



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO 545 OF 2012

BELGO HOLDING LIMITED.....PLAINTIFF

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST DEFENDANT

THE MINISTER OF ROADS.....2ND DEFENDANT

JUDGEMENT

1. This matter was commenced by a plaint dated 23rd August 2012. The plaintiff seeks the following reliefs as against the defendant jointly and severally:-

(i) An order of permanent injunction restraining the Minister of Roads and/or Kenya Urban Roads Authority from entering upon or trespassing on Land Reference Number 28587 and 28586 (original numbers 3859 and 3860) Peponi Road Nairobi.

(ii) An order of mandatory injunction directing the Minister of Roads or Kenya Urban Roads Authority to vacate forthwith any portions of the said properties currently occupied by them.

(iii) Damages for trespass.

(iv) A declaration that the plaintiff is the indefeasible owner and registered proprietor of the portions of the said properties claimed by the Minister of Roads and or Kenya Urban Roads Authority to be land acquired by the Government.

(v) A declaration that the plaintiff is being deprived of its rights to the said properties (protected by Article 40 of the Constitution) by the Minister of Roads and or Kenya Urban Roads Authority; and

(vi) Costs of this suit.

2. The facts set out in the plaint are that LR No 3859 (original number 16/3) and (3680 originally 16/4) were on 21st January 1974 conveyed to Jays Syndicate Limited for an estate on fee simple subject and registered at the Government Lands Registry in Volume N.7 Folio 159/23 and Volume N.17 Folio 63/13) after which Jays Syndicate Limited conveyed the same to Standard Bank Limited through an indenture dated 21st January 1974 and registered in Volume No. N.176 3114 and Volume N.17 Folio 351/24 as security for banking facilities. The properties were held by the bank until 25th April 1981. It is the plaintiff's case that the Commissioner of Lands decided to carry out acquisition of portions of the said properties subject to the Land Acquisition Act and Gazette Notice No. 943 published on 21st March 1975 to ascertain the value of 6.548 acres out of LR No 3859 and 6.137 acres out of LR No. 3860. There is no evidence that any compensation was paid to Jays Syndicate Limited on or about the year 1976. Besides the properties were charged to the bank at the time.

3. The plaintiff further contends that the survey was never done as required, the notices were not served on the registered proprietor or the bank. The Commissioner of Lands did not take possession of the portions of the suit properties hence they did not vest in the Government of Kenya. In essence the Commissioner of Lands abandoned the acquisition process. The plaintiff further avers that the commissioner of lands never served notice on the registered proprietor or the Registrar that the portions have been vested on the government of Kenya. The bank was not notified to deliver the documents of title to the Registrar in order to endorse that the portions had been vested on the government under the Land Acquisition Act.

4. It is also the plaintiff's case that Lakeview Developments Limited acquired the suit properties from Jays Syndicate Limited by a conveyance dated 25th April 1981 and registered in the lands registry in Volume N.17 Folio 63/16 and Volume N.7 Folio 351/25. Lakeview

developments Limited took possession on or about May 1981 and remained in possession until May 1995 when the plaintiff purchased the suit properties through a conveyance dated 27th July 1995 and registered in volumes N7 Folio 351/31 and N61 Folio 15/23. The plaintiff, like Lakeview Development Limited was a bonafide purchaser without any notice of the alleged acquisition. The plaintiff remained in possession until 2004 when trespassers took possession but were evicted by court orders in 2007 after which the plaintiff retook possession. The then president exempted the suit properties from the Land Contract Act vide legal notice NO. 259 dated 23rd August 1996. That in 2010 the titles to the suit properties were converted from Government Land Act to Registered Titles Act regimes and new deed plans were issued as Deed Plan No. 310720 for LR No. 28586 (original 3860) and NO. 310721 for LR No. 28587 (original 3859) respectively. The Plaintiff also avers that Jays Syndicate Limited, Lakeview Developments Limited and itself have paid rates in respect to the suit properties since 1976 to the City Council of Nairobi. Further that on or about August and September 2011, the 1st and 2nd defendants trespassed upon portions of the suit properties and laid foundation for making a temporary road, dumped soil all over the land and parked their equipment over the properties. It prays for the prayers in the plaint.

