



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

**ENVIRONMENT & LAND CASE NO. 207 OF 2012**

**Formerly HCC 35 OF 2005**

**TITUS GATITU**

**NJAU:.....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF**

**ELDORET:.....DEFENDANT**

**JUDGEMENT**

***(Suit initially filed by plaintiff seeking orders to stop a demolition of his building; interim orders of injunction stopping the demolition granted; defendant despite being aware of the order proceeding to demolish the building; building having not been in conformity with the town plan; application for change of user rejected; claim of plaintiff for damages equivalent to the reconstruction cost of the building; whether such claim tenable in face of fact that building not in conformity with the user of the land; exemplary damages; when such damages awardable; claim for plaintiff for reconstruction of similar premises fails but award for exemplary damages in sum of Kshs. 15 Million made and Kshs. 500,000/= as general damages for trespass)***

1. This suit was commenced by way of plaint filed on 25 April 2005. The facts of the case are not largely in dispute and can be discerned from the pleadings and the evidence. The case of the plaintiff as originally filed, was that he was the proprietor of the land parcel Eldoret Municipality/Block 4/337. The plot is situated within the Eldoret Central Business District (CBD) and there were some developments on the said plot. What precipitated the filing of the suit is that the Municipal Council of Eldoret, threatened to demolish the structures on the said plot. In the suit as originally filed, the plaintiff sought the following principal orders :-

*(a) A declaration that he is the rightful proprietor of the suit land.*

*(b) A temporary and permanent injunction to restrain the Municipal Council of Eldoret from interfering with the suit land or interfering with the structures thereon.*

*(c) A mandatory injunction against the defendant to cease laying any claim over the suit land.*

2. Together with the plaint, the plaintiff filed an application for injunction to restrain the defendant from trespassing, or interfering with the said land, so as to forestall the threatened demolition of the structures within the plot. Interim orders were issued by Gacheche J in the following terms :-

*(i). That a temporary injunction be and is hereby issued to restrain the defendant/respondent either acting by itself, its servant, staff and/or agents from trespassing, entering, demolishing structures on, occupying and/or in any other manner interfering and/or dealing with the applicant's parcel of land known as Eldoret Municipality Block 4/337 including the buildings standing thereon pending the hearing and determination of this application inter-partes.*

*(ii). That the application be heard inter partes on 4th day of May 2005.*

3. On 27th April 2005, employees and/or agents of the Municipal Council of Eldoret, descended on the premises and demolished the structures therein. This the plaintiff claims, was done, despite the defendant having been served with the interim order of injunction. Owing to this development, the plaintiff amended his plaint to add a pleading to the effect that the defendant proceeded to demolish the structures on the suit land when there was an order of injunction. He pleaded that he would now incur an amount of Kshs. 10,000,000/= as reconstruction costs and he amended his prayers to plead the said sum as damages for reconstruction. He also pleaded that he had tenants in the premises and the demolition has caused him loss of earnings to the tune of Kshs. 81,000/= which he claimed till determination of the suit.

4. In its Statement of Defence, the defendant inter alia denied that the plaintiff is the legitimate owner of the suit land. On the issue of demolition, the defendant pleaded that they were perfectly entitled to demolish the structure for the following reasons :-

*(a) The plaintiff was fully aware that the approved user of the said parcel of land was limited to be for a service petrol station only.*

*(b) The plaintiff's application to have approval of the defendant to use the land for other business was rejected and the rejection was communicated to the plaintiff.*

*(c) The plaintiff nevertheless went on to construct buildings and other structures on the said parcel of land without the approval of the defendant.*

*(d) The plaintiff was given ample notice to voluntarily remove all the illegal structures on the said parcel of land but he ignored the same.*

The defendant also denied any knowledge of a court order stopping the demolition and put the plaintiff to strict proof of his claim for damages. It pleaded that if the plaintiff suffered any losses, the same were authored by the plaintiff's own blatant breaches of the terms of the lease, and that any damages incurred arose out of illegal contracts.

5. In his testimony, the plaintiff gave evidence on how he acquired proprietorship of the suit land. The land and 20 other plots were originally owned by Theluji Drycleaners Limited of which he is a shareholder. Theluji Drycleaners Limited distributed these plots to its 18 shareholders and out of this distribution, the plaintiff got the plot No. 335. He then purchased the plot No. 336 from the company and Theluji remained as proprietor of the plot No. 337 (the suit land). This they later exchanged with the plot No. 335 and he thereafter became registered as proprietor of the suit land. The same is a leasehold from the Government of Kenya.

6. Before the land was transferred to the plaintiff, Theluji had applied for change of user from a public car park to Petrol Station. However, there was a single storey building on which the plaintiff managed a business of hides and skins and also allowed tenants who operated various small businesses. The premises was therefore used as a commercial building housing several businesses. He stated that his total monthly rental income was kshs. 82,000/= and he produced several tenancy agreements to demonstrate this. The tenants had licenses from the Municipal Council of Eldoret, allowing them to operate their businesses on the suit premises. He also had a licence to operate his hides and skins business. In 1999-2000 he renovated the building to place a sewer line in place of a septic tank, which renovation was approved by the defendant. On 20 March 2002, the plaintiff applied for a change of user. He wanted the user changed from "petrol station" to "commercial", which application was approved by the Physical Planner, but

declined by the defendant through a letter dated 9 June 2003. The reason given for refusal was that the plot was a public utility plot. The plaintiff protested through a letter dated 7 August 2003, in which he pointed out that the plot could not be a public utility plot, having been previously owned by Theluji Drycleaners Ltd, and the fact that he was now the registered proprietor of it. The Municipal however earmarked the property for demolition hence the suit. He asked for damages as pleaded in the plaint, alongside exemplary damages, since the demolition was done in violation of a court order.

7. PW-2 was Jackson Webale Webale. He was previously employed by the judiciary as a court process server where he retired in the year 1986. Thereafter, he started working as a private court process server. His evidence was that he did serve the order of interim injunction upon the defendant and he produced the affidavit of service. He served the same upon a Mr. Sitienei, the Deputy Town Clerk on 26 April 2005 at around 8.00 am.

8. PW-3 was Henry Ndungu a caretaker of the plaintiff. He testified that he was at the suit premises on 27 April 2005 when officers of the defendant demolished the building on the suit premises. This was despite him showing the officers the interim order of injunction which stopped any interference with the premises. He testified that when he showed the officers the order, they said that they do not care whether there is an order and proceeded to knock down the building.

9. The plaintiff's last witness was Mwaragania Wambugu, a registered quantity surveyor with the Institute of Quantity Surveyors. He is also a member of the Board of Registration of Architects and Quantity Surveyors of Kenya. He has been in private practice since the year 1996. He was retained by the plaintiff to undertake a cost estimate. In his view, as at April 2006, the estimate of restoring the demolished building was be Kshs. 7,783,170/=. The cost as at May 2014, was quantified at Kshs. 13,418,300/= owing to inflation.

10. The defendant called one witness, a Mr. Barnabas Cheruiyot. He is an Administrative Officer with the Uasin Gishu County. He testified that the user of the suit property is petrol station. He stated that at some point, the plaintiff wanted a change of user which was declined. He stated that when the building was demolished, it was used as a butchery, shop, hotel and as a hides & skins godown. He testified that when approval was given for user as a petrol station, there was a condition that any structures affecting the proposal and construction of roads, and sewer water mains, be demolished. He stated that before demolishing the building, a notice was issued. In cross-examination, he agreed that Mr. Sitienei worked as a Principal Administrator in the office of the Town Clerk and Deputy Town Clerk and legal process would be served in the office of the Town Clerk. He himself was not involved in the demolition of the building, which was undertaken by the engineering department, as at that time, he worked in the registry, which work entailed the keeping of records. He agreed that the suit land is private property and not public. He agreed that the reason why the building was earmarked for demolition, as contained in the notice, was that the property was a public utility and not that the property was being utilized for a user that was not authorized. He stated that the persons who demolished the building were better placed to say why they demolished it.

11. In his submissions, Mr. Kiarie for the plaintiff, was of the view that three issues need to be determined being :-

*(a) Whether the injunctive orders were served upon the defendat .*

*(b) Whether the demolition of the suit property by the defendant was justifiable.*

*(c) Whether the plaintiff suffered loss as a result of the defendant's actions.*

12. He submitted that the injunctive orders were served and that the demolition was not justified as the plaintiff owned the suit premises. He submitted that there was no proof that the premises was a public utility. He submitted that the demolition, in any event, could not be because there was contravention on the user of the plot as a petrol station. He submitted that the plaintiff got the plot when there was already a building on it; that the plaintiff had applied for change of user; that when the change of user was declined,

the plaintiff requested for a review, which review is still pending. He also submitted that the defendant approved the connection of a sewer line to the plot while it was aware that the premises was not being used as a petrol station. He submitted that the defendant also continued to issue business licences to his tenants. He submitted that the defendant slept on its rights and equity cannot aid it. He submitted that the defendant was stopped by its actions. He also submitted that the plaintiff has proved the damages pleaded. He relied on various authorities which I have perused.

13. M/s Kalya & Company for the defendant, submitted inter alia, that the plaintiff had confirmed that the user of the plot was a petrol station and it was never changed. They also submitted that the plaintiff was given notice to demolish the structures on the plot which hindered the running of the said business. They submitted that the structure on the land was against the use of the premises as a petrol station, and that since notice was given, the defendant was entitled to demolish the structure. They submitted that the businesses were being carried out on the premises illegally, and the plaintiff cannot benefit from an illegality. They further submitted that reconstruction cannot be undertaken without approval of the defendant, and that the premises cannot be reconstructed as it was because the user remains a petrol station. They further submitted that the order stopping demolition was never served in accordance with Section 263A of the now repealed Local Government Act which was in operation at that time. They submitted that the order was served upon a Mr. Sitienei who in their view was not the Town Clerk. They submitted that if there was disobedience, the plaintiff ought to have sought punishment of the Town Clerk for disobedience.

14. I have considered the pleadings, evidence and submissions of counsel and I take the following view of the matter.

15. I do not think the defendant in these proceedings has contested the ownership of the suit property. They have not pleaded that the property is a public utility or that the plaintiff is not entitled to the leasehold title thereof. They in fact concede that the property belongs to the plaintiff. The issue that the property is a public utility plot popped out of the blue when the plaintiff applied to change the user of the property from petrol station to commercial which I understand it to mean that the plaintiff wanted to use the premises as a commercial building rather than a petrol station. It is in their reply, through the letter dated 9 June 2003, that the defendant first laid claim that the suit property was a public utility. They indeed based their refusal on the change of user on this ground. The plaintiff, through his letter dated 7 August 2003, asked the defendant to review their position, as the plot was not a public utility property. I have no evidence on whether this plea by the plaintiff was ever considered. What is not in doubt, is that the defendant earmarked the premises for demolition. Their reasons for demolishing was in a notice dated 6 February 2003, whereby it was stated that on the suit property, is "an old building within an area set aside for a public car park that was supposed to be surrendered to the council on sub-division of Block 5/41 and illegal extension of the same building."

16. But I have pointed out earlier, there is no pleading herein from the defendant that the suit property is a public utility. I am prepared to hold, on a balance of probability, that the suit property is a leasehold belonging to the plaintiff, there being no claim over it by the defendant. The claims in the notice of 6 February 2003 and the letter of 9 June 2003, that the plot is public utility, are completely unsupported, and indeed, the defendant has not pleaded nor tabled any evidence that the suit land is public utility.

17. The defendant has justified the demolition of the building which was on the suit premises on the ground that the user of the land is a petrol station and not a commercial building. It should however be noted that in their notice of February 2003, they never gave the reason that they wished to demolish the building because it was not being used according to planning regulations. The reