass to her properties by the 1st respondent and for 3rd respondent.

Alternatively

5. A declaration that the petitioner is entitled to vacant possession of her properties LR No Kijabe /Kijabe Block 4037 and 4038 and the 1st and 3rd respondents be compelled at their own costs to move out from the petitioner's parcel of land within period of thirty (30) days or other reasonable period to be stipulated by the court.
6. The respondents to pay the petitioner's costs of these proceedings in any event.
3. Munene Wambugu & Kiplagat Advocates filed a notice of appointment of advocates on behalf of the 3rd respondent on 1/12/2014. That firm filed the 3rd respondent's grounds of opposition on 20/2/2018.
4. The Attorney General through Ms Muthoni Kimani, Senior Deputy Solicitor General filed a memorandum of appearance on 10/9/2012 and no other document. Ms Khatambi appeared before court on behalf of the respondents on the 20th September 2013 and sought more time to respond to the petition. However, the 1st respondent, the 2nd respondent and the interested party had not filed any responses to the petition by the time of hearing of the petition. The court on 25th November 2021 ordered that the petition be disposed of by way of written submissions. A scrutiny of the court records shows that only the submissions of the petitioner, filed on 14/2/2022 are in the court file.
5. In her submissions, the petitioner through her counsel, apparently out of abundance of caution, submitted on among other issues, the matters raised in the 3rd respondent's grounds of opposition. The petitioner reiterated the contents of the petition and the supporting affidavit as analyzed herein before. Her further submissions are that since the contents of the petition are not being controverted by the respondents then the orders sought should be granted. She stated that she had valuations attached to



her applications for amendment of the petition but the respondents had not opposed her valuation or brought their own valuations. She cited the decisions in *Anagherry Ltd v Attorney General* [2014] eKLR, *David Gitau Njuguna & 9 others v Attorney General* [2013] eKLR and *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR in response to the claim that the petition was time barred. She also responded to the issue of laches by citing Peter M. Kariuki *v Attorney General* [2014] eKLR. Regarding the ground that the orders sought are against public interest she cited *Mike Maina Kamau v Attorney General* [2017] eKLR as well as Article 47 of *the Constitution*. As to whether there is a cause of action established against the 3rd respondent the petitioner's submission is that the test to be applied under *the Constitution of Kenya 2010* is whether a petition raises issues so insubstantial and attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged, and that that test needs no mathematical precision.

6. Lastly, on the issue of trespass the petitioner submitted that the facts in the petition are not rebutted and that it is the established legal position that once trespass to land is established it is actionable per se and no proof of damages is necessary for the court to award general damages. For this proposition a raft of legal decisions were cited including *Kenya Hotel Properties Ltd vs Willesden Investments Ltd* [2009] eKLR, *Rhoda S Kiilu vs Jianxi Water and Hydropower Construction Kenya Ltd* [2019] eKLR, *Anthony Millimu Lubullellah vs County Government of Kakamega Land Registrar & another* [2019] eKLR, and *Silvester K Kaitany vs Nyayo Tea Zone Development Corporation, The National Land Commission and another* [2021] eKLR. She stated that no citizen is to be deprived of his land by the state or any public authority against his wish unless that deprivation is expressly authorized by law and public interest decisively demands so.
7. I have considered the petition and the submissions before me. It is the correct position that the factual basis of the petition has not been controverted either by the respondents or by the interested party. I have noted that the suit properties are registered in the name of the petitioner. Registration thereof was, according to the copies of certificates of official search dated 4/7/2012 annexed to the petition, issued in the name of the petitioner on 8/8/1991. No encumbrances are recorded thereon. The petition states that the 1st respondent took possession of the suit properties in the year 1993 after that registration and erected thereon a health centre by the name Maai Mahiu Health Centre on the understanding that compensation would be paid to the petitioner. I have not heard the respondents or the interested party assert that the petitioner or even her husband received any compensation.
8. Section 28 of the *Registered Land Act* (RLA) now repealed provided as follows:

“28.

The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.



9. Section 25(1) of the [Land Registration Act](#) No. 3 of 2012 provides as follows:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration, by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:

- a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and
- b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

10. The provisions of Section 26(1) of the [Land Registration Act 2012](#) are as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restriction and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge.

Except-

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) Where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme”.

11. It is clear that the successive law in the land statutes cited above has been intent on protecting the sanctity of title to land. The [Land Registration Act 2012](#) was enacted after [the Constitution of Kenya 2010](#), and must therefore be taken to be, as far as real property is concerned, one of the statutes that safeguard the citizen’s rights under Articles 40(1) and 40 (3) of [the Constitution 2010](#).

12. Article 40 (1) of [the Constitution](#) provides as follows:

“ 40.