5. The defendants through the Attorney General filed a statement dated 16th November 2012. They denied all the allegations in the plaint and averred that the Government of Kenya acquired the portions of the suit properties for a link road from Waiyaki way to Redhill road in 1975 and payment was done in 1976. That the said compulsory acquisition was known to the previous owners as it was well captured in the approved sub division plan and confirmed through the minutes of the Physical Planning Committee of the City Council of Nairobi. They aver that the Commissioner for Land made a final survey plan and there was an approved subdivision plan; that they have not trespassed on the suit properties but are implementing the project for which the land was compulsorily acquired. They contend that the plaintiffs claim over the portion is irregular null and void and contrary to public policy and public interest. That the resultant titles over the portions of the suit land which was compulsorily acquired are not protected as per Article 40(6) of the Constitution. They pray that the suit be dismissed with costs.

6. PW1 Akber Ismail, a director of the plaintiff and an advocate of the High Court adopted his witness statement dated 24th September 2012. He also swore an affidavit dated 18th July 2018 with annexed documents and a further list of documents dated 28th September 2018. He stated that he had personal involvement and knowledge of the matter regarding the suit properties since 1980. He produced the bundle of documents which included title deeds and grants as exhibit P1 and P2.

7. On cross examination he denied that there was any acquisition of any part of the land in 1975. No notices were issued under the Land Acquisition Act to the Standard Bank. Referring to the letter dated 6th August 1976 from the Senior Valuer to the Chief Engineer Ministry of Works in respect of LR Nos 3859 and 3860, he stated that there is no evidence that payment was made to Jays Syndicate Limited and Standard Bank Limited. He further told the court that he incorporated Lakeview Development Limited on 18th July 1980, that Lakeview Development Limited sold the suit properties to the plaintiff. That subdivision was never done on the suit properties and there was nothing to show that the land had been surveyed. He confirmed that the plaintiff is paying rates for the suit properties. He produced a bundle of receipts as exhibits. That the plaintiff is in possession of the suit properties, he also told the court that no new deed plans were issued for 44 acres each and that they show that as at 2010, no acquisition or excision had been done.

8. In summary, that the alleged portions did not vest on the Government of Kenya under the Land Acquisition Act; that the court in HCCC 266 OF 2005 held that the suit properties belonged to the plaintiff and the said decree has not been set aside.

9. DW1 Abdulkadir Ibrahim Jatani, the manager in charge of survey at the 1st defendant; adopted his witness statements dated 15th March 2016. He also relied on the defendant's bundle of documents filed on 16th January 2012 and 29th March 2017. He told the court that the Government of Kenya acquired land for a 60 metre road reserve. That the same was presented to the owner of the suit properties then Lakeview Developments Limited in 1980. That the said portion was acquired in 1975 vide gazette notices No. 942 and 943. That by a letter dated 6th August 1976, the Senior Valuer advised the Chief Engineer of Roads to effect payments for the portion acquired for the link road between Waiyaki Way and Red Hill. The affected properties were LR No. 3859 and 3860. The payee would be Jay Syndicate Limited and Standard Bank. The amount was assessed at Kshs.214,000/-. When cross examined by the plaintiff's counsel he admitted he was not working with Kenya Urban Roads authority at the time. He also admitted that the Deed Plan No. 310721 dated 2010 in respect of the LR No. 28587 (original 3859) does not show a subdivision. He insisted the process of acquisition was complete and that survey can be done at any time. He also admitted that the Deed Plan No. 310721 dated 2010 in respect of the LR No. 28587 (original 3859) does not show a subdivision. He maintained that the process of acquisition was complete and that survey can be done at any time.

The Plaintiff's Submissions

10. They are dated 27th March 2019. It has outlined six issues for determination. The first one is whether the Government of Kenya acquired 12.685 acres out of the suit properties in 1975 as alleged in paragraph 3 of the defence. It is the plaintiff's case that the steps of acquisition fell short of the mandatory steps which were required in the pre-2010 constitution and the Land Acquisition Act and as such there was never any acquisition. The Commissioner of Lands did not serve the interested persons any notice under Section 6(2) nor give the required notices under Section 11, 19(1) (3) of Act. No survey of the portions of the suit properties as required under Section 17 was done nor were any steps taken pursuant to Section 20. The Commissioner of Lands never took possession of the 12.685 acres and that the intention to acquire in 1975 was abandoned. It has put forward the case of **Angaine vs M'Muronga 2011 2 KLR 160, Patrick Musumba vs NLC & others [2016] 2 EA 260**. Further that the gazette notice 942 and 943 did not comply with the requirements of Section 6 of the act and thus were defective and inoperative as no public body or public purpose is named in either of them. It has put forward the cases of **Commissioner of Lands vs Coastal Aquaculture Limited KLR E & L 264; Town Council of Awendo vs Onyango [2015] eKLR**. The government's failure to pay the compensation promptly was a defect in the acquisition process. The successive owners have been paying rates for the suit properties and have been in possession. The gazette notice of 1996 exempting the land from the Land Control Act gave each area as approximate 44 acres. There was no notification or caveat lodged at the Land Registry to prove acquisition. Titles in respect of the suit properties were issued to the plaintiff under the Registered Titles Act. There was therefore no acquisition by the defendants.

