



**Mucheke v Director General Kenya Urban Roads & 5 others (Environment and Land Case Civil Suit E001 of 2021) [2022] KEELC 3256 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3256 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND CASE CIVIL SUIT E001 OF 2021**

**CK YANO, J**

**JUNE 6, 2022**

**BETWEEN**

**JOSHUA RUTERE MUCHEKE ..... PLAINTIFF**

**AND**

**DIRECTOR GENERAL KENYA URBAN ROADS ..... 1<sup>ST</sup> DEFENDANT**

**HYPERTEC CONTRACTORS & EQUIPMENT ..... 2<sup>ND</sup> DEFENDANT**

**KENYA POWER & LIGHTNING COMPANY ..... 3<sup>RD</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> DEFENDANT**

**OCS ,CHUKA POLICE STATION ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit by a plaint dated February 8, 2021 seeking for orders against the defendants for:
  - a) A declaration that LR; KARINGANI/NDAGANI/594 belongs to the plaintiff absolutely.
  - b) A declaration that the plaintiff is at liberty to reconstruct its commercial building to wit shops that was demolished.
  - c) The 1<sup>st</sup> defendant to pay the plaintiff Kshs 8,500,000 being the value of the commercial building.
  - d) The 1<sup>st</sup> defendant to pay mesne profits and non-user of the premises.
  - e) The 1<sup>st</sup> defendant to pay general damages for the ridicule and loss of reputation suffered by the plaintiff.



- f) Cost of the suit and interest from the date of filing.

## **PLAINTIFF' S CASE**

2. This suit was brought on behalf of the Baptist Convention of Kenya by the plaintiff's Secretary General. The plaintiff contends that at all material time relevant to this suit the Baptist Convention of Kenya is the sole registered proprietor of land parcel no LR; KARINGANI/NDAGANI/594 which property is freehold and absolute.
3. The plaintiff avers that it constructed the following developments on the land; Baptist Convention in Kenya-Chuka Church, a private primary school and commercial building with rental shops.
4. It is pleaded that on or around February 7, 2020, agents of the 1<sup>st</sup> defendant marked buildings in Chuka township for demolition to pave way for tarmacking of the "Moi Girls" road and that the commercial building belonging to the plaintiff and standing on land parcel no LR:KARINGANI/NDAGANI/594 was marked with a RED "X" sign and that the plaintiff travelled to the regional offices of the 1<sup>st</sup> defendant in Meru town to inquire why part of its commercial building was painted with an X sign but was not given any audience.
5. The plaintiff contends that on the morning of April 4, 2020 at 6.00 am, officers of the 1<sup>st</sup> defendant illegally demolished the plaintiff's commercial building standing on LR KARINGANI/NDAGANI/594 in Chuka town. The plaintiff further contends that the survey exercise by the survey of Kenya under the Ministry of Lands and Physical Planning established that all the demolished buildings stood on LR KARINGANI/NDAGANI/594 and none was on a road reserve.
6. The plaintiff further contends that he engaged a licensed valuer to carry out a valuation exercise and concluded that the estimated loss suffered by the plaintiff out of the actions of the 1<sup>st</sup> defendant was over Kshs 20 million, and that Ultimate Valuers assessed the value of the commercial building standing on LR KARINGANI/NDAGANI/594 that was demolished at Kshs 8,500,000 which the Plaintiff claims. The Plaintiff also claims from the defendants jointly and severally Kshs 50,0000 being Valuation charges for the assessment of the damage caused by the demolition of the commercial building standing on LR KARINGANI/NDAGANI/594.
7. The plaintiff's claim against the defendant jointly and severally is Kshs 8,550,000 in special damages and the declarations outlined hereinabove.
8. The plaintiff called 3 witnesses in support of its case. PW1 was JOSHUA RUTERE MUCHEKE a Pastor working for the Baptist Convention in Kenya as the General Secretary at Nairobi. He stated that he wrote a statement on March 15, 2021 and asked the court to adopt the statement as his evidence in this suit. He also presented a list of documents dated February 4, 2021 which he produced as exhibits 1 to 7. He urged the court to find that the church building was illegally demolished and asked the court to award damages and to grant cost of the suit to the plaintiff and further asked the court to allow the plaintiff to reconstruct their church and to award mesne profits and damages for non-user of the premises and general damages.
9. PW1 was cross-examined by Mr Kiongo counsel for the Attorney General for the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and stated that the buildings were put up in 2017 and 2018 and were approved since one could not construct in a town without approvals. PW1 maintained that P Exhibit No 4 was relevant since it was stamped by the Chuka Town Administrator. The document stated that they maintain a minimum of 2 metres and 1.5 metres and requires that they obtain NEMA licence, which the witness stated that they got, though he did not have it in court. PW1 stated that the buildings had rental aspects but had no document related to the rent. He further testified that though they have pleaded that they



