



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 270 OF 2016**

**(FORMERLY NAIROBI HCCC NO. 918 OF 2002)**

**SMALL WONDER LTD.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The matter before me was first filed in the year 2002 as Nairobi Milimani Commercial Courts Civil Case No. 918 of 2002. By a Plaint filed as aforesaid on 23<sup>rd</sup> July 2002, Small Wonder Ltd (the Plaintiff) sued the Honourable the Attorney General (the Defendant) on behalf of the Commissioner of Lands, Ministry of Lands and Settlement for declarations that its rights to Plot No. 644 as comprised in Grant number CR 20175 measuring about 8.677 hectares (the suit property) had been infringed and that the suit property had unconstitutionally been taken away by the said Commissioner. The Plaintiff further prayed for general, special, exemplary and aggravated damages, interests and costs.
2. The gist of the Plaintiff's claim was its contention that having been the registered owner of the suit property, the then District Land Registrar Malindi had unlawfully and arbitrarily barred it from developing the same on the ground that the same had been allocated to other parties.
3. The Honourable the Attorney General filed a Statement of Defence to the Claim on 2<sup>nd</sup> October 2003 where it generally denied the Plaintiff was the registered owner of the suit property and invited the Plaintiff to strict proof. A few years after the Defence was filed, the Plaintiff filed an application dated 17<sup>th</sup> January 2007 where it sought to have the Statement of Defence struck out and for Judgment to be entered on admission against the Defendant.
4. The said application proceeded before Mwilu, J, (as she then was) and on 17<sup>th</sup> April 2008, she struck out the Statement of Defence for being frivolous and vexatious. No appeal was preferred against that finding and subsequently the matter proceeded for formal proof before P. Kihara Kariuki. J. (as he then was) on 12<sup>th</sup> November 2008.
5. In a reserved Judgment delivered on 3<sup>rd</sup> February 2009 the Learned Judge granted the declaration sought in the Plaint together with general damages of Kshs 301,875,000/-, Special damages of Kshs 1,457,063/-, Interests and costs. In addition, the Learned Judge ordered that upon payment of the decretal amount, the Commissioner of Lands cancels the registration of the Plaintiff as the proprietor of the suit property.
6. Aggrieved by the said decision, the Honourable the Attorney General lodged an appeal to the Court of Appeal. Having come to the conclusion that the Plaintiff did not demonstrate that the Defendant was served with a hearing notice when the case came up for formal proof, the Court of Appeal proceeded on 18<sup>th</sup> December 2015 to allow the appeal, set aside the proceedings before P. Kihara Kariuki J and the Judgment of 3<sup>rd</sup> February 2009 as well as all consequential orders arising therefrom. In addition, the Court of Appeal ordered that the matter be re-heard on formal proof.
7. Subsequently, on 3<sup>rd</sup> October 2016, the file was placed before Lady Justice Farah Amin who on the application of Counsel for the Plaintiff directed that the matter be transferred to the Environment and Land Court Malindi for hearing as the suit property is situated in Watamu in Malindi.
8. When this matter came before me on 26<sup>th</sup> July 2017 both the Plaintiff and the Defendant recorded a consent in the following terms:-

**1) The Plaintiff's evidence on record be admitted;**

**2) The Defendant be given 21 days within which to file a Valuation Report;**

**3) Matter be mentioned to confirm filing of the Valuation Report and take directions on filing submissions on compensation.**

9. As agreed the Defendant filed a Valuation Report after which both sides filed written submissions on the quantum of damages payable.

#### **The Plaintiff's Case**

10. In the course of the proceedings conducted before P. Kihara Kariuki J. as aforesaid on 12<sup>th</sup> November 2008, the Plaintiff called two witnesses.

11. PW1- Pieia Remato, a director and shareholder of the Plaintiff testified and presented receipts for expenses incurred in connection with the suit property. He produced two original receipts Nos. MCY 9364 and MCM 10717 dated 20<sup>th</sup> March 1996 and 30<sup>th</sup> November 1996 issued by the Municipal Council of Malindi. He told the Court that the receipts were for rates paid to the Council by the Plaintiff. The receipts marked as Plaintiff Exhibits 1A and B were for a total of Kshs 655,593/-.

12. PW2- Magdalene Wambui Muhia was a registered Valuer and the Managing Director of Royal Valuers Ltd. PW2 testified that she was instructed to carry out a valuation of Plot No. 644 Kilifi. The property registered under the Mombasa Registry as CR 20175 measures 8.677 Hectares or approximately 21.441 Acres. As of 7<sup>th</sup> November 2008, the property was registered in the name of the Plaintiff. PW2 valued the property at Kshs 262,500,000/-.

#### **The Defence Case**

13. As stated hereinabove the Statement of Defence filed by the Honourable the Attorney General was struck out on 17<sup>th</sup> April 2008 for being frivolous and vexatious. Pursuant to the consent of the parties as recorded on 26<sup>th</sup> July 2017, the Defendants on 17<sup>th</sup> September 2017 filed a Valuation report prepared by the Government Land Valuer. The said Report puts the value of the land as at the year 2008 at Kshs 170,000,000/- and as at the date of its preparation at Kshs 320,000,000/-.

#### **Analysis and Determination**

14. It was the Plaintiff's case that at all material times, it was and still is the registered proprietor of the suit property which comprises 8.677 hectares by virtue of Grant No. CR 20175 dated 27<sup>th</sup> March 1990. The Plaintiff avers that when it sought to take possession and develop and utilize the same, it was unlawfully barred and arbitrarily restricted from doing so by the then District Land Registrar, Malindi.

15. According to the Plaintiff, the said Land Registrar's reasons for his action was the contention that the suitland had been allocated to other persons by the Government of Kenya. As a result of the Land Registrar's actions the Plaintiff contended that its right to property had been infringed and that it had been deprived of the use and enjoyment of its property as a result whereof it has suffered loss and damage.

16. According to the Plaintiff's two witnesses, the suitland comprised of a prima beach property in Watamu Area of Malindi with developed residential cottages, a health club and a luxurious beach hotel named Crystal Bay Resort complete with a bar and restaurant and all other auxiliary attachments including ample parking areas, makuti-thatched beach sheds, water reservoirs and workers units.

17. Ms Magdalene Wambui Muhia (PW2), a registered Valuer produced her Report and Valuation of the suitland dated 10<sup>th</sup> November 2008 together with various photographs and plans which she explained at length. After carrying out what the Plaintiff described as an in-depth analysis of other properties in the Watamu Area she put the value of the suitland at Kshs 262,500,000/- as at the date of her Report. On this basis the Plaintiff's submit that the value of the property as at the year 2017 would be in the region of Kshs 627,900,000/-.

18. Consequent upon their Statement of Defence being struck out and this matter proceeding by way of formal proof, the Defendant did not offer much by way of evidence to contradict the Plaintiff's assertions. They did however file a Valuation Report giving their assessment of the value of the property pursuant to a consent entered into with the Plaintiff's as foresaid.

19. Their Report prepared by the Government Land Valuer and dated 17<sup>th</sup> September 2017 somewhat agrees with that of the Plaintiff in its assessment that the suit property is situated within a quiet highly popular neighbourhood and that similar properties thereat are in demand for commercial hotel and leisure use by tourists. The said Report puts the value of the suitland as at the year 2008 at Kshs 170,000,000/- and as today at Kshs 320,000,000/-

20. From the material placed before me, it is evident that under and by virtue of Grant No. CR 20175 dated 27<sup>th</sup> March 1990, the President of the Republic of Kenya granted the suitland to the Plaintiff and the Plaintiff is still the registered proprietor thereof. However, when the Plaintiff went to the ground to take possession and develop the suitland, it was unlawfully barred from doing so after it emerged that the land had been allocated to third parties who were then in possession.

21. By this letter dated 6<sup>th</sup> January 2003, addressed to the Attorney General, the Commissioner of lands observed candidly that:-

***"...Basically this was an issue of two title documents over the same piece of land. One set was issued and registered under the Registered Land Act (RLA) while the other was registered under the Registration of Titles Act (R.T.A). Both titles are genuine***

**and were issued by this Department although the Grant issued to the Plaintiff was done in error since it did not recognize the existence of the titles issued under the Registered Land Act and registered in Kilifi.**

**To resolve the issuance of double registration, it was mutually agreed between the Plaintiffs and this office that an alternative piece of land be identified and allocated to them. To this end several letters have been written to relevant departments/offices seeking to identify ideal alternatives without success hence this suit. As it stands now, we have not been able to find an alternative piece of land that is acceptable to the Plaintiffs.”**

22. On the evidence adduced before me, I find and hold that the Plaintiff was at all times material the registered proprietor of the suit property. The Plaintiff was restrained by the then District Land Registrar Malindi from taking possession thereof. Thereafter, the Defendant offered to compensate it with an alternative parcel of land but many years down the line, this has not been done.

23. In the circumstances herein, I think the Plaintiff is entitled to damages in compensation. As to the amount to be awarded in compensation, both parties have relied on two Valuation reports prepared by Ms Magdalene Wambui Muhia of Royal Valuers Ltd dated 10<sup>th</sup> November 2008 together with other projections in their submissions which put the current value of the property at Kshs 627,900,000/- as at the end of the year 2017. On its part, the Defendant relies on a Report prepared by Government Valuers. The Report dated 17<sup>th</sup> March 2016 was prepared on the instructions of the Solicitor General.

24. As Mativo J. stated in **Stephen Kinini Wang'onde –vs- The Ark Limited (Civil Appeal No. 2 of 2014(2016) eKLR:-**

*“The fundamental characteristic of expert evidence is that it is opinion evidence...Except testimony, like any other evidence, must be given the appropriate weight. It must be influential in the overall decision-making process as it deserves; nothing more, nothing less. To my mind the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for Courts use being commissioned on any factual matter, technical or otherwise, providing, it is deemed likely to be outside the knowledge and experience of those trying the case, and the Court agrees to the evidence being called.”*

*While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a Court should use to weight the Probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account. Four consequences flow from this.*

*Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that Judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then be rigidly judged with mathematical precision.*

*Secondly, a Judge must not consider expert evidence in a Vacuum. It should not therefore be ‘artificially separated’ from the rest of the evidence. To do so is a structural failing. A Court’s finding will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the Court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.*

*Thirdly, where there is conflicting expert opinion, a Judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.*

*Fourthly, a Judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.”*

25. This Court fully concurs with the Learned Judge that expert evidence should not trump all other evidence, that it should not be considered in vacuum and that it must be evaluated in the context of other material evidence. In this regard, this Court notes that when PW2 carried out her valuation in November 2008, Plot No. 644 did not exist on the ground. According to the Valuer no comparable Plots existed around the suit property in terms of size to enable the Valuer assess and compare the approximate Market Value thereof. Her estimates were in the circumstances obtained from other sources on sub-divided Plots as the Plaintiff never took possession of the suitland.

26. According to PW2 the value of the land based on the said estimates was as at November 2008 in the sum of Kshs 262,500,000/-. The Plaintiff did not deem it necessary to carry out a fresh valuation of the suit property after the Court of Appeal directed that the Plaintiff’s evidence be heard afresh. Instead they have, in submissions filed before me, made Projections in which they contend that the current market value of the suit property stands at Kshs 627,900,000/- as at the year 2017. I did not find any basis to accept these arithmetic calculations and variations made on the value of the suit property without the involvement of a registered valuer.

27. On its part, the Defendant submitted a report which placed the value of the land as at the year 2008 at Kshs 170,000.00/- and as at the date of its preparation on 22<sup>nd</sup> August 2016 at Kshs 320,000,000/-. I must state that I found this report prepared by two Government Valuers on the instructions of the Solicitor General more reasonable and acceptable in its estimations.

28. In the result and given the time lapse between August 2016 and now, I would estimate the current value of the land at Kshs 325,000,000/-. The Plaintiff had also proved Special damages of Kshs 1,457,063. I did not however find any basis for the claim for exemplary or aggravated damages as it is apparent, at least from the letter from the Commissioner of Lands dated 6<sup>th</sup> January 2003, that this

situation arose from an error on their part. As it were, I did not find any evidence of fraud on the part of the Defendant as submitted by the Plaintiff.

29. Accordingly, I hereby enter Judgment for the Plaintiff in terms of the prayers contained in the Plaint dated 22<sup>nd</sup> July 2002 and filed on 23<sup>rd</sup> July 2002, and make the following orders:-

***a) It is hereby declared:-***

***i) That the Plaintiff's rights to the suit land have been violated;***

***ii) That the suit land had been unlawfully and unconstitutionally taken away from the Plaintiff by the Commissioner of Lands.***

***iii) General Damages in the sum of Kshs 325,000,000/-.***

***iv) Special Damages in the sum of Kshs 1,457,063/-.***

***v) Costs of the suit.***

***vi) Upon payment of the decretal amount to the Plaintiff the registration of the Title in favour of the Plaintiff be cancelled forthwith.***

30. It is so ordered.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**