

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 30 OF 2019

ABEDNEGO KYALO MBITHI.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST

DEFENDANT

NATIONAL LAND COMMISSION.....2ND

DEFENDANT

THE ATTORNEY GENERAL.....4TH

DEFENDANT

JUDGMENT

A. Plaintiffs' claim

1. By a plaint dated 21.02.2029, the plaintiff sued the defendants seeking the following reliefs:

- a. *A declaration that the mark letter "X" and a red line affixed on premises by agents of the 1st defendant communicates a message understood by the Kenyan public that the building/structure on which the mark is affixed is due for demolition. A declaration that the mark letter "X" and a red*

line affixed on premises by agents of the 1st defendant communicates a message understood by the Kenyan public that the building/structure on which the mark is affixed is due for demolition.

- b. A declaration that the mark letter "X" and a red line over the premises on LR NO. 11492/415, the 1st defendant wanted the public and the plaintiff to know that the said premises are marked for demolition.*
 - c. A declaration that between the time of affixing the mark letter "X" and a red line affixed on premises by agents of the 1st defendant to the time the defendants compensate the plaintiff for the compulsory acquisition of Plot LR NO. 11492/415, the plaintiff is entitled to be compensated for all the losses suffered during the intervening duration.*
 - d. An order for compensating at market rate of the value of the premises and Plot LR NO. 11492/415 being Kshs 165,000,000/=.*
 - e. An order for compensation of the plaintiff by the defendants at the rate of Kshs 1,715,327/= per month with effect from 30th July 2018 until the date the defendants effect full compensation to the plaintiff of the value of the premises and the Plot NO. 11492/415.*
 - f. Any other order that this court may grant.*
 - g. Costs of the suit.*
2. The plaintiff pleaded that he is the registered proprietor of LR No. 11492/415 situated in Mariakani on which he has constructed a commercial building. He further pleaded that

sometime in 2017 the agents of the 1st defendant marked the ground floor of the said building with the letter “X” in red colour. He contended that soon after the 1st defendant held public meetings with the residents of Mariakani and elaborated that all buildings bearing the “X” mark were marked for demolition to expand the Nairobi-Mombasa Highway. He claimed that as a result of the markings all the lessees, including Cooperative Bank of Kenya- Mariakani branch, vacated the suit property for fear of business disruption as a result of the impending demolition.

3. He contended that ever since the tenants vacated he has been unable to secure tenants because the red marking on the suit property was interpreted to mean that the same is due for demolition and compulsory acquisition by the 1st defendant. He maintained that he had lost revenue and goodwill he would have earned from the three-storey building at a rate of Kshs 1,715,327/= per month with effect from 30.07.2018. He urged the court to compensate him for the loss of earnings as well as for the value of the suit property which he valued at Kshs 165,000,000/=.

B. 1st Defendant’s defence

4. The 1st defendant filed a defence dated 20.05.2019 denying liability for the plaintiff's claim. It admitted holding sensitization meetings with key stakeholders as part of assessing the viability of expanding the Nairobi-Mombasa Highway at Mariakani. The assessment revealed that in order to expand the road, there would be a lot of demolition hence the intended project was not undertaken. It was pleaded that no steps were taken to commence the compulsory acquisition procedure as laid out in law and therefore the plaintiff could not purport to seek compensation for his property. The 1st defendant further denied marking the suit property with a red letter "X" with the intention of demolishing it for road expansion. In particular, the 1st defendant denied being responsible for the loss of revenue since it did not show any intention to acquire the suit property. As a result, the 1st defendant prayed for dismissal of the plaintiff's suit with costs.

C. 2nd defendant's defence

5. The 2nd defendant filed a defence dated 17.09.2019. The 2nd defendant denied being in the process of compulsorily acquiring LR NO. 11492/145 for expanding the Mombasa-Nairobi Highway, nor having received a request from any government agency to

do so. Further, it denied placing any mark on the suit property and prayed for the plaintiff's claim for compensation to be dismissed with costs.

D. 3rd defendants' response

6. The 3rd defendant filed a defence on 03.03.2023. The 3rd defendant contended that it was not privy to the agreements the plaintiff had with his tenants hence had no liability in their vacating the suit property. It was maintained that the plaintiff had no cause of action against the 3rd defendant as he could not demonstrate how it had breached his proprietary rights. The court was urged to strike out the suit against the 3rd defendant.

E. Trial of the action

7. The material on record shows that at the trial hereof, the plaintiff gave evidence as PW1, followed by five other witnesses, Nicodemus Mwangangi, Samuel Charo Kombe, Ruth Wambani Nyogesa, and Idi Hamisi Hinzano as PW2, PW3, PW4, and PW5, respectively.

8. The plaintiff adopted the contents of his witness statement dated 21.02.2019 as evidence in chief and produced the documents listed in the documents dated 21.02.2019 as exhibits in support of his claim. His evidence at the trial mirrored the

averments made in his plaint and the affidavit he had filed in support of an interlocutory application dated 21.02.2019.

9. PW2 testified that his firm valued the suit property at the request of the plaintiff whereby he valued the suit property at a market value of Kshs 8 million and a monthly income of Kshs 20 million. He stated that at the time of carrying out the valuation the building was partially occupied.
10. Counsel for the plaintiff requested the court to conduct a site visit to the suit property to identify the beacons placed by the plaintiff. The same was conducted by the court's Deputy Registrar on 16.09.2022 in the presence of counsel for the plaintiff and the 1st defendant and in the absence of the 2nd and 3rd defendants. After the said visit was conducted, by consent, PW1 was recalled. He adopted his further witness statement dated 26.02.2024 and produced the documents listed in the further list of documents dated 26.02.2024 as exhibits in support of his claim. He testified that the survey report revealed that the proposed road passes through his plot.
11. PW3 adopted his statement dated 23.10.2023 as his evidence. He stated that he was at the material time the assistant chief of Mariakani when the 1st defendant carried out sensitization

meetings with the locals. He stated that he attended the initial meeting where the 1st defendant informed the locals that they would mark for demolition the buildings that were in the way of the road expansion and later compensate the owners. However, he confirmed that the banking hall on the suit property is currently occupied by Equity Bank.

12. PW4 adopted into evidence her statement dated 24.01.2024. She testified that she was a member of the committee that represented the residents of Mariakani in the road expansion project by the 1st defendant. She maintained that she attended all the relevant meetings up to 2019. She claimed that some of the people affected were compensated.
13. PW5 adopted into evidence his statement dated 21.02.2022. He testified that he attended the meetings called by the 1st defendant and that the plaintiff's suit property was marked for demolition. However, he admitted he was not present when the suit property was marked. With that, the plaintiff closed his case.
14. The 1st defendant called only one witness, Eliud Munene. He adopted the contents of his witness statement dated 20.05.2019 and a further statement dated 11.03.2025. He produced the documents in the list of documents dated 20.05.2019 and the

joint survey report dated 16.09.2022 as exhibits. On their part, the 2nd and 3rd defendants did not call any witnesses at the trial.

F. Directions on submissions

15. Upon the conclusion of the hearing, the plaintiff was granted 30 days to file and serve his submissions, whereas the defendants were granted a similar period to file and serve theirs. The record shows that the plaintiff filed his submissions on 07.04.2025 whereas the 1st defendant filed its submissions on 08.05.2025. On his part, the 3rd defendant filed his on 24.04.2025.

G. Issues for determination

16. The court has considered the pleadings, documents, and evidence on record in this matter. The court is of the view that the main issues for determination herein are as follows;

a. Whether the plaintiff has proved his claim against the defendants.

b. Whether the plaintiff is entitled to the reliefs sought in the suit.

c. Who shall bear the costs of the suit.

H. Analysis and determination

a. Whether the plaintiff has proved his claim against the defendants

17. The court has considered the material and submissions on record on this issue. The plaintiff claimed that the 1st defendant had earmarked his building at Mariakani for demolition for the expansion of the Nairobi-Mombasa highway. It was his case that the 1st defendant had marked the ground floor of the building with a visible mark "X" which obviously meant that the building was for compulsory acquisition and demolition as a result of which his tenants vacated. He thus demanded damages for loss of business and compensation for compulsory acquisition of his property.

18. Although the plaintiff called 4 witnesses in support of his claim, none of them actually saw the 1st defendant's agents affix the mark "X" on the building. None of them could tell the date it was allegedly affixed on the plaintiff's building. The 1st defendant's evidence was to the effect that it only carried out various sensitisation meetings in Mariakani on the intended expansion of the highway but did not mark the plaintiff's property for acquisition.

19. It was also the 1st defendant's evidence that the intended project did not go ahead because it was not found feasible and viable because it would have resulted into massive demolitions. It

denied having affixed mark "X" on the plaintiff's property and stated that it did not even initiate the process of compulsory acquisition of the land and that the National Land Commission (NLC) did not publish the requisite notices for compulsory acquisition and inquiry on compensation.

20. Accordingly to the drawings produced in evidence by the 1st defendant, the plaintiff's property falls on the right side of the highway as one faces the Nairobi direction. There are several other properties on the same line, e.g, LR Nos 11492/384, 11492/382, 11492/359, 11492/412, 11492/32, and 11942/219. If the 1st defendant wanted to expand the highway, these properties would also have been similarly affected. It would be a rare case where a road expansion project would affect only one among several plots in the same line. There is, however, no credible evidence before the court to show that they were marked. There is no evidence to show that they were vacated in panic because of the intended expansion of the highway. The court has noted from the material on record and the report of the Deputy Registrar during a site visit that the alleged mark on the plaintiff's building was not accompanied by the initials of the 1st defendant "KENHA" as is usually the case.

21. In the premises the court finds no credible evidence to associate the alleged mark with the 1st defendant. The court believes the evidence of the 1st defendant that the intended expansion of the highway was put on hold after the sensitization meetings and that even the final drawings of the road were never produced. The 1st defendant did not even initiate the process of compulsory acquisition of the plaintiff's property or any of the properties in Mariakani.

22. The court has perused the letter dated 29.06.2018 from the Cooperative Bank of Kenya which gave notice to vacate the plaintiff's building. In the said letter, the bank did not make any reference to any impending demolition or markings on the plaintiff's property. The letter simply stated that the bank was leaving due to unavoidable circumstances. Moreover, the evidence on record shows that thereafter another bank namely Equity Bank actually took up a lease at the same building.

23. The court is thus far from satisfied that the plaintiff has proved any liability on the part of the defendants. The plaintiff's claim appears to be largely speculative since he did not even bother to formally write to the 1st defendant to inquire if they had affixed the mark complained of on his building and the purpose thereof.

There is no letter of complaint or inquiry done by the plaintiff in 2017 when the said mark was allegedly affixed to the building. The plaintiff's claim simply does not add up.

b. Whether the plaintiff is entitled to the reliefs sought in the suit

24. The court has already found that the plaintiff has failed to prove his claim against the defendants or any one of them. It would thus follow that the plaintiff is not entitled to any of the reliefs sought in the suit.

c. Who shall bear costs of the suit

25. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *provisio to Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason why the successful parties should not be awarded costs of the suit. As a result, the defendants shall be awarded costs of the suit.

I. Conclusion and disposal orders

26. The upshot of the foregoing is that the court finds and holds that the plaintiff has failed to prove his pleaded case against the defendants or any one of them. As a result, the court makes the following orders for the disposal of the suit;

a. The plaintiff's suit is hereby dismissed in its entirety.

b. The defendants are awarded costs of the suit.

It is so ordered.

Judgment dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **2nd day** of October **2025** in the presence/absence of the parties as indicated below.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Ms. Musyoki for the plaintiff

Mr. Mugenda for the 1st defendant

N/A for the 2nd defendant

Ms. Nzau for the 3rd defendant