had hired the services of survey of Kenya, he did not have documents showing that the plaintiff paid for the said services. He also stated that they engaged the services of a valuer at Kshs50,000/= but did not have the receipts.

10. When questioned over the allegation that they were collecting rent, PW1 admitted that he did not have any receipts for the payments. He stated that when the building was demolished, he was not present in person and he could not tell who demolished it. PW1 stated that Zacharia Kinyua Muguti, the church's representative was present during the demolition. He stated that the plaintiff's building was next to the road and there was about 4 metres in between. PW1 stated that the church and the school were not demolished, but what was demolished were the buildings in front. He stated that they were not given notice though the buildings were marked.
11. PW1 was re-examined by Mr Muthomi Gitari Advocate for the plaintiff and stated that they obtained the services of the survey of Kenya, adding that the District Surveyor would be testifying to provide all the details.
12. PW2 was Pastor Zachary Kinyua, a pastor at Chuka Baptist Church. He adopted his witness statement made on March 15, 2021 as his evidence in the case and was cross-examined and re-examined.
13. PW2 stated that on February 7, 2020, the 1<sup>st</sup> defendant marked the building for demolition, adding that they were not given notice as a church. He admitted that he attended a meeting on September 23, 2020 for Environment Public Assessment which was held in their hall. He stated that he led the prayers but left because the people who attended the meeting had only hired the hall. He added that Maureen Kainyu, the church's book-keeper was in the meeting but was not representing the church. PW2 stated that he went to the office of the 1<sup>st</sup> defendant after their premises were marked, but added that though the meeting may have agreed that buildings on a road reserve be demolished, he maintained that their building was not on the road reserve.
14. PW2 further stated that the plaintiff had 14 tenants in the building with each paying Kshs 8,000/= through an agent who would issue receipts. Though he stated that he could not remember when the building was built, he stated that it was between 2012 and 2019, adding that all of the 14 rooms/stalls were demolished.
15. PW3 was Magdaline Wanjagi Njoki, a surveyor working with the Ministry of Lands and Physical Planning, survey office at Meru South/Maara and Chuka Igambang'ombe sub-counties. She stated that pursuant to a court order, she visited the ground on April 28, 2020 and prepared an independent report dated May 5, 2020. The order required the witness to determine the actual boundary of Moi Girls' Road and LR NO KARINGANI/NDAGANI/594. PW3 stated that she visited the site after the building had been demolished and the place excavated. From the findings of PW3, the buildings that were standing on parcel No 594 did not extend to or encroach the road reserve. According to PW3, there also existed a part-development plan approved on May 20, 1998 by the Commissioner of Lands that shows that Moi Girls' Road consists of 18 metres which is inclusive of the 3 metres contained in the Registry Index Map and did not affect parcel No 594. Her finding was that the 1<sup>st</sup> defendant demolished a building that was standing on private land, and which did not encroach on a road reserve. The report dated May 5, 2020 was produced as an exhibit. PW3 was cross-examined by Mr Mugambi advocate for the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and re-examined by Mr Muthomi advocate for the plaintiff.

## **DEFENDANTS' CASE**

16. On November 23, 2021, the plaintiff's suit against the 3<sup>rd</sup> defendant was withdrawn with no order as to costs. The 2<sup>nd</sup> defendant never entered appearance nor file defence.



17. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants filed a joint statement of defence dated March 8, 2021 wherein they denied the plaintiff's claim in its entirety. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in particular denied the ownership and the developments constructed on the suit land, and averred that if at all any buildings were marked, then the same was in furtherance of the duties and obligation of the 1<sup>st</sup> defendant as provided for in law. They gave particulars of statutory duties of the 1<sup>st</sup> defendant. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the suit land is the property of the Republic of Kenya and that the plaintiff's interest in it was fraudulently and illegally procured contrary to the provisions of the Government Lands Act and all other enabling laws and that the actions of the 1<sup>st</sup> defendant were in line with their mandate. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants pleaded that the orders sought by the plaintiff are not tenable as against them, adding that the suit was frivolous, vexatious and an abuse of court process as no known cause of action had been disclosed against them. They prayed for the dismissal of the suit with costs.
18. Dorcas Kanan Gitonga testified on behalf of the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants as DW1. She testified that she works for Kenya Urban Roads Authority as a Senior Lands Surveyor. DW1 relied on and adopted her witness statement filed on June 22, 2021, and produced the documents filed on the same date as D Exhibits 1 to 4.
19. DW1 testified that she visited the site as a surveyor and stated that the contention was the width of the road specifically on plot No. 594. DW1 denied that the Plaintiff's building was demolished by Kenya Urban Roads Authority (KURA), adding that after consultation, the said structures were demolished by the Plaintiff's representatives and not KURA.
20. DW1 was cross-examined by Mr Muthomi and re-examined by Mr. Mugambi. She confirmed that Parcel No 594 is a freehold property within Chuka Municipality and which was registered in the name of Baptist Convention of Kenya. She stated that the section where the commercial shops were constructed was within the road reserve, adding that their mandate was to construct Moi Girls' Road. She vehemently denied that KURA demolished any property as stated. DW1 stated that she was aware of the existence of another case filed in the subordinate court which was later withdrawn by the plaintiff. DW1 denied that there was any order stopping the demolition, but stated that there was an order to stop the construction of the road until the case was heard and determined. DW1 maintained that the plaintiff demolished their own building after a meeting in the 1<sup>st</sup> defendant's Office. DW1 did not however have the minutes of such meeting. She stated that the plaintiff was meant to put up a church on the suit land, but not a commercial building, adding that there should have been an application for change of user. She stated that she did not have notice for removal of the said commercial structure, but that the same had been marked. She was aware that many structures along Moi Girls' Road were demolished, though not by the 1<sup>st</sup> defendant. DW1 stated that the demolitions were carried out before the issuance of orders of injunction. DW1 confirmed that Moi Girls' Road is not within parcel No 594, but that it borders the said plot. DW1 stated that KURA had engaged the services of the 2<sup>nd</sup> defendant but that the contract was terminated.

## **PLAINTIFF'S SUBMISSIONS**

21. The plaintiff filed submissions on May 9, 2022 and formulated the following issues for determination:
  - i. Whether the Baptist Convention of Kenya is the registered owner of LR: KARINGANI/NDAGANI/594 and whether the Secretary General of the Baptist Convention of Kenya is mandated to sue or be sued on behalf of the convention.



- ii. Whether the plaintiff had constructed a commercial building on LR: KARINGANI/NDAGANI/594 with the necessary approvals and whether the building had encroached on the road reserve.
  - iii. Whether the 1<sup>st</sup> defendant and or its agents demolished the plaintiff's commercial building erected on LR:KARINGANI/NDAGANI/594.
  - iv. Whether the plaintiff is entitled to the prayers in the plaint.
22. On the first issue, the plaintiff submitted that it has produced a copy of search certificate and a copy of the title deed for LR KARINGANI/NDAGANI/594 showing the same as being registered under the name of Baptist Convention of Kenya. The plaintiff's submission is that the constitution of the Baptist Convention of Kenya provides that the Secretary General of the convention shall sue or be sued on behalf of the convention. That Joshua Mucheke is the acting Secretary General of the Convention and therefore is authorized to handle legal matters on behalf of the convention. The plaintiff cited section 26 of the Land Registration Act No 3 of 2012 which is to the effect that a certificate of title is to be held as conclusive evidence of proprietorship. The plaintiff also relied on the case of Isaac Gathungu Wanjohi & Another –vs- Attorney General & 6 Others [2012] eKLR where the court held that “where the state contended a property was acquired illegally, the state must follow due process to establish the illegality.”
23. On whether the plaintiff had constructed a commercial building with all necessary approval on the suit plot, and whether the building had encroached on the road reserve, the plaintiff cited sections 107(1) and 109 of the Evidence Act and submitted that their exhibits produced confirms that approvals were given by the Tharaka Nithi County Government. The plaintiff also relied on the case of Virendra Ramji Guoka & 3 Others –vs- The Hon AG, ELC No 480 of 2011. The plaintiff submitted that the evidence adduced and the exhibits produced such as P Exhibit 7 confirms that the building that was demolished were on parcel 594 and did not encroach on the road reserve.
24. Regarding the issue whether the 1<sup>st</sup> defendant and or its agents demolished the plaintiff's commercial building erected on LR: KARINGANI/NDAGANI/594, the plaintiff submitted that the evidence tendered confirms that the building was demolished by the 1<sup>st</sup> defendant, adding that the 1<sup>st</sup> defendant even alleged in its statement of defence that the suit land was the property of the state and that it was illegally procured, and that its actions were in line with its mandate. The plaintiff submitted that no evidence was tendered by the 1<sup>st</sup> defendant to show that the suit land was government land and that on the contrary, the evidence tendered clearly shows that the land belonged to the plaintiff. The plaintiff therefore maintained that its building standing on LR: KARINGANI/NDAGANI/594 was illegally demolished by officers of the 1<sup>st</sup> defendant.
25. The plaintiff further submitted that it has adduced credible evidence in support of its case which has not been controverted by the defendants and that the court has power to award damages as well as compensation under section 13(7)(c) & (d) of the Environment and Land Court Act No 19 of 2011. On the issue of damages, the plaintiff's advocates urged the court to rely on the case of Livingstone – vs- Rawyards coal Co (1880) 5 App Cases 25, where Lord Blackburn stated as follows:
- “ that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.”
26. The Plaintiff also relied on the case of Mike Maina Kamau –vs- Attorney General [2017] eKLR where the minister for roads was held to have illegally demolished the plaintiff's house on the basis that the



same was on a road reserve, and the plaintiff was awarded Kshs 711,588,204/= as damages. The plaintiff also relied on the case of Simon Nyachae & another –vs- County Government of Mombasa [2020] eKLR where the plaintiffs were awarded Kshs1,500,000/= by this court as general damages for trespass plus costs after the defendant was found to have trespassed on the plaintiffs property and demolished a perimeter wall.

27. In the submissions filed on April 6, 2022, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants submitted that they tendered evidence through their witness that there was no demolition since there was a court order which was obeyed. That there were no contempt of court proceedings that were filed for the alleged disobedience of a court order. The defendants submitted that the production of a valuation report by the plaintiff should be disregarded since there is no further evidence to support the alleged claim. Further, the defendants submitted that the construction of the road was to be done by an independent contractor who was not under their control and therefore they submitted that they are not liable for the contractor's actions. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants relied on the case of *Fredrick Byakika –vs- Mutiso Menezes International Unlimited* [2016] eKLR, *Maurice Oduor Okech –vs- The Chequered Flag Limited* [2011] eKLR and *Kenneth Kimani Mburu & another –vs- Kibe Muigai Holdings Limited* [2014] eKLR. The defendants further submitted that no ownership documents were produced showing that the plaintiff owned the said land. That the alleged payment of rent for the alleged building was not supported by any evidence by way of receipts or other documents. The defendants also submitted that the valuation report should be disregarded since the opinion of the National Land Commission was not sought to validate the same. They cited section 113 of the *Land Act* and submitted that the suit is misconceived and a waste of the court's process and urged the court to have it dismissed with costs to the defendant.

## **ANALYSIS AND DETERMINATION**

28. This court has now carefully considered the pleadings, the evidence adduced and the exhibits produced in court. The court has also taken into account the written submissions, the cited authorities and the relevant provisions of law. The court identifies the following issues for determination:
- i) Whether or not the plaintiff holds a good title to the suit property.
  - ii) Whether the building that was demolished was on the plaintiff's land or on a road reserve.
  - iii) Whether or not the demolition was lawful or otherwise.
  - iv) Whether or not the plaintiff is entitled to the orders sought, including any compensation, and if so, what should be the quantum thereof.
  - v) What should be the order as to costs.

## **WHETHER OR NOT THE PLAINTIFF HOLDS A GOOD TITLE TO THE SUIT PROPERTY**

29. From the material placed before me, it is not in dispute that the parcel known as LR:KARINGANI/NDAGANI/594 is registered in the name of Baptist Convention of Kenya, the plaintiff herein. The title deed dated February 13, 2002 was issued to the plaintiff and the same was produced as an exhibit. A certificate of official search dated February 12, 2020 confirming that the plaintiff was the registered proprietor of the said land was also produced as an exhibit. Upon the issuance of the said title, the plaintiff became the absolute and indefeasible owner of the suit property.



30. Section 26 of the [Land Registration Act](#) No 3 of 2012 provides that:

“(1) 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, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- (a) on 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, unprocedurally or through a corrupt scheme.”

31. Section 24 of the [Land Registration Act](#), No 3 of 2021 provides:

“(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of a lease.”

32. Section 25 of the same Act provides as follows:

“1) The rights of a proprietor, whether acquired on first registration or 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) 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.

2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

33. In the instant case, no fraud or misrepresentation has been proved against the plaintiff in the manner it acquired title to the suit property. It has also not been proved that the plaintiff's title was acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff has demonstrated on a balance of probabilities that it is the bonafide registered owner of the suit property. As the bona fide registered owner of the property, the plaintiff is therefore protected under the provisions of Article 40 of the [Constitution](#). I find the evidence on record sufficient to prove that the plaintiff is the registered owner of the Property known as Parcel LR: KARINGANI/NDAGANI/594. Whereas the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants pleaded that the suit land was fraudulently and illegally procured, such allegations have not



been proved in this case. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and strictly proved. It is not allowable to leave fraud to be inferred from the facts pleaded. General accusations are not sufficient to prove fraud.

34. In the case of *Gladys Wanjiru Ngacha –vs- Theresa Chepsaat & 4 Others* [2013] eKLR the Court of Appeal held that “allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court.”
35. In *Central Bank of Kenya –vs- Trust Bank Limited & 4 Others* [1996] eKLR proof of fraud was held as being beyond that of a balance of probabilities. In that case, the Court of Appeal rendered itself as follows:
- “The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the appellant in this case than in the ordinary civil case.”
36. In the present case, the defendants have alleged in their defence that the plaintiff’s title was acquired fraudulently and unprocedurally, but no evidence has been submitted to confirm the allegations. In this case, the defendants have not substantiated their allegations of fraud and therefore have not persuaded this court that there was fraud or illegality in the procurement of the plaintiff’s title.

#### **Whether the building that was demolished was on the plaintiff’s land or on a road reserve and whether the demolition was lawful or not**

37. The defendants have alleged that they demolished the plaintiff’s buildings on the guise that it fell on a road reserve. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in their defence pleaded that their actions were in furtherance of their duties and obligations of the 1<sup>st</sup> defendant as provided for in law. On their part, it was the plaintiff’s case that the buildings that were demolished were on their land parcel No KARINGANI/NDAGANI/594 and not on a road reserve.
38. PW3 who is a surveyor working with the Ministry of Lands and Physical Planning Survey Office testified that she visited the site and from her findings, established that the buildings that were demolished were standing on parcel No KARINGANI/NDAGANI/594 and was categorical that it did not encroach the road reserve. It was the evidence of PW3 that the 1<sup>st</sup> defendant demolished buildings that were standing on private land and not on a road reserve. Her evidence were not shaken even on cross-examination by the defence. From the evidence adduced, it is the finding of this court that the buildings that were demolished were standing on Parcel No KARINGANI/NDAGANI/594 and not on a road reserve. It follows therefore that the said demolitions were unlawful.

#### **Whether the plaintiff is entitled to the orders sought**

39. It cannot be overemphasized that the state had no right whatsoever to trample on the plaintiff’s rights by demolishing premises that were standing on private land. This no doubt was in breach of Article 40 and 47 of the *Constitution*. Having demolished the plaintiff’s property without authority and having failed to follow due process in acquiring the said property for the expansion of the road, if need be, the court finds that the defendants are liable and the plaintiff is entitled to the reliefs sought.
40. The plaintiff has sought various reliefs. The court has held that the plaintiff is the absolute and indefeasible owner of LR No KARINGANI/NDAGANI/594 at the time of demolition. The said



title deed has not been cancelled and/or revoked. It is also evident that the plaintiff applied and obtained approvals from the relevant Government bodies such as the Commissioner of lands and the County Government. The plaintiff therefore had legitimate expectation which was thwarted when the suit property was demolished. The plaintiff is therefore entitled to the orders sought in the plaint.

41. In the case of *Mr Virendra Ramji Guoka & 3 others vs the Hon AG*, Elc No 480 of 2011 it was held that:-

“The City Council of Nairobi in approving the development plans must have been satisfied that the property was not on a road reserve. Further during the course of the development until the development was completed, the defendant does not appear to have raised any objection to the development on the basis that the development was taking place on a road reserve or was encroaching on land reserved for construction of a road.”

42. The plaintiff called various expert witnesses to support their claim and also attached various exhibits, which this court has carefully considered. The documentary evidence produced by the plaintiff has also not been controverted by the defendants. Under section 13(7) of the *Environment and Land Court Act* No 19 of 2011, the court has jurisdiction as follows:

“In exercise of its jurisdiction under this Act, the court shall have power to make any order or grant, any relief as the court deems fit and just including: -

- a) Interim or permanent preservation orders including injunction.
- b) Prerogative orders
- c) Award of damages
- d) Compensation
- e) Specific performance
- f) Restitution
- g) Declarations or
- h) Costs”

43. It is clear from the above provisions of law that the court has power to award damages as well as compensation and restitution under section 13(7) (c) (d) & (f) plus costs. The court will now proceed to determine the appropriate reliefs to grant having found that the plaintiff has proved its case on a balance of probabilities and is entitled to the prayers sought.

44. In the plaint, the plaintiff claims Kshs 8,500,000/= being the value of the commercial building that was demolished. The valuation report by Ultimate Valuers Ltd that was produced as an exhibit put the improvement value of the demolished premises at Kshs 8,500,000/=. The court will proceed to award the plaintiff the said sum of Kshs 8,500,000/=.

45. The plaintiff further claims for payment of mesne profits and non-user of the premises against the 1<sup>st</sup> defendant. The claim for mesne profit is a special damages claim. The court however finds that the same has not been proved or substantiated. The court only notes that the plaintiff pleaded that it was getting a rent of Kshs 8,000/= per tenant from 14 tenants but there is no evidence adduced in that regard.



46. The Court of Appeal in the case of *Attorney General –vs- Halal Meat products Limited* (2016) e KLR Considered when mesne profits could be awarded and stated as follows:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on damages, 18<sup>th</sup> Ed. para 34-42.”

47. The Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* (2014) eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

“We agree with counsel for the appellants that it was incumbent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

48. Similarly, the court in the case of *Karanja Mbugua & another v Marybin Holding Co Ltd* (2014) eKLR Stated as follows with regard to mesne profits:

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of order 21, rule 13 of the Civil procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:”

Order 21 Rule 13 of the *Civil Procedure Rules* provides as follows: -

“13.(1) where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

- (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; directing an inquiry as to rent or mesne profits from the institution of such suit until-
  - i. the delivery of possession to the decree holder
  - ii. the relinquishment of possession by the judgement-debtor with notice to the decree holder through the court; or
  - iii. the expiration of three years from the date of the decree, whichever event first occurs.
- (2) where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

49. It is my humble opinion that the plaintiff in this case has not tabled evidence before this court to enable the court make a determination in their favour with regard to the claim for mesne profits and non-user. No receipts for the alleged rent paid or other documents were produced.

50. In addition, the plaintiff claims for payment of general damages for the ridicule and loss of reputation suffered. Under this heading, the plaintiff's counsel has not submitted on any figure to guide the



court. However, the plaintiff's advocates relied on the case of Mike Maina Kamau -vs- Attorney General (supra) where the plaintiff was awarded Kshs 711,588,204 as damages and the case of Simeon Nyachae & another -vs- County Government of Mombasa (supra) where the Plaintiffs were awarded Kshs 1,500,000/= as general damages.

51. It is clear from the evidence adduced by the plaintiff that the plaintiff suffered loss and damage as a result of the defendants' actions. The plaintiff is therefore entitled to general damages for trespass. It is trite law that trespass is actionable per se. 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/= would be adequate compensation to the plaintiff for the loss suffered as a result of the defendants' actions of demolition.
52. In conclusion therefore, the court finds that the plaintiff has proved its case on a balance of probabilities. Consequently, the court enters judgment for the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally in the following terms:
- a) Compensatory damages based on the value of the property demolished – Kshs 8,500,000/=.
  - b) General damages for distress, pain and suffering – Kshs 3,000,000/=
  - c) The Plaintiff is entitled to the costs of the suit plus interest from the date of this judgment until payment in full at the court's rate.
53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6<sup>TH</sup> DAY OF JUNE 2022 IN THE PRESENCE OF:

CA: Ann

Muthomi Gitari for Plaintiff

Ms. Kendi for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants

N/A for 2<sup>nd</sup> Defendant

C. K. YANO,

JUDGE.