Protection of right to property

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.”

13. Article 40 (3) provides as follows:

“(3)

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—



- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”
- (Emphasis mine)

14. The petitioner has clearly established that she owns the suit lands and that she is entitled to protection under the law and under *the constitution* as per the cited provisions above. On the other hand, the 1st and 3rd respondents have failed to demonstrate that the petitioner’s title has any defect of any kind that would invalidate her claim; neither have they demonstrated that they purchased or compulsorily acquired the suit properties and promptly paid the petitioner compensation for the same, yet they are in possession thereof.
15. In this court’s view the petitioner has established that her fundamental rights under Article 40(1) and Article 40(3) of *the Constitution* have been violated, and will continue being violated for as long as the respondents are in occupation, and she deserves a remedy. However, the petitioner admits that there has been erected on the suit properties a medical institution no doubt established by the 1st respondent for public benefit. In the light of that admission what orders are best to issue in the circumstances of this case?
16. I have noted that no valuation report is attached to the main petition by way of affidavit. It is also important to point out that were it even the case that such valuations had been presented appropriately, an award of compensation for compulsory acquisition should be left to the appropriate legal mechanisms and institutions mandated under the law and be referred to this court only if there is dissatisfaction on the petitioner’s part.
17. This court is left with only declarations to make and if deserved, an award of damages for trespass to property. The declarations sought in prayers no 1, 2, 3, and 5 can in appropriate circumstances be made in favour of a deserving citizen litigant against the State. However, this court ought to weigh carefully the impact of its orders before it issues them. In this case declarations sought in prayers 1 and 2 are clearly deserved, but the court has to elect between the issue of declaration of liability to compensate as contrasted with the issue of declaration that the petitioner is entitled to vacant possession and that the 1st and 3rd respondents should vacate. The latter order would be virtually an eviction order. I have considered that there is a health institution on the land. Matters of public health are matters of public interest and they have to be taken seriously. Nothing has taught the world a better lesson towards that end than the recent pandemic that ravaged the entire globe, not sparing our country, and the role of health institutions and professionals in saving people’s lives was quite appreciated during that period. Having said that, this is a case in which this court must put public interest first. In the case of *Mike Maina Kamau (Supra)* the court held as follows:

“Even if the public interest always supersedes the private interest, at least due process ought to have been followed and the State had no right whatsoever to trample on the Plaintiff’s rights and/or breach his right to property as provided by Article 40 of *the Constitution*. The



action of the State or Ministry of Roads officials and specifically the Minister for Roads who supervised the said demolition contravened Article 47 of *the Constitution*. Article 47(2) of *the Constitution* provides: -

47. (2) If a right or 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.”

18. Mindful that this court has not been informed of the progress of negotiations or the degree at which of pursuit of the process of compensation stalled, this court cannot conclude that there is willful refusal to compensate the petitioner but that there was wrongful entry into the suit properties by the 1st respondent without compensation to the petitioner. In the circumstances, the most efficacious prayer that should be granted is not that of vacant possession of the suit land on which an operational public institution is located but an order for prompt compensation as well as an order for damages for trespass to the premises.

19. In regard to the issue of damages for trespass I note that in the case of *Park Towers Ltd v John Mithamo Njika & 7 others* [2014] eKLR, J.M Mutungi J., stated 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...”

20. In the case of *Duncan Nderitu Ndegwa v KP&LC Limited & another* [2013] eKLR, P. Nyamweya J. held: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages”.

21. In the case of *Joshua Ngeno v Kenya Power & Lighting Company Limited & County Government of Kericho* [2021] eKLR the court held as follows:

“75. The summation of my finding is that having found that the Plaintiff had proved his case against the 1st Defendant only for trespass, I herein enter judgment in his favor as against the 1st Defendant on that account. And since there was no evidence tendered in relation to the state or the value of the Plaintiff’s property before and after the trespass, it would be difficult to assess the general damages. However, considering the acreage involved and the fact that that the poles on the Plaintiff’s land are of permanent nature wherein nothing can be constructed underneath, I shall exercise my discretion and find as follows:

- i. The Plaintiff’s suit against the 2nd Defendant fails in its entirety and is therefore dismissed with costs.
- ii. Judgment is however entered for the Plaintiff against the 1st Defendant wherein I award him Kshs 5,000,000/= (five million shillings only) plus interest from the date of this judgment until payment in full, as compensation of the infringement of his right to use and enjoy the suit property.



