



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC CASE NO. 04 OF 2018**

**FORMERLY MERU ELC CASE NO. 63 OF 2004**

**ISAIYA MUGAMBI M'MUKETHA.....PLAINTIFF**

**VERSUS**

**HON. THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MERU.....3<sup>RD</sup> DEFENDANT**

**JOHN MUCHAI MUGAMBI.....INTERESTED PARTY**

**JUDGMENT**

1. This matter was filed on 5<sup>th</sup> August 2004 at the High Court in Meru and the Plaintiff was amended on two occasions with the latest amended plaintiff being dated the 24<sup>th</sup> of September 2013.

2. The Plaintiff's claim was that he was the registered owner of two parcels of land known as MERU MUNICIPALITY BLOCK 1/230 and MERU MUNICIPALITY BLOCK 1/231 having purchased the same for value and having been issued with leases for a period of 99 years for each property. He sought relief against the defendants who he claimed had destroyed construction of a hotel that he had commenced on his properties and further converted the said properties into a green park for public utility purposes without any notice to him and in contravention of a prohibitory court order issued in Meru High Court Judicial Review No. 33 of 2003.

3. He sought the following reliefs;

1. Kshs. 2,850,000/= being the value of the demolished and destroyed building/property.
2. Loss of user of the premises for 89 years, being the unexpired lease term, in the sum of Kshs. 126,200,000/=.
3. General damages.
4. Exemplary and aggravated damages.
5. Costs of this suit with interests on the above.

4. The three defendants entered appearance and filed their defences and the matter proceeded to hearing on three different dates, that is, 8/4/2014, 11/7/2014 and on 3/11/2014.

5. Judgment was delivered by the ELC Court at Meru on 27<sup>th</sup> April 2016 where Judgment was entered in favour of the Plaintiff as follows:

- 1.Kshs. 2,850,000/= being the value of destroyed buildings.
- 2.Kshs. 63,100,000/= being loss of user for the unexpired term of the lease, 89 years.

3.Kshs. 1,000,000/= as general damages.

4.Kshs. 2,000,000/= as exemplary and aggravated damages.

5.Costs of this suit and interest on the above from the date of judgment.

6. The 3<sup>rd</sup> defendant appealed against the said judgment on the ground, inter alia, that liability had not been established against the 3<sup>rd</sup> defendant. The Appeal was filed at the Court of Appeal sitting in Nyeri and was Civil Appeal No. 80 of 2016.

7. The Court of Appeal Judges Lady Justice Sichale, Justice Kantai and Justice G. B.M Kariuki concurred with the trial Judge, Justice P. M. Njoroge, that liability had indeed been established against the 3<sup>rd</sup> defendant and upheld the awards issued for value of destroyed property, general damages and exemplary damages. They also upheld the Judge's finding on liability.

8. However, on the issue of loss of user as awarded by the ELC Court at Meru, the Court of Appeal found that there was insufficient evidence to support the award of Kshs. 63,100,000/= and ordered that the trial court take further evidence in that regard and assess reasonable damages for loss of user. The Plaintiff herein, who had filed a cross-appeal citing the award on loss of user as insufficient, had his cross-appeal dismissed.

9. To put matters into their proper perspective, I wish to reproduce paragraphs 11 to 18 of the Court of Appeal Judgment dated 29<sup>th</sup> December, 2017 which remitted this matter back to me. They constitute my terms of reference in this matter.

**11.**We have perused the record of appeal and the written submissions and authorities filed by the parties. We have also given due consideration to the oral highlighting of the submissions. We are alive to the requirement for the parties to get a retrial of their case in this appeal in line with Rule 29(1) (a) and the principles in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123.

