



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 505 OF 2017

(FORMERLY MILIMANI ELC NO.111 OF 2009)

HARRIET WAIRIMU WANG'OMBE

(Suing as the personal representative of

JOSEPH WANG'OMBE NGATIA).....PLAINTIFF

VERSUS

KENYA ELECTRICITY GENERATING COMPANY.....DEFENDANT

JUDGMENT

By a further **Amended Plaintiff** dated 31st July 2012, the Plaintiff herein filed a suit against the Defendant for the following orders;

- a) A declaration that the occupied portion of the suit land belongs to the Plaintiff herein.*
- b) Permanent injunction to issue restraining the Defendant, its employees, agents and/ or any other person drawing Title from it, from trespassing, occupying, constructing and/ or doing anything detrimental to the Plaintiff's Title.*
- c) Full possession of the said portion of land.*
- d) Removal of all structures by the Defendant at its costs.*
- e) Re-instatement of the portion of land in its original form back to the Plaintiff.*
- f) General Damages.*
- g) Mesne profits at the rate of Kshs.80,000/= per month since encroachment.*
- h) Costs of the suit.*
- i) Interest on (e) and (f) above*

In her statement of claim, the Plaintiff averred that in the year 2008 or 2009, the Defendant trespassed on her suit land on a portion measuring about 4 acres and now, the Defendant whether by itself, their servants, agents and or employees are in the process of interfering with and/or constructing erecting and/or putting up structures.

The Plaintiff particularized the Defendant's illegal acts as; encroaching on her land and erecting permanent building and thereby infringing on her rights due to the encroachment as provided for in the title, Dumping and scattering waste material on the her property, Establishing a garage /motor service, parking yard on the suit property, instructing its agents to enter into her property without her knowledge or consent and thereupon proceeding to erect buildings of permanent nature and other structures, alienating part of the land by erecting a fence around it, establishing temporary road and/or passage through the affected portion without the Plaintiff's consent.

The Plaintiff in her Complaint further averred that by the reason of the illegal acts of the Defendant, she has been deprived of the use and

enjoyment of the said land and further she cannot put into effect the plans for the development of the suit land and has thereby suffered loss and damages. She particularized the damage and inconvenience as follows as; the current and/or continued occupation of her land unabated and/or

wanton construction works going on tantamount to trespass upon certain and/or entire Plaintiff's property to which she holds a valid title thereto over and above any other person. The ongoing construction work will also cause the Plaintiff damage and inconvenience as the same is not what the Plaintiff acquired it for, The continued occupation is illegal as the Defendant do not have any proprietary interests over the Plaintiff's property.

The suit is contested and the Defendant filed its further Amended Defence dated **24th April 2013** and denied all the allegations made in the Plaintiff and averred that the suit property is situated along the **Tana River border**, which falls under the **Tana River Development Authority(TARDA)** which is charged with the Responsibility of undertaking Development within the **Tana and Athi River basins**. That during the construction of **Masinga dam**, several parcels of land along the dam were flooded and all the affected land were compulsorily acquired by **TARDA** and all owners adequately compensated, the Plaintiff being among them. It further averred that it was exercising its rights and authority under the **Wayleaves Act** as such its acts were never illegal but in conformity with the law. It was its contention that the Plaintiff had been made aware of the activities in question and the suit is merely an afterthought. Further the Defendant averred that the Plaintiff is not entitled to the prayers sought and urged the Court to dismiss the suit.

The Plaintiff filed a reply to the amended statement of defence and reiterated the contents of the **Plaint** and further averred that the suit property is not part of the flooded area that was compulsorily acquired during construction of **Masinga Dam** and no section of the encroached portion of land has been flooded as there are Development on the said portion of land.

The suit proceeded by way of *viva voce* evidence and the Plaintiff gave evidence for herself and called one witness, while the Defendant called one witness to support its case.

PLAINTIFF'S CASE

PW1 - Harriet Wairi Wangombe, testified that she is the Administrator of the **Estate of Joseph Wangombe** having been substituted on **27th April 2017**, and adopted her witness statement. She testified that the 10 acres land is still in her husband's name. That **KenGen** built on their land and blocked them from entering onto the said land and she does not have access to the land since **2009**. It was her evidence that the land was used as a banana Plantation for commercial purposes. It was her further testimony that she has sought for Mesne profit at the rate of **Kshs.80,000/=** per month as she would be earning that much if she had access and use of the land. She further testified that she was not aware of any compulsory acquisition of their land though she had seen documents to that effect. She also testified that she was never asked for the original title for the purpose of compulsory acquisition and that she was never compensated even a single cent by the Government. It was her further testimony that she had contracted a valuer and urged the Court to award the Judgment as per reliefs sought in her claim. It was her evidence that the current market value is **Kshs.60,000,000/=** and if the Defendant would offer her the same, she would surrender the land to them but she has not been offered the above current Market rate. She produced her list of documents as exhibits in court.

On cross examination, she testified that there is a Dam around her land and though she has heard of **Masinga Dam**, she did not know that the land around the Dam was acquired. She testified that around the year **2008/2009**, KenGen entered her land and took control of it. Then Plaintiff reported the matter and KenGen assured her that they would compensate her, but she has not been compensated. She denied that there have been any negotiations and that the negotiations never came to anything. She testified that her land is **No.10759** having seen the mapping of the area and it touches in the river and the dam as shown on the map. She also testified that the buildings are not occupying **4 acres** only and that she is unable to enter the land. Further that prior to **2009**, she used to plant bananas for commercial purposes and she would earn about **Kshs.80,000/=** per month. That the land was bought in the year **2008**, and she immediately planted bananas and that the above was the projected profit. It was her evidence that she would have gotten better production because of the River though she did not have evidence on the same. She further testified that KenGen occupied the land in **2008/2009** and when the Defendant took possession, she was never informed that the land was compulsorily acquired and her husband was never paid any compensation as there is no evidence of such compensation and the letter dated **15th May 2008**, did not reflect the true position of the matter. She acknowledged that their land was bordering riparian area and it was supposed to be **12.5 acres** but due to riparian land, it is **10 acres**. She further testified that KenGen has occupied the whole area and the buildings have occupied the whole land and she cannot enter the land as it is fenced and guarded. She also testified that she bought the land for agricultural purposes.

On re-examination she stated that the letters dated **31st December 1974**, did not give the title numbers and only talk of Upper Tana land acquisition and not about land parcel **No.10759** which is her land. She further testified that she does banana farming and therefore knows how much it can fetch.

PW2 David Chege Kariuki testified that he is a registered and licensed Valuer and that he received instructions from the Plaintiff to carry out valuation on her land. He went to the site and valued the land and prepared a **Valuation Report** dated **21st July 2016**. He also testified that the site was blocked by KenGen and he did not go to the side of the go downs. It was his evidence that the entire property is not fenced and that the only part that is fenced is where the buildings are and one cannot access the fenced area without permission and the unfenced area is where the bananas are and one cannot access the plantation because of the River and also the buildings by KenGen. It was his testimony that he had given the current market value of the property and that he went to the property and got the comparables for the neighborhood within the radius of about 5km and an acre would fetch around **5 to 6 million** to a willing buyer. His client land was **10acre** and as she was not willing to sell the land, he took the value of **Kshs.6 million** and the market value was therefore **Kshs.60,000,000/=**. He testified that he used bananas as they were the ones he found grown on the land. He testified that the loss was for **7 years** and he took into account that an acre would grow two branches of bananas and one would produce one bunch of banana for **Kshs.300/=**. He then multiplied with **10 acres** and **7 years** and it came to **Kshs.14,700,000/=** and that is what the Plaintiff would have gotten if all factors remained constant. He testified that having seen the original title, and the google map indicating where the land is located, he then prepared the valuation report which he produced in court as exhibit.

On cross examination, he testified that as per the title, the land was meant for a **Petrol Station** and that he inspected what he saw on the ground and further that the client must have asked for change of user or is ignorant of the special condition and he did not see change of user and that he did not see the Petrol Station but he saw the buildings on the land that occupy about 3 acres and the other portion of land was fenced. He further testified that the suit land was for agricultural purposes and the value was about **Kshs.5 million** per acre. He also testified that he did not know if the valuation of the area is **Kshs.900,000/=** per acre. It was his further evidence that KenGen had built on about 3 acres but had occupied the whole of 10 acres and the 3 acres were fenced. It was his evidence that the profit per acre given in his report is mean profit and not gross profit and for the 10 acre per month, the profit is about **Kshs.175,000/=**. He testified that there is a Dam at the vicinity at **Wanjie area** and that he did not ask if the land was acquired. He denied that the report was guesswork and stated that he used his professional training to determine the value of land.

On re-examination, he testified that he personally went to the site and saw the bananas and unless one is given access, one cannot get into the land. He testified that someone is cultivating bananas on the remaining portion but it was not the Plaintiff. It was his testimony that the special condition does not bar the user from using the land and further that a banana bunch would retail at **Kshs.300/=** and that is a direct loss from lack of use.

DEFENCE CASE

DW1 - Philomen Nyangoja testified that he is the Chief property officer at KenGen and adopted his witness statement dated **19th April 2013**. He further testified that by a letter dated **15th May 2008**, addressed to the **Commissioner of Lands, KenGen Co. Ltd** wished to conclude the transfer of the land that was the subject of the letter. He also testified that the letter dated **31st December 1974**, talked about proposed upper reservoir and the subject land was the one acquired by **Tana River Development Authority(TARDA)** and the map as attached is to show the different parcels of land affected and he testified that it was therefore a matter of land acquisition for **Masinga Dam** and the witness produced the two letters as exhibits. He further testified that the part of the land that was acquired was the flooded one on **LR.10759**, and the affected area was **2.905 ha** and not **7.2 acres**. It was his evidence that according to the map, that area was acquired and the precise area that was acquired is the one covered by the continuous line and the total acreage was **12.5 acres** and the **2.5 acres** was set aside for riparian reserve. He further testified that the title was given during the colonial area and it shows that the riparian reserve was **2.5 acres** and **KenGen Co. Ltd** acquired the whole parcel of land shown by continuous line for construction of the Dam and he also denied that Defendant has fenced the whole of the property which property is located along the **Sagana-Nyeri Highway**. It was his evidence that a portion of land near Sagana has farming activities going on but he was not aware of who was farming on the said portion. He also denied that **KenGen** is responsible for the farming and it is making profit on the land. He also testified that the structures on the suit land were put up by the contractors. It was his testimony that **KenGen Co. Ltd** occupies the upper part and that it had hired a contractor to repair the Power Station and the contractor built structures for the equipment. That there is a **Tana Power Station** and **KenGen** bought the access Road in **1982**, and constructed the access road which is tarmacked and therefore the access road is a private road bought by **KenGen**.

It was his testimony that they are not bound to compensate the Plaintiff for the entire parcel of land as they only occupy **0.75 ha** of the land and not **7.2 acres** and that is the area that **KenGen** acquired. She stated that they have two other structures and they are willing to remove the structures that were left behind by the contractors. He also testified that the Plaintiff was compensated fully but the transfer was never effected.

On Cross examination, he stated that she did not have any authority to show that **Tana River Development Authority(TARDA)** gave them authority to use the land and that the structures on site were put up by a contractor and that they hired the contractor as he did not have any documentation to that effect. Further that there was no **Gazette Notice** for

compulsory acquisition and no minutes to show that a committee sat for purposes of acquiring the suit property. He acknowledged that the Plaintiff had an original title. It was his further testimony that the Government acquired the suit property on behalf of **Tana River Development Authority(TARDA)** but had no documentation to that effect. He reiterated that the suit land was Compulsorily acquired during construction of **Masinga Dam** wherein some parcels of land were flooded and were compulsorily acquired. He said there were documents from TARDA to show that the land was acquired.

He also confirmed that the land is **LR. No. 10759**, and that the exhibits are for **Upper Tana River** land acquisition. The letter does not refer to the specific parcels of land that were to be acquired but the accompanying map talks of the parcels of land. However, the letter accompanying the map refers to acquisition and not flooding. It was his testimony that the suit land was compulsorily acquired by the government and if that was the case, the Plaintiff was to surrender the Original title. He testified that he did not have any documentation informing the Plaintiff of the compulsory acquisition nor any documentation asking the Plaintiff to surrender the title nor did he have evidence of full payment being done. He further testified that he had a letter stating that full payment was done though he did not write the letter nor did it originate from **KenGen** but from **TARDA** who copied it to **KenGen** it to them.

It was his further testimony that there is no evidence that TARDA owns the land though he had the letter in Court. He further testified that the structures are only stores for **KenGen** and there was a gate manned by security guards and there was also a private road that passes through the property and the access road was bought from the land owners but he did not have any evidence to that effect. DW1 further testified that the Plaintiff bought the land in **2008**, but the Defendant had enjoyed the use of the access road since **1982** and that that was not the only parcel of land affected. He further testified that there is no evidence that **KenGen** is occupying **2 acres** and that though there is no report presented to Court, they have a **Surveyors Report** to that effect which he did not produce in Court.

On re-examination, the witness testified that **TARDA** has a relationship with **KenGen** and that **KenGen** generates power while **TARDA** owns the Dams along Tana River. It was his testimony that the transaction was done by the Government and **TARDA** made follow ups with the Government to conclude the compulsory acquisition and the Plaintiff still has the title deed because the transfer process was not complete as it is still pending. He further testified that there were negotiations to compensate the Plaintiff and they did a survey and established that only **0.72 ha** was occupied by the structures and the balance is in possession of the Plaintiff and the Defendant did not anticipate that the matter would end up in court.

On **19th October 2018**, the Court directed that **Murang'a County Surveyor** to visit the suit property and ascertain the extent of the acquired land. The said visit was done by **Mr.W.W Kibiru District Surveyor Murang'a** and a Valuation Report was filed in court on **13th December, 2018** which this Court has incorporated as part of the available evidence. There is also another Valuation Report by **Mwaka Musau Consultants** dated **10th December 2018**.

After the close of *viva voce* evidence, the parties filed their written submissions which this Court has carefully read and considered. The Court finds the issues for determination are as follows:-

1. ***Whether the suit property was compulsorily acquired***
2. ***What was the extent of occupation by the Defendant***
3. ***Whether the Plaintiff is entitled to the orders sought.***

1. *Whether the suit property was compulsorily acquired*

The witness called by the Defendant alleged that the suit property was compulsorily acquired by the Government and given to Tana River Development Authority (TARDA) who in return passed it on to Defendant. There is a process that is recognized by the law in order for a property to be compulsorily acquired. This Court has seen letters that have been purportedly used to compulsorily acquire the suit land. However, these letters do not mention which of the suit land that is to be acquired. The Plaintiff has alleged that she is not aware of any acquisition by the Government and that she has never been informed of any such acquisition. The Defendant having been the one who alleged that compulsory acquisition was effected, then it had the onus of proving the same. Without any documentation to this effect not even a Gazette Notice to this effect, this court has no reason to rely on the Defendant's word. Further the **Muranga District Surveyor's Report** that has been placed before Court owing to court order also acknowledges that there is no documentation to prove the acquisition. Without any documentation to prove compulsory acquisition, this Court finds and holds that there was no compulsory acquisition.

Further the Defendant has sought to rely on the Way Leaves Act. **Section 4 (1)** of the said Act expressly provides for the process to be followed before the Government can be said to have exercised its authority under this Act. It provides that;

“The Government shall, at least one month before carrying rail or pipeline into, through, over or under any private land without the consent of the owner of the land, give notice of the intended work, either by notice in the Gazette or in such other manner as the Minister may in any case direct.”

Further **Section 6** of the same Act provides for the compensation. The Defendant herein has not provided any evidence that the process that is established by law was followed. It is not enough to just plead that they had exercised its rights and authority. These rights and authority must be exercised in conformity with the law. This Court therefore finds that the acts of the Defendant were illegal and not in conformity with the law and therefore this defence must fail.

2. *What was the extent of occupation by the Defendant*

The question of extent of occupation by the Defendant has been answered by the Surveyors report and therefore this Court is inclined to use the said report to make its findings. Though the Plaintiff has alleged that the Defendant occupied the whole of the portion of land, the Surveyor's Report indicates that the developments of the Defendants have covered an area of **0.4839ha** and therefore it is this Court's opinion that that is the only portion that the Defendant took away from the Plaintiff. The Court has perused the Surveyor's Report from the Plaintiff's Surveyor and he had indicated that he was able to access part of the suit land where the Defendant had not put up its developments. The Plaintiff testified that she was not able to access the whole of the suit land but she did not in any way bring before this court any evidence to show that she tried to enter the suit land that was not developed by the Defendant and was stopped. Further the Plaintiff has alleged that the bananas that were planted on the part of the suit land belong to the Defendant's employees. However there was no proof or evidence brought forth to support these allegation. **Section 107 and 108** of the **Evidence Act** requires that whoever alleges must prove of the existence of such facts, In this case having failed to produce any

documentation, this Court finds and holds that the area of occupation by the Defendant is that which that was reported by the District Surveyor Muranga.

3. *Whether the Plaintiff is entitled to the Reliefs sought.*

Having come to a conclusion that the suit land was never compulsorily acquired, this Court must therefore answer the question as to whether or not the Plaintiff is entitled to the reliefs that she has sought. The Plaintiff has sought for a Declaration that the suit land belongs to her. As already noted, the suit land was never wholly acquired and the same having been registered in the name of the late **Joseph Wangombe Ngatia** and with no reason whatsoever to have the said title cancelled and further the Plaintiff being the legal representative to the estate of the said **Joseph Wangombe Ngatia**, this Court has no option but to find that the said prayer is merited.

Further the Plaintiff has prayed for full possession of the suit land. This Court will take Judicial Notice that the Defendant is a State Corporation and an electricity generating Power Company and to this extend, it is in the interest of the public that the said Company is in good shape, up and running. The Court takes into account that public interest should not override private interest. However in this instant

case, the Plaintiff has testified that she was willing to let go of the suit land and be given compensation by the Defendant. It is this Court's opinion that in this instant case, the Public interest can be protected while also protecting the interest of the Plaintiff. The Plaintiff having been willing to take compensation, the Court finds and holds that the portion already occupied by the Defendant should be left to the Defendant for its access and use but subject to the Defendant compensating the Plaintiff for the said acquired land. However the Plaintiff should occupy the remaining portion of land and continue to carry on with her banana planting as she had envisaged and therefore she will not be prejudiced in any way.

In the case of **Gami Properties Limited...Vs...National Land Commission [2017] eKLR**, the Court held that;

“The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.

“If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation”.

It is important to note that the **Valuation Report** that has been presented by the Plaintiff only covered the area that was vacant and did not cover the portion occupied by the Defendant. However the Court directs the Defendant to compensate the Plaintiff for the land that the Defendant has occupied.. This Court therefore finds that there is a need for the area occupied by the Defendant as computed by the District Land Surveyor to be valued and then the Defendant or the Government to compensate the Plaintiff with regard to the said portion.

The Plaintiff has also sought for general damage. Black's Law Dictionary Ninth Edition (2009), West Publishing Co. Thomas Reuters, United states of America p.445 defines damages as;

“Money claimed by or ordered to be paid to, a person as compensation for loss or injury .”

From the foregoing it is clear that the Plaintiff indeed did suffer loss. The Plaintiff having bought the suit property intended to use it in her own way and the occupation of the said suit property by the Defendant amounts to trespass to the Plaintiff's property. Given that the court has already established that the Plaintiff is the rightful owner of the suit property and that the Defendant entered the property without having compensated the Plaintiff, then the Plaintiff is entitled to some damages. In the case of **Park Towers Ltd v John Mithamo Njika & 7 others (2014) eKLR**, the

Court held that;

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages . The Court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

Having considered the circumstances of this case, the Court finds that the Plaintiff is entitled to general damages and awards her general damages in the tune of **Ksh.800,000/=**.

Having awarded general damages, the Court finds that the Plaintiff is not entitled to Mesne profits as the Court cannot award the two.

This Court having carefully considered the available evidence, it finds that the Plaintiff has proved her case on the required standard of balance of probability. Consequently this Court enters Judgment for the Plaintiff against the Defendant on the following terms:-

- 1. A declaration that the Plaintiff is the rightful owner of the suit property LR No. 10759.**
- 2. An order that the area of 0.4839ha occupied by the Defendant be valued and the Plaintiff be compensated based on current market value of the said area.**
- 3. Plaintiff is granted General Damages of Ksh.800,000/=.**
- 4. A permanent injunction is hereby issued against the Defendant and its employees or servants from interfering with the remainder of the suit property that belong to the Plaintiff.**
- 5. The Plaintiff is awarded costs of the suit.**

It is so ordered.

Dated, Signed and Delivered at Thika this 31st day of May 2019.

L. GACHERU

JUDGE

31/5/2019

In the presence of

Mr. Cherongis holding brief for Mr. Orege for Plaintiff

Mr. Muchiri holding brief for M/S Mutua for Defendant

Lucy - Court Assistant

Court – Judgment read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

31/5/2019