11. The second issue is whether the issue of the plaintiff's title to the suit properties is res judicata by virtue of the judgment delivered in HCCC 266 of 2005 and as confirmed by the High Court Petition No. 21 of 2016. The High Court rejected the government's defence that part of the suit properties belonged to it and gave judgment in favour of the plaintiff. The Attorney General did not appeal against the said

judgment and it is binding on it. In 2010, titles to the suit properties were substituted by two grants.

12. The third issue is whether the defendants can dispute the plaintiff's title to the suit properties when National Land Commission after inquiry accepted the legality and proprietary of the plaintiff's title. It has also put forward the case of **Compar Investments vs National Land Commission & Others [2016] eKLR**.

13. The fourth issue is whether the plaintiff's title to the suit properties is protected the Article 40 of the Constitution. It is the plaintiff's submissions that there has been no finding that the suit properties were acquired unlawfully. The High Court has twice held that the plaintiff is the rightful proprietor. It has also put forward the case of **Kuria Greens vs Registrar of Titles [2011] eKLR; Evelyn College of Design vs Director of Children Department [2013] eKLR**. The plaintiff has full protection under Article 40 of the Constitution.

14. The fifth issue is whether the occupation of 21.8 acres or thereabouts of the suit properties and construction of a road thereon can be justified by public policy or public interest. The plaintiff submits that the defendants should follow due process to establish fraud or illegality of the plaintiff's claim over the portions. It has put forward the cases of **Mwaura vs AG & Others [2012] eKLR; Isaac Gathingu Wanjohi vs AG [2012] eKLR**. It is the plaintiff's submissions that the plaintiff is entitled to general damages including substantial aggravated and exemplary damages from the defendants for committing continuous acts of trespass. It has put forward the case of **Bank of Baroda vs Timwood Products [2008] eKLR**. The plaintiff is entitled to substantial damages which should accrue from the date of judgment until Kenya Urban Rural Authority complies with the laws relating to acquisition of private properties.

The Defendants' Submissions

15. The government acquired a total of about 12.865 acres vide gazette notices No. 942 and 943 of 1975 for the purposes of constructing a link road between Waiyaki Way and Red Hill Road. Payments of Kshs.214,000 was made through a voucher on 6th September 1976 to Jays Syndicate and Standard Bank Limited. The plaintiff cannot claim to challenge the acquisition process. They have put forward the case of **Cycad Properties Limited & Ano. Vs AG & 4 Others [2013] eKLR**. The validity of the acquisition can only be questioned within the time limits specified in the Land Acquisition Act. They have put forward the cases of **KENHA vs Shalian Masood Mughal & 5 Others [2017] eKLR**. The plaintiff was aware of the acquisition as it has the same directors as Lakeview and thus cannot be allowed to hide behind the corporate veil. They have put forward the case of **Zingo Investment Limited vs Miema Enterprises Limited [2015]eKLR**.

16. The question of whether there was an acquisition of a portion of the land has not been determined by any other court. The parties in this case are different from those on HCCC 266 of 2005; the defendants have not disobeyed any court orders since no orders were served upon them. They have relied on the case of **Worburn Estate Limited vs Margaret Bushforth [2016] eKLR**. The plaintiff ought to have instituted contempt proceedings to deal with disobedience of court orders.

17. To compensate the plaintiff would amount to the government re-acquiring and re compensating the same parcel of land. Compensation can only be paid when the title is indefeasible. The plaintiff is encroaching an acquired land hence not protected under Article 40 of the Constitution. They have relied on the cases of **Kepha Maobe & 365 Others vs Benson L Mwangi & Another [2015] eKLR; Veronica Njeri Waweru & 4 Others vs City Council of Nairobi & 2 Others [2012] eKLR; Kenya Airports Authority vs Mitu Bell Welfare Society & 2 Others [2016] eKLR**.

