



REPUBLIC OF KENYA

KENYA LAW

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC PETITION NO 1 OF 2018

(FORMERLY NAIROBI PETITION NO.496 OF 2017)

KINUTHIA WAMWANGI.....PETITIONER

VERSUS

MINISTRY OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....1ST RESPONDENT

KENYA PRISON SERVICES.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

By a **Petition** dated 2nd **October** 2017, the Petitioner herein brought this suit against the Respondents and sought for orders that;

- a) A declaration that the Petitioner is the registered owner and beneficial owner of the all that parcel of land known as Title Number Thika Municipality Block 13/314***
- b) A declaration that the 2nd Respondent's actions of occupying and denying the Petitioner access to and possession of Title Number Thika Municipality Block 13/314 is unfair, unjust and unconstitutional and the same breaches the Petitioner's Right to property protected under Article 40(1)(a) and (b) of the Constitution of Kenya***
- c) A declaration that the Respondents action in seeking to curtail undermine and or deprive the Petitioner of his right to all that property known as Thika Municipality Block 13/314, without giving him notice or even a fair hearing prior to seizing Occupying and taking possession of his property infringes the Petitioner's rights to fair administrative action protected under Article 47(1) and (2) of the Constitution.***
- d) An order of eviction directed at the 1st 2nd and 3rd Respondents their agents and or servants from the property known as Title Number Thika Municipality Block 13/314 and ordering them to deliver to the Petitioner unconditionally and unencumbered vacant possession thereof; or***
- e) In the alternative the respondents be ordered to compensate the Petitioner in the sum of Kshs.89,500,000/= being the current assessed value of all that parcel of land known as Title Number Thika Municipality Block 13/314.***
- f) The Respondents be ordered to compensate the Petitioner.***
- g) A Permanent Injunction restraining the Respondents either by themselves agents servants and or anyone claiming under them from entering upon, remaining, re-entering trespassing, laying a claim to building on, interfering with and/ or in any other manner dealing with property known as Thika Municipality Block 13/314 and/ or any portion thereof in any manner whatsoever and / or howsoever.***
- h) The Respondent be ordered to compensate the Petitioner for the loss occasioned to the Petitioner herein;***

i) Loss of mesne profits and income

ii) General Damages

iii) Exemplary Damages

iv) Costs of the suit

v) Interest at Court rates

In his Petition, the Petitioner averred on the **5th of December 1986**, the Municipal Council of Thika, advertised that the suit property was available for allocation. He made a written request to be allocated and on **15th May 1987**, he was issued with a Certificate of lease making him the registered owner of the suit property. He averred that he entered into a contract with **Roack Consult Ltd**, a private developer which it was to develop and construct 60 residential units for lease at an estimated cost of **Kshs.421,000,000/=** and he engaged the services of professional consultants and the **Thika Municipal Council** approved the project. Further that the **National Environmental Management Authority (NEMA)** also approved the project and deposits were received from prospective buyers after the Estate agents advertised for sale.

He averred that in **February 2012**, when the project manager embarked on executing the project, the contractor and his personnel were restrained from accessing the property by personnel deployed by the 2nd Respondent who cordoned the suit property and barricade it. It was his contention that he visited the 2nd Respondent's offices and protested the illegal action, but the 2nd Respondent insisted that the suit property was public land but did not provide prove to justify it.

He further averred that via a letter dated **13th March 2012**, he sought for the status of the property at the office of the **Town Clerk, Thika** and the 2nd Respondent vide letter **13th March 2012**, maintained that the suit property belonged to it as a public land set aside for Prison Department. Further that vide letter dated **10th April 2012**, he sought clarification from the Commissioner of Lands and the Director of Physical Planning in the Ministry of Lands. Further that the Town Clerk vide letter dated **15th May 2012**, addressed to the Commissioner of Lands clarified that the suit property was legally his and the Ministry of Lands also affirmed that he was the legal owner. Further that the Commission of Administrative Justice also communicated the clarification to him vide a letter dated **5th August 2013**, and he therefore confirmed the status through an official search.

It was his contention that as a result, the prospective buyers demanded for refunds of these deposits and the project manager demanded for the suspension of the project management and eventually sought to terminate the project agreement and made a demand of his consultancy fee to the tune of **Ksh.16,144,366.35**. Further that the Mechanical Engineer for the project also forwarded a fee note of **Kshs.6,501,709** and the project manager made a demand of **Kshs.56,178,663.10** that led to a reference.

He further averred that the 2nd Respondent has refused to deliver possession and occupation to him and therefore its actions are unjustified and unlawful and continues to infringe on his right to property which right is protected under Article **40(1)** of the **Constitution of Kenya 2010**. Further the 2nd Respondent never informed him of their claim or offered him an opportunity to defend his ownership.

He contended that there is no basis upon which the 2nd Respondent continues to occupy the suit land and if such actions are allowed, a serious constitutional violation is imminent and therefore the continued occupation violates his right to own property and to procedurally fair administration.

The Petitioner swore a **Supporting Affidavit** on the **2nd of October 2017** and reiterated the contents of the Petition.

The Petition is contested and the Respondents through **Mathews Kimanzi** swore a **Replying Affidavit** on the **15th of October 2018** and denied that the 2nd Respondent interfered with Petitioners right to property.

It was his contention that the 2nd Respondent is not in occupation nor in possession of the suit property and the prayer for compensation cannot be issued as the 2nd Respondent is not interested in taking over the suit property, and the compensation sought for various professions cannot be issued as it is speculative.

The Petitioner filed a further Affidavit and averred that the 2nd Respondent's officers maintain armed patrol over the suit property and its forceful occupation of the suit property demonstrate its intention to lay claim and the lengthy occupation further justifies his claim for reasonable compensation.

The Petition was canvassed by way of written submissions which the Court has now carefully read and considered together with the pleadings and the annexures thereto;

Having considered the pleadings and the written submissions, the Court finds the issues for determination are:-

1. Whether there was Violation of the Petitioner's rights

2. If so Whether the Petitioner suffered any damages

3. Whether the Petitioner is entitled to the orders sought

1. Whether there was Violation of the Petitioner's rights.

The Petitioner has averred that the 2nd respondents denied him entry to the suit land and claimed that the land is public Land. On its part, the 2nd Respondent in its **Replying Affidavit** denied the allegations. However

this Court has seen correspondences between the Petitioner and various Government agencies. The Court has also seen the letter dated **13th March 2012**, in which the **Commissioner of Prison** wrote to the Petitioner and acknowledged that the officer in charge of the **Thika Prison** was keeping away trespassers and therefore this Court finds that indeed there was intrusion into the Petitioner's land by the 2nd Respondent.

Article 40(1) of the **Constitution** provides for the right to property as follows:-

“Subject to Article 65 each person has a right either individually or in association with others to acquire and own property ;-

(a) of any description

(b) in any part of the Kenya

From the foregoing, it is clear that any Kenyan Citizen has a right to own property without any interference. However this right is not absolute but is limited in certain instances as provided for by **Article 40(3)** of the **Constitution** which provides;

(3) 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 an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) is for a 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, of just compensation to the person; and

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

The provisions of the Constitution are very clear on the instances wherein a person can be deprived of his rights to a property. It is not in doubt that the suit property belonged to the Petitioner after he had legally acquired the same. His proprietorship was confirmed by the **Town Clerk** via letter dated **15th May 2012**. Further via a letter dated **31st July, 2013**, the Ministry of Lands also confirmed that the suit property belonged to the Petitioner.

If the 2nd Respondent truly believed that the suit land was public land that belonged to the Prisons Department, then the same ought to have been determined through a legally recognized process and institution and a finding made to the effect that the suit land was acquired illegally.

The Petitioner being holder of lease to the suit property, has an **absolute** and **indefeasible** title which can only be challenged if there was either fraud or misrepresentation and the said illegality should be determined by a legally recognized institution. See the case of **The National Land Commission & Others Exparte Vivo Energy Kenya Ltd (2015) eKLR**, where the Court held that:-

“The impugned Gazette Notice seems to suggest that there was an illegality, involved in the registration of the suit land in the name of the Applicant. No doubt under the provisions of Article

40(6) of the Constitution, property rights protected under

Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. Therefore, there must be a finding that the property in question was unlawfully acquired”.

Further see the case of **Isaac Gathungu Wanjohi & Another...Vs... Attorney General & 6 Others (2012) eKLR**, where the Court held that:-

“Where the state contended a property was acquired illegally, the state must follow due process to establish the illegality”.

By depriving the Petitioner of his rights to enjoy his rights over the suit land without going through the due process, the 2nd Respondent was in violation of the Petitioner's right under **Article 40** of the **Constitution**. This Court therefore holds and finds that the 2nd Respondent's actions were a violation of the Petitioner's rights.

2. If so Whether the Petitioner suffered any damages

In his Petition, the Petitioner claimed that he suffered damages. This has been denied by the 2nd Respondent. The Petitioner has produced before this Court documentation to show that he intended to start a project and had even sought for various approvals. The Petitioner has also produced annexures in his **Supporting Affidavit**, being an agreement between him and **Roack Consult Limited** that showed that he intended to start a project. He also produced minutes of various meetings on the projects and various approvals that had been granted to him in connection to the intended project.

The Petitioner has also produced various letters such as the one dated **16th July 2012**, from clients who had sought for refund of the their deposits that they had already paid for the project. It is clear to this Court that the Petitioner invested his time and moneys while seeking for approvals required in relation to a development that did not materialize and hence he suffered damages.

Further the entry of the Petitioner's land by the 2nd Respondent without any justifiable cause amounted to trespass. Trespass has been defined in the **10th Edition of Black's Law Dictionary** as;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”

See the case of **Park Towers Limited versus John Mithamo Njika & 7 others (2014)eKLR**, where 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 damages awardable depending on the unique facts and circumstances of each case”.

3. Whether the Petitioner is entitled to the orders sought

This Court has already held and found that the Petitioner was the lawful owner of the suit property and that the actions of the 2nd Respondents were in violation of the Petitioner's right to property. Therefore, the Court finds that the Petitioner is entitled to prayers **(a), (b), (c) (d)and (g)** of the Petition.

With regards to prayer **(e)** which is an alternative prayer wherein the Petitioner seeks for compensation of **Kshs.89,500,000/=** being the value of the suit land, the 2nd Respondent has categorically stated that they do not need the suit land and therefore they do not intended to acquire it. With the said averment from the 2nd Respondent that Prison is not interested in the suit property, then the Petitioner can have access to it as the court has allowed prayers (a) & (b).

The petitioner has further sought for **Kshs.56,178,663.10** being the sum claimed by various professionals for the work undertaken. However those are special damages that ought to have been proved specifically. There is no proof that the professionals were paid the said amount and for that reason, the Court finds that the said claim is not tenable and thus declines to allow the award of the said amount.

The Petitioner has further sought for Mesne profits and General Damages. The two prayers cannot be granted at the same time. It is evident that the Petitioner did not plead mesne profits as damages and the said claim is not merited. See the case of **Karanja Mbugua & Another v Marybin Holding Co. Ltd [2014] eKLR** stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

- a. For the possession of the property.**
- b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.**
- c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-**
 - i. The delivery of possession to the decree-holder**
 - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or**
 - iii. The expiration of three years from the date of the decree, whichever even first occurs.**

The Applicant is however entitled to damages for trespass. See the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR**, where the Court held:-

“..... 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 the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less”

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....”

Taking into account the value of the land, the Petitioner is entitled to **Kshs.2,000,000/=** as general damages for trespass.

Exemplary damages should be awarded in two cases. 1st in a case of oppressive, arbitrary or unconstitutional action by the servants of government and secondly in cases where the defendants conduct has been calculated by him to make a profit for himself which may as well exceed the compensation payable to the Plaintiff.

Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 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 actual 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 receive by way of damages such an amount as would reasonably be paid for that use.

d) Where there is an oppressive, arbitrary or 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, damages may be awarded.

e) If the trespass is accompanied by aggravating circumstances.

The 2nd Respondent is a public institution and therefore the officers working therein are public officers. Since the said officers' actions were arbitrary and oppressive towards the Petitioners, the Court finds that the Petitioner is entitled to **Exemplary damages**. Consequently the Petitioner is awarded **Kshs.1000,000/=** as Exemplary Damages.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Petitioner has proved his case on

the required standard of balance of probabilities.

For the above reasons the Court enters Judgment for the Petitioner against the Respondents in terms of **prayers (a), (b), (c) (d) and (g)**.

In terms of **prayer No.h(ii)** and **(iii)** the Court awards the Petitioner General and Exemplary Damages for trespass in the tune of **Kshs.2,000,000/=** and **Kshs.1,000,000** respectively.

However, **prayers No.(e),(f) and h(i)** are found not merited and the said prayers are dismissed entirely.

On costs of the suit, since the Petitioner is the successful litigant, he is awarded costs of the suit and interest thereon from the date of filing of this Petition to the date of payment in full.

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of November 2019.

L. GACHERU

JUDGE

29/11/2019

In the presence of

Mr. Mbae holding brief for Mr. Ndungu for Petitioner

M/S Wangui holding brief for M/s Robi for) 1st Respondent

) 2nd Respondent

) 3rd Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

29/11/2019