- iii. The 1st defendant shall meet the Plaintiff's costs on the successful claim only.”
22. It is clear from the foregoing that the petitioner deserves damages, but what is the measure of damages to be awarded?
23. In the case of *Park Tower v Moses Chege & others (supra)* the Hon Justice Mutungi held as follows: -
- “....As observed on the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the cases before me, I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the central Business District. This is prime property in the city centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages”.
24. In *Aster Holdings Limited v City Council of Nairobi & 4 others* [2017] eKLR the court held as follows:
- “39. The suit property is 2.105 hectares which is about 5.2015 acres. The property is in Westlands area which is 4.8 kilometres from the city centre. The property is off Mvuli Road in Westlands and is surrounded by upmarket residential neighbourhood with executive apartments and maisonettes according to the valuation report. I have considered the fact that since 1993 when the Plaintiff had acquired the suit property, there is no development which had been undertaken for 14 years until the suit property was invaded in 2007. This however does not mean that the property would have remained undeveloped until now. Considering the location and value of the suit property I assess general damages in the sum of Ksh. 100,000,000/=.”
25. I have considered the submission of the petitioner, citing *Anagherry (supra)* and I agree as in that cited case that the respondents' trespass on the petitioner's land has been continuous and has transcended the last two constitutional regimes we have had in this country and that the present constitution applies in so far as the complaints still subsist to date. There is no doubt that the 1st respondent is liable having taken the land away from the petitioner and having developed it to be a health centre. The third respondent now runs the health centre on the suit premises and will continue to do so for the foreseeable future under the devolution system in *the constitution* and for that reason it must be held just as liable as the 1st respondent.
26. This court cannot rely on the valuation reports attached to the interlocutory applications made in the proceedings in its final judgment in the matter as conclusive proof of the value of the properties though may be utilized for another purpose, say, identifying the location of the suit lands to enable the court form its own assessments as to damages. In the case of *Ochako Obinchi vs Zachary Oyoti Nyamongo* 2018 eKLR the court citing the case of *Philip Aluchio vs chrispinus Ngayo* 2014 eKLR and awarded damages in the sum of Ksh 100,000/=. In the case of *Belgo Holdings Ltd vs Kenya Urban Roads Authority & another* [2020] eKLR the court citing the *Philip Aluchio case* awarded Ksh 2,000,000/= for trespass on 21.8 acres for a period beginning 2011 and the judgment was delivered in 2020 issuing a mandatory injunction for the defendants to vacate the land in that case, after a period of occupation of around 9 years.
27. Having in mind the considerations addressed by the court in the *Park Tower* and the *Aster Holdings cases (supra)*, I observe that the suit lands measure in aggregate 4.04 ha which translates to 9.98 acres



and it is credible that the respondents have been on the current petitioner's land for a period of 29 years from 1993 to date. The suit lands in this case are located in Maai Mahiu Township to the south of Naivasha Town, and are described in the valuation report in the record as residential/commercial/agricultural properties in an exclusive prime location within a fast expanding urban set-up. In the circumstances of this case I would assess the proper sum of damages for trespass at Ksh. 20,000,000/=.

28. Consequently, I am of the view that the petitioner has established her claim against the respondents and the interested party of violation of her rights to own property under Article 40(1) and the right not to be deprived of that property under Article 40(3) of *the constitution* to the required standard and I enter judgment in the petitioner's favour and I issue the following orders:

1. A declaration that the 1st and 3rd respondents' act of taking possession of parcels of land known as LR Nos Kijabe /Kijabe Block 1/ 4037 and Kijabe /Kijabe Block 1/ 4038 by the 1st and 3rd respondents amounts to trespass on the said properties and it is a gross violation of her constitutional right to own private property and not to be deprived thereof and is therefore an infringement of protection afforded by Article 40 of *the constitution*;
2. A declaration that the respondents have no right in law to interfere with LR Nos Kijabe /Kijabe Block 1/ 4037 and Kijabe /Kijabe Block 1/ 4038 without following the due process of law in compulsory acquisition as provided in Article 40(3) of *the Constitution*;
3. A declaration that the respondents are liable to compensate the petitioner for acquisition and deprivation of her properties LR Nos Kijabe /Kijabe Block 1/ 4037 and Kijabe /Kijabe Block 1/ 4038;
4. An order that the 1st and 3rd respondents shall pay to the petitioner Ksh 20,000,000/= (in words Twenty Million Shillings only) being general damages for their act of trespass upon LR Nos Kijabe /Kijabe Block 1/ 4037 and Kijabe /Kijabe Block 1/ 4038 and violation of the petitioner's constitutional rights from the year 1993 to date;
5. The respondents and the interested party shall set into motion the mechanisms required to commence and perfect the compulsory acquisition of the suit properties and shall promptly pay the petitioner the appropriate compensation therefor within 365 days from the date of this judgment.
6. The respondents shall jointly and severally pay the petitioner's costs of these proceedings.

It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 5TH DAY OF MAY, 2022

MWANGI NJOROGE

JUDGE

ELC, NAKURU