18. There can be no claim for trespass against the defendants in relation to the acquired portion since it belongs to the government and not the plaintiff. They have put forward the case of **Charles Mbuvi vs Vincent Nganga [2008] eKLR**.

19. I have considered the proceedings, the evidence on record, the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the government acquired 12.865 acres out of the suit properties in 1975.

(ii) What is the effect of the judgment in HCCC 266 of 2005 and HC Petition 21 of 2016 as regards the ownership of the suit properties.

(iii) Is the plaintiff entitled to the reliefs sought?

(iv) Who should bear costs?

20. Article 40 of the Constitution provides for the protection of rights to property. Article 40(1) provides as follows:-

“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”

Article 40(3) provides as follows:-

“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 a conversion of any interest in land, or title to land, in accordance with Chapter Five, or

(b) is for 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, or just compensation to the persons; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law”.

21. The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. Section 3 of the Land Acquisition Act provides as follows:-

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under Section 6, the Commissioner may cause notice thereof to be published on the gazette, and shall deliver a copy of the notice to every person who appears to him to be interested on the land”.

Section 6(1) of the Act, lays down the conditions which must be fulfilled before land can be acquired compulsorily and goes on to provide that where these exist the minister upon so certifying to the Commission can then direct the Commissioner in writing to acquire the land. Subsection 6(2) then goes on to state that upon the receipt, the Commissioner of Lands of the written directions he shall give notice of the intention of the government to acquire land.

22. It is also the plaintiff’s case that its previous owners were not served with the notices under Section 6(2), 9, 11, 19(3) 20 of Land Acquisition Act. It is also the plaintiff’s case that there was no record of the alleged acquisition either on the lands office or at the survey office. That the process of acquiring the 21.8 acres or thereabout of the suit properties was never completed. There is no evidence of payment of prompt compensation under Section 13 of the Land Acquisition Act.

23. I agree with the plaintiff’s submissions that no evidence was adduced to show that payment was made on 6th September 1976 to Jays Syndicate Limited. The defendants did not call a witness nor did they produce documents to confirm payment. No compulsory acquisition had occurred with knowledge of Lakeview Developments Limited. The burden was on the defendants to show that payment had been made. There is evidence by the plaintiff that in 2010 the titles were converted from Government Land Act to Registered Titles Act. New deed plans were issued as Deep Plan No. 310720 for LR No. 28586 (original 3860) and No. 310720 for LR No. 28587 (Original 3859) respectively. All those were done with no mention of the acquisition in 1975.

24. I therefore find that the intended acquisition of portions of the suit properties was not completed. In the case of **Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR** it was held that:-

“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions or the constitution or statute. The condition precedent to taking away anyone’s property is that the authority must ensure compliance with the constitution and statutory provisions”.

I am guided by the above authority.

DW1 Abdulkadir Ibrahim Jatani when cross examined by the plaintiff’s counsel told the court that he did not know when the acquisition process was complete.

25. The plaintiff is a second purchaser of the suit properties after Jays Syndicate Limited. It is also a first grantee from the state under the Registration of Titles Act, in the year 2010 of the entire suit properties.

26. It is not in doubt that the High Court in the HCCC 266 of 2015 as consolidated with HCCC 507 of 2003 (os) held that the plaintiff is the lawful and exclusive owner of the entire suit properties. The high court in Petition Number 20 of 2016 held that the decision declaring the plaintiff to be the lawful owner of the suit properties was a judgment *in rem* binding everyone. The said judgment has not been set aside and/or reviewed.

27. Prior to issuing the grants, the Ministry of Lands in its letter dated 21st January 2010, accepted the validity of the judgment in HCCC 266 of 2005 without any qualifications. In its inquiry the National Land Commission accepted the binding effect of both judgments in the High Court and concluded its inquiry and confirmed in the letter dated 18th May 2018 that the plaintiff was the lawful proprietor of the suit properties.

28. The defendants admit that they have forcefully moved onto the portions of the suit properties comprising of 21.8 acres or thereabout and built a road against the wishes of the plaintiff, the registered proprietor. This amounts to trespass for which the plaintiffs is entitled to damages.

