



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 234 OF 2017**

**JACOB KAWITI LUMUNGE.....PLAINTIFF**

**VERSUS**

**CHINA CITY CONSTRUCTION CO. LTD.....1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by way of a Plaint dated 27<sup>th</sup> June, 2017 which was amended on 2<sup>nd</sup> November, 2017. The Plaintiff is seeking for judgment against the Defendants jointly and severally for:

**a. An order for injunction to issue restraining the 1<sup>st</sup> Defendant by itself, its agents, servants and/or any other person from encroaching and/or trespassing and/or working and/or constructing and/or extending road in any part of PLOT NO. LR 4118/340 situate along Voi- Taveta-Holili road at Taveta Town until this suit is heard and determined.**

**b. A declaration that the said plot belongs to the Plaintiff and he is therefore entitled to be compensated in the event of compulsory acquisition.**

**c. A declaration that the Plaintiff is entitled to adequate compensation upon compulsory acquisition of PLOT NO. LR 4118/340 which belongs to him.**

**d. The Plaintiff be awarded Kshs.14,925,000.00 compensation for the area of PLOT NO. LR 4118/340 compulsorily acquired and/or encroached.**

**e. General damages and exemplary damages to be granted.**

**f. Costs and interests of the Suit at court rates.**

**g. Any other relief that this Honourable Court may deem fit and just to grant.**

2. The Plaintiff's case is that he is the registered owner of Plot No. LR 4118/340 situate along the Voi-Taveta road at Taveta Town. The Plaintiff avers that the 1<sup>st</sup> Defendant's contractors working on the Mwatate- Taveta (A23) Road and Taveta – Voi Bypass Road have encroached on part of his plot and trespassed on it in the process constructed a road. The Plaintiff avers that the Defendants have continued with the acts of trespassing on his said plot despite his protests, claiming that the Plaintiff has been compensated, a fact which is denied by the Plaintiff.

3. The Plaintiff further states that the gravity of trespass on part of his said plot by the Defendants is such that he is unable to use his whole property effectively. The Plaintiff avers that the suit property was never acquired for road construction and there has never been any indication that his land will be acquired as part of road extension, and as such he was never compensated for the property at all. The Plaintiff further avers that as a result, of the trespass by the Defendants his petroleum business has been interfered with hence has suffered loss and damage. The Plaintiff contends that the Defendants have no rights whatsoever to acquire his land without permission and/or consent and therefore the Defendants' acts are illegal. The Plaintiff states that the Defendants are liable for the loss he has suffered as he has been deprived the use and enjoyment of his property and now demands full compensation from the Defendants.

4. The Defendants were duly served with summons to enter appearance but failed to do so and upon request by the Plaintiff, interlocutory

judgment was entered against them in default of appearance on 6<sup>th</sup> December, 2017. The suit proceeded for formal proof on 3<sup>rd</sup> April 2019 when the Plaintiff testified but did not call any witness.

5. The Plaintiff in his evidence told the court that a portion of his plot NO.LR 4118/340 has been taken over by a road. That his plot is developed with a petrol station. He stated that when the Defendants were constructing the road, they trespassed onto his plot and he expected to be compensated. The Plaintiff produced a survey report (p.exhibit 1) which showed the road trespassed on his plot. He stated that he issued demand notice to the Defendants who verbally promised to compensate him but they did not do so. The demand notices were produced as P.Exhibits 2 and 3. The Plaintiff stated that he instructed Tuliflocks Limited, a firm of valuers, to carry out valuation. The report and valuation dated 5<sup>th</sup> April 2017, was produced as P. Exhibit 4. The valuation report estimated the damage done on the Plaintiff's Plot as Kshs.14,925,000.00.

6. The Plaintiff stated that while the road was being constructed, his wall, offices were demolished and he had to remove the petrol tanks. The Plaintiff also produced a copy of the title for PLOT LR. 4118/340 in his name as p.exhibit 5. The Plaintiff's claim is for compensation plus costs.

7. The Plaintiff's counsel in their submissions dated 20<sup>th</sup> May 2019 submitted that it is apparent that the suit land was acquired for the construction of the Voi - Taveta road which activities were not conducted by the 1<sup>st</sup> Defendant having been contracted by the 2<sup>nd</sup> Defendant who has the authority to do so by the law. It was their submissions that the conditions for compulsory acquisition were met as the suit property was acquired by the 2<sup>nd</sup> Defendant for the construction of the road was private land, that the state took physical possession of the property and is now for public use. Counsel submitted that the owner must be duly compensated. Counsel further submitted that the 2<sup>nd</sup> Defendant failed to abide by the provisions of Sections 107 through to 110 of the Land Act. That the Plaintiff is the absolute owner of PLOT NO.LR. 4118/340 and is entitled to compensation as a result of the acquisition. Counsel cited Article 40 of the constitution and Section 24 of the Land Registration Act (repealed) and submitted that the Plaintiff is entitled to the amount of Kshs.14,925,000.00 as prayed in the amended plaint and to which interlocutory judgment has already been entered. They relied on the case of **Katra Jama Issa –v- Attorney General & 3 Others (2018)eKLR** and **Horn –v- Sunderland Corporation (1941) 2KB 26, 40.**

8. The Plaintiff's counsel further submitted that the Plaintiff's land was taken without permission and without the Defendants following due process. That the Plaintiff's petroleum business was affected and was given no notice and his effort to get explanation were unsuccessful. It was therefore submitted that the Plaintiff is entitled to an award of Kshs.2,000,000.00 for both general and exemplary damages. They urged the court to grant the orders sought plus costs.

9. I have considered the pleadings, the evidence tendered and the submissions made. The issues for determination are:

**i. Whether the Plaintiff is the lawfully registered proprietor of the suit property.**

**ii. Whether a portion of the Plaintiff's land was encroached by the road constructed by the Defendants.**

**iii. Whether the Plaintiff is entitled to both general and exemplary damages.**

**iv. Who will bear the costs of the suit.**

10. From the material placed before me, there is no dispute that the suit property is registered in the Plaintiff's name. The Plaintiff produced the title (p.exhibits 5) which confirms that the property is registered in his name.

11. Section 26 (1) of the Land Registration Act provides 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, restrictions 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, unprocedurally or through a corrupt scheme. ”**

12. The said title indicated that the Plaintiff was registered as the owner of the suit property on 1<sup>st</sup> day of June 1991. There was no evidence tendered showing that the Plaintiff acted fraudulently or that he misrepresented any fact which led to him to obtain the title. There was no evidence indicating that the Plaintiff acquired the title illegally, unprocedurally or through a corrupt scheme. Further Section 24 (1) of the Land Registration Act vests in the person registered as proprietor of land or lease the absolute ownership of that land or the leasehold interest, together with all rights and privileges associated with that status. As the proprietor of the suit property, the Plaintiff is entitled to enjoy rights and privileges associated with such ownership which include exclusive use, possession and enjoyment thereof without interference by any third party save with his consent. The Plaintiff has accused the Defendants of encroaching onto and annexing a portion of the suit property and constructed a road thereon.

13. From the report which was undertaken by Edward Kiguru Land Surveyors (P. Exhibit 4), it was confirmed that the road constructed by the 1<sup>st</sup> Defendant has encroached onto LR NO.4118/340. The area encroached is given as 0.0178 hectares or thereabouts. The Plaintiff has tendered documentary evidence that show that a portion of his land measuring about 0.0178 hectares has been encroached by the Defendants. The Plaintiff's evidence has not been challenged and his evidence remains uncontroverted. The Defendants encroachment on

the Plaintiff's land is unlawful. I find the evidence on record sufficient to prove that the Plaintiff has proved his claim regarding encroachment on a portion of his property by Defendants. The defendants having been proved to have entered the Plaintiff's property without the Plaintiff's permission or any lawful cause, the Defendants have unlawfully acquired the Plaintiff's said portion of the property and the Plaintiff is entitled to compensation. The Surveyor's report states that the road which has encroached on a portion of the Plaintiff's land was constructed in a way that it did not leave any way-leaves for water, electricity, internet cables, among others. That all such developments will be forced to pass a different portion of the suit property, leading to another encroachment. A beacon certificate is also attached to the survey report confirming the beacons that define the boundaries of LR NO. 4118/340 and other parcels.

14. Article 40 of the Constitution protects ownership of property and states that the state shall not deprive a person of property of any description of any interest without prompt payment in full of just compensation.

15. I have perused the valuation report which was produced as p.exhibit 4. The report indicates the area encroached as measuring approximately 0.1 acres. The survey report on the other hand indicated the encroached area as measuring approximately 0.0178 hectares. This translates to approximately 0.0445 acres. It is clear therefore that the valuation was based on a bigger area, that is 0.1 acres instead of 0.445 acres. Based on the valuation rate that was used, I would award a sum of Kshs.1,335,000.00 for the portion of land that has been encroached. The Plaintiff did not also lead evidence to justify the 15% added severance. I therefore decline to grant the prayer for 15% severance of Kshs.1,995,000.00. I am also not satisfied that in the circumstances of his case that the Plaintiff has laid a basis for an award of both general and exemplary damages. Taking into account all the circumstances of his case, I am of the opinion that an award of Kshs.11,635,000.00 would be adequate compensation to the Plaintiff.

16. The upshot of this is that this court is satisfied that the Plaintiff has proved his case against the Defendants on balance of probabilities. Judgment is entered for the Plaintiff against the Defendants jointly and severally in the following terms:

**a. Kshs.11,635,000.00 compensation for the portion of 0.0178 hectares encroached by the road out of LR NO.4118/340 together with the development thereon.**

**b. Costs of this suit are awarded to the Plaintiff to be paid by the Defendants jointly and severally.**

**DATED, SIGNED and DELIVERED at MOMBASA this 1<sup>st</sup> day of October 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Mwanzia holding brief for Oddiaga for plaintiff

No appearance for defendants.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**