**12.** The issues raised in this appeal are two and relate to liability and award of damages.

**13.** The facts of this appeal are not complicated. It is conceded that the respondent had both legal title and possession of the suit premises. He was in the process of developing the suit premises and had purchased and stored building materials on the site. It is not in dispute that the leasehold title had an unexpired term of 89 years from 1<sup>st</sup> May 1995. The respondent testified that in 2003, the Clerk of the predecessor to the appellant, that is, the defunct Municipal Council of Meru directed the respondent to stop any construction on the two plots that constitute the suit premises. Aggrieved, the respondent sought and obtained a court order of stay in Judicial Review Application No. 33 of 2003. In spite of the court intervention, the buildings were pulled down. The respondent filed suit seeking Damages which was determined on 27<sup>th</sup> April, 2016 in a judgment that gave rise to this appeal.

**14.** The evidence adduced at the trial shows that the appellant and its predecessor were interfering with the respondent's quiet enjoyment of the suit premises. The fact that they (the Municipal Council of Meru) tried to stop the construction of the buildings on the suit premises coupled with the evidence of Joseph Mwithimbu – DW2 who testified that the Municipal Council of Meru, and hence the appellant, participated in destruction of the respondent's property, puts the issue of liability beyond challenge. The buildings being put up on the suit premises had received approval as shown in evidence and testimony of Joseph Mwithimbu. The appellant did not rebut this evidence. After perusing the evidence, it is our finding that the learned judge arrived at the correct decision on liability.

**15.** As regards damages, the respondent tendered proof of the construction materials and on the balance of probabilities proved that he was entitled to the sum of Kshs.2,850,000/=. As regards general damages, we think that the sum of Kshs.1,000,000/= award by the learned judge was reasonable and there would be no basis to interfere with it, nor would there be any basis for interfering with the award of Kshs.2,000,000/= granted towards exemplary damages in item No. 4 of the judgment under review.

**16. Accordingly** and pursuant to Rule 31 of the Court of Appeal Rules, we allow damages awarded in item No. 1 (i.e. Kshs.2,850,000/=) and in item No. 3 (Kshs.1,000,000/=) and item no. 4 (Kshs.2,000,000/=) of the judgment dated 27<sup>th</sup> April, 2016 by P. M. Njoroge, J and uphold the judgment only to that extent but we decline to allow the award in item No. 2 (Kshs.63,100,000/=) of the said judgment. In our view, there was not enough material before the learned judge on the basis of which an assessment of an award of damages could be made. Additional evidence is called for to facilitate a fair determination of damages. Accordingly, we direct that the trial Judge shall take further evidence on item No. 2 and proceed to assess reasonable damages for loss of user.

**17.** We dismiss the cross-appeal.

**18.** We award the costs of the appeal to the respondent.

10. The file was transferred to the Environment and Land Court in Chuka and became ELC case No. 4 of 2018. The matter proceeded for hearing once more before Justice P. M. Njoroge, myself, now sitting at the ELC in Chuka on, 3/7/2018 and 10/7/2018. Two witnesses testified in the matter

11. As agreed by the parties, the sole issue for determination is as to what is the proper assessment on Loss of Use of the premises for 89 years, being the period of unexpired lease. This is as per paragraph 16 of the Court of Appeal's judgment.

12. PW1, Vincent Kibet Kiptoo, testified on 3<sup>rd</sup> July 2018. His testimony was to the effect that he was a licensed valuer, registered with the Institution of Surveyors of Kenya and holding a valid practising certificate for the year 2018. He produced his practising certificate for the current year. He also stated that he works at a company called Afriland Valuers Limited which is registered in Kenya.

13. He testified that he filed a report dated the 27<sup>th</sup> of June 2018 following his assessment of a multi-user property, namely, MERU MUNICIPALITY BLOCK 1/230 and BLOCK 1/231. He testified that he undertook the same with instructions from the plaintiff's advocates on behalf of the plaintiff.

14. The witness went ahead to produce the valuation report which stated the loss of user as 109,585,488.65/=. He explained at length the manner in which he arrived at his figure based on his professional experience, expertise and several considerations. He explained that the considerations were calculated as from 2007, as this was estimated as the time the building may have likely been completed. He stated that he visited the site in question and considered the following:

- a) The location of the property (at the heart of Meru town)
- b) The market for similar properties (as the plan for the hotel had already been partially implemented)
- c) The nature of the user as business cum residential ie multi-user.
- d) Prevailing economic trends in the County, business risks such as political instabilities and market derivatives.
- e) Calculation of expected income for the unexpired portion of the lease.
- f) Reasonable occupancy rate and industry operational expenses
- g) Prudence and likelihood of the owner to develop the property and manage the business.
- h) Time it may have taken for the owner to complete the hotel in different phases.

15. PW1 confirmed that professionals may have varying opinions but the same tend not to differ significantly and are based on professional projections and not mere speculations.

16. **PW 2, Harun Muthomi**, testified on the 10<sup>th</sup> of July 2018. He testified to the fact that he operates a spare parts shop about 100 to 150 metres from the suit property and pays Kshs. 32,983/= as rent per month for a space of approximately 10 feet by 24 feet. He has been in occupation of the said premises for 20 years. He confirmed that the suit property is in the centre of town and there is no hotel near the said premises. I wish to point out that PW2's evidence was relevant to this suit in that it demonstrated that the suit land was in the centre of the town. It also demonstrated indicative rental parameters. This is in accordance with the finding in *Limo versus Commissioner of Lands* (supra) that nearness to the main town and to the road of access were pertinent issues.

17. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not participate in the hearing after the directions of the Court of Appeal which remitted this suit back to this court. On its part, the 3<sup>rd</sup> defendant did not call any witness and did not file a contrary valuation report.

18. The Plaintiff's written submissions on further evidence are dated 16<sup>th</sup> July 2018. In them, he submits that his witnesses have given enough evidence to now enable the court to determine the proper amount of compensation due to the Plaintiff for loss of use of his properties. The Plaintiff submits that the term "**loss of user**" entails an assessment of what the Plaintiff would have earned if he had utilized the intended developments for the term of the lease. He also submitted that the failure to file a separate assessment by the 3<sup>rd</sup> defendant was akin to the 3<sup>rd</sup> defendant agreeing with the valuation report produced by PW1. The Plaintiff submits that in the absence of specific law on loss of user, the Court should be guided by Sec III of the Land Act 2012 on prompt payment after compulsory acquisition of the Plaintiff's land. The submissions by the Plaintiff also urge the Court to consider the location of the suit property in light of the fact that it is between Meru police station and Tuskys Supermarket at the Meru Town centre along Embu/Nanyuki Highway.

19. The Plaintiff relies on 2 authorities, namely *Limo versus Commissioner of Lands*, Civil Appeal No 6 of 1987 and *Nairobi ELC case No. 445 of 2014 Five Star Agencies Ltd versus National Land Commission*.

20. The case of *Five Star Agencies versus NLC* is a matter involving review of a compensatory award fixed by the Respondent, which the Appellant felt was insufficient. The award was reviewed from 87,804,225/= to 413,192,500/=. In making the said decision, the court expressed itself that just compensation includes both the present and potential value of the land. The Appellant in this case had demonstrated an intention to develop the land by producing reports, plans and approvals from the City Council of Nairobi and a licence approval by NEMA. This indicated to the judge that the planned development was not just speculative.

21. In the case of *Limo versus Commissioner for Lands*, compulsory acquisition was the issue. The estimated compensation by the Respondent was disputed as being too low. The same had been assessed at Kshs. 663,389/= for one plot and Kshs. 854,170/= for another. This particular appeal was dismissed. The court considered the provisions of assessment under the now repealed Land Acquisition Act and found the valuation to have been proper.

22. The 3<sup>rd</sup> defendant filed its written submissions on the 19<sup>th</sup> of September 2018. The 3<sup>rd</sup> defendant submits that it was erroneous for the Plaintiff to bring additional witnesses and a further valuation report as the directions of the Court of Appeal did not anticipate the collection of fresh evidence that was not part of the initial trial. It persists in its assertion that the valuation report is speculative. The 3<sup>rd</sup> defendant also submitted that PW2 was an irrelevant witness as his business was not similar to the one the Plaintiff had sought to establish. Further to that, the 3<sup>rd</sup> defendant argues that loss of user is a specific claim and ought to be pleaded. He argues that as the original valuation report filed at Meru and this valuation differ, the claim by the plaintiff has not been proved.

23. The 3<sup>rd</sup> defendant did not rely on any authorities in his submissions.

24. First and foremost, an issue arises as to whether this Court is assessing a situation on improper compulsory acquisition of land or is handling an assessment for loss of user. Counsel for the 3<sup>rd</sup> defendant states that there was no compulsory acquisition while counsel for the Plaintiff relies heavily on statute and case law relating to compulsory acquisition. I opine that this is a closed issue. The Court of Appeal was specific that the only issue for consideration in these proceedings was “loss of use”.

25. It is important to note that while the present issue relates to loss of user, compulsory acquisition and loss of user go hand in hand. The two issues cannot exist in a vacuum. This is because the events that led to the claim for loss of user, amounted to constructive compulsory acquisition by the 3<sup>rd</sup> defendant. At the same time, there must be a distinction as the Plaintiff’s claim was specific. He did not seek for the court to assess the value of the property alone in the event of compulsory acquisition, but instead filed a claim for loss of user. On a claim for compulsory acquisition, in terms of compensation, the calculation of award would be based on the present value of the land at the time of acquisition and also on the value of any improvements upon the land plus appreciation of the land at market rates as analyzed by a valuer. With regard to loss of user, the award is based on value of the property in issue, the developments on the land if any and more importantly, the intended income earning activity which the proprietor was undertaking or intended to undertake on the said property. The insinuation that the proprietor was intending to undertake a commercial venture, however, must be demonstrated to the satisfaction of the Court. This intention had, however, been proved before the matter escalated to the Court of Appeal and this proof was accepted by the Court of Appeal.

26. Lady, Justice P. NYAMWEYA, while delivering judgment in NAIROBI ELC 25/2013 JOHN KARIUKI MACHARIA VERSUS COMMISSIONER FOR LANDS stated;

*I am also guided in this respect by the following decisions on the factors that courts should consider in determining the market value of property that has been compulsorily acquired. In Kanini Farm Ltd v Commissioner of Lands (1986) KLR 310 the court stated as follows:*

*“The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator, but a reasonable one...In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character”*

27. In Limo v Commissioner of Lands KLR (E&L) 175 it was also held in this regard as follows:

*“In addition to the matters contained in the schedule to the Land Acquisition Act which a court should consider in assessing compensation to be paid to a person whose land has been compulsorily acquired, courts have tended to take into account the nearness of the land in question to the main town and its nearness to the road access.”*

28. In ELC 445 OF 2014, FIVE STAR AGENCIES VERSUS THE NLC(supra), Lady Justice P. NYAMWEYA, J. expressed herself as follows;

*Just compensation in my opinion and as illustrated by the principles set out in the Schedule to the repealed Land Acquisition Act includes both the present and potential value of the land being acquired, had the owner thereof been allowed to continue using it for the purposes he or she intended.*

*The Appellant has shown to the satisfaction of the Court the intended use of its property and the benefits that would have accrued therefrom were it not for the compulsory acquisition. This Court however notes that the Appellant only provided evidence of loss of actual earnings, and that the said earnings were valued between Kshs 193,000,000/= and Kshs 392,000,000/= according to the two valuation reports it presented. I find that an average of the two sums of Kshs 292,500,000/= would be a reasonable and just assessment of the loss of actual earnings in the circumstances, and taking into account the fact that the overall net profit the Appellant would have earned was approximately Kshs 400,000,000 million.*

29. In this case, the plaintiff has already shown to the satisfaction of the court the intended use of his property and the benefits that would accrue therefrom were it not for the constructive compulsory acquisition by the 3<sup>rd</sup> defendant.

30. On the issue of costs, in the Five Agencies Case (supra), it was ordered that each party shall bear its own costs as the property was acquired for public use. In this matter, this court will make its own decision. The court notes that the constructive compulsory acquisition in this case was done in an egregiously illegal manner, even spawning disobedience of a court order.

31. With regard to the submission that the Court of Appeal did not anticipate fresh evidence, the submission lacks merit as the instruction to this Honourable Court by the Court of Appeal was that “there was NOT ENOUGH material before the Learned Judge on which an assessment of an award of damages could be made. ADDITIONAL evidence is called for to facilitate a fair determination of damages. Accordingly we direct that the trial Judge shall take FURTHER EVIDENCE on item 2 and proceed to assess reasonable damages for loss of user.” The very wording of those directions called upon the present Court to gather evidence, in addition to what was already on record. Also, after gathering the said “FURTHER EVIDENCE” this Court was not stopped from changing its award to a higher figure or a lower figure than its initial award. Similarly, this Court can even maintain the award as it was, if it is satisfied that the same was fair and the available evidence supports such award.

32. The submission by the 3<sup>rd</sup> defendant that the new evidence collected by the court ought to be rejected is, ipso facto, groundless. It flies in the face of the unequivocal instruction by the court of appeal that additional evidence be obtained. The Court of Appeal said: **“Additional evidence is called for to facilitate a fair determination of damages.”**

33. I do note that on 3<sup>rd</sup> July, 2018, advocates for both parties agreed that the only issue for determination in this matter was loss of user. I do agree.

34. On 30<sup>th</sup> May, 2018, the plaintiff's advocate, Mr. Riungu, intimated that he would call one expert witness to file his report. On his part, the defendant's advocate, Mr. Ringera, told the court that he did not intend to call an expert witness. Nevertheless, the court allowed him to call one by ordering that: "Parties do file and exchange expert witness reports at least 7 days before the hearing date." Eventually, the defendant did not call an expert witness or any other witness for that matter.

35. In his submissions, the defendant seeks to reopen matters which had been settled by the Court of Appeal. The issue of liability had been settled once and for all by the Court of Appeal. In paragraph 14 of its judgment, the Court of Appeal said: "**After perusing the evidence, it is our finding that the learned Judge arrived at the correct decision on liability.**" Loss of use is the only issue this court will determine. I reject the defendant's attempt to reopen this issue.

36. I have considered the pleadings proffered by the parties. I have also considered the evidence given by the plaintiff's two witnesses. I have further considered the two authorities proffered by the plaintiff in support of his assertions. The defendant did not proffer any legal authority.

37. As it was pellucid from the word go that this court in these proceedings was only determining the issue of damages for "loss of use", I opine that it would have helped the defendants case if it offered evidence regarding this area. Perhaps the aid of an expert would have helped.

38. Only the plaintiff proffered evidence concerning "loss of user". I find that the evidence given by the plaintiff's two witnesses was credible. I find that it was not impeached during cross-examination. I accept that the report filed by Afriland Valuers Limited on behalf of the plaintiff contains a reasonable basis for its finding that loss of user accruable to the plaintiff with respect to Land Parcel No. MERU MUNICIPALITY/BLOCK 1/230 and 231 is a sum of Kshs. One hundred and nine million five hundred and eighty five thousand four hundred and eighty eight and sixty five cents (Kshs.109,585,488.65/=).

39. In the circumstances, judgment is entered for the plaintiff against the 3<sup>rd</sup> defendant, the County Government of Meru, in the following terms:

a) Kshs.2,850,000/= being the value for destroyed construction and materials.

b) Kshs.1000,000/= as general damages.

c) Kshs.2,000,000/= as exemplary and aggravated damages.

d) Kshs.109,585,488.65/= for the unexpired term of the plaintiff's leases.

e) Interest on a, b, c and d at court rates, for a to c from 27<sup>th</sup> April, 2016 when the judgment in Meru ELC Court No. 63 of 2004 was delivered AND for d from the date of delivery of this judgment.

40. As awards a to c in paragraph 37 above have already been upheld by the Court of Appeal, there would be no basis for any further delay in their implementation.

41. Orders accordingly.

Delivered in open Court at Chuka this **3<sup>rd</sup> day of December, 2018** in the presence of:

CA: Ndegwa

Riungu for plaintiff

Ringera for 3<sup>rd</sup> defendant

**P. M. NJOROGE**

**JUDGE**