29. The actions of the contractor amount to trespass which is actionable per se. The plaintiff did not have to prove any damage. In the case of **Nakuru Industries Limited vs SS Mehta & Sons 2016 eKL M. Odero J** relied on;

“Halsbury’s 4th Edition Volume 45 at Paragraph 26, 1503 which provides as follows on computation of damages in an action for trespass:-

(a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any loss.

(b) If the trespass has caused the plaintiff actual damage he is entitled to receive such amount as will compensate him for his loss.

(c) Where the defendant has made use of the plaintiff’s land, the plaintiff is entitled to recover by way of damages such a sum as would reasonably be paid for that use.

(d) Where there is an oppressive arbitrary or an unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain, by his unlawful conduct, exemplary damages may be awarded.

(e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased”.

In the instant suit this court would be concerned with (d) above.

30. It is the plaintiff’s case that without any notice the defendants invaded the suit properties around August 2011 and started the construction. PW1, Akber Esmail gave evidence in respect of trespass and forceful taking of possession by Kenya Urban Roads Authority and its contractor. This evidence was not controverted by the defendants. The plaintiffs also adduced evidence to show that the area invaded by Kenya Urban Roads Authority and its contractor is a 60 meter road corridor measuring 21.8 acres.

31. It is clear that the portion of the suit properties that has been trespassed on, is about 21.8 acres. In the case of **Philip Ayaya Aluoch vs Chrispnus Ngayo [2014] eKLR J Obaga** stated thus:

“.....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 plaintiff’s property immediately after the trespass or the cost of restoration whichever is less (see Hostler vs Greenpark Development Co. 986 W 2 d 500 (NO. Ct App 1999). The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass”.

The Honourable Learned Judge went ahead to award a nominal figure of Kshs.100,000/-. In the instant suit the area trespassed upon is about 21.8 acres. As the exact value was not given, I award Kshs.2,000,000/- general damages for trespass which I think is reasonable.

32. Due to the conduct of Kenya Urban Roads Authority and its contractor I find that the plaintiff is also entitled to exemplary damages. In the case of **Adulhamid Ebrahim Ahmed vs Municipal Council of Mombasa [2004]eKLR Maraga J** (as he then was) held that:-

“Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort and only in three categories of cases. The first category relates to the oppressive arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendants conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute”

I am also guided by the holding in the case of **Mike Maina Kamau vs Attorney General [2014] eKLR**.

33. In the case of **Titus Gatitu Njau vs Municipal Council of Eldoret [2015] eKLR; Sila Munyao J** states thus:

..... “The basis for awarding exemplary damages is to punish the defendant for its conduct. A wrong doer must not be allowed to benefit from his conduct. If this were not so, a wrong doer could choose to commit a wrong, being alive to the reality that taking into consideration the amount to be awarded in damages he would still be better off if he commits the wrong.....”

In the instant case, the trespass commenced in 2011. Several orders were issued to restrain Kenya Urban Roads Authority and its contractor but they chose not to obey. I award Kshs.20,000,000/- in exemplary damages which I think is reasonable in the circumstances.

I am of the view that Kenya Urban Roads Authority ought to comply with the laws relating to acquisition of private properties.

34. The plaintiff also prays for permanent injunction to restrain the defendants from occupying or dealing with the portions of the suit properties which is allowed together with the other prayers sought in the plaint.

35. In conclusion, I find that the plaintiff has proved its case on a balance of probabilities as against the defendants jointly and severally. I enter judgment in its favour as follows:-

(a) That an order of permanent injunction is hereby issued restraining the Minister for Roads and or Kenya Urban Roads authority from entering upon or trespassing on LR Nos 28586 and 28587 (original nos 3859 and 4860 Peponi Road Nairobi).

(b) That an order of mandatory injunction is hereby issued directing the Minister for Roads and or Kenya Urban Roads Authority to vacate forthwith any portions of the said properties currently occupied by them.

(c) General damages for trespass Kshs.2,000,000/- and exemplary damages of Kshs. 20,000,000 plus interest from the date of this Judgment till payment in full.

(d) That a declaration is hereby issued that the plaintiff is the indefeasible owner and registered proprietor of the portions of the said properties claimed by the Minister for Roads and or Kenya Urban Roads Authority to be land acquired by the government.

(e) That a declaration is hereby issued that the plaintiff is being deprived of its rights to the said properties (protected by Article 40 of the Constitution) by the Minister of Roads and or Kenya Urban Roads Authority.

(f) That the plaintiff shall have costs of the suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30th day of January 2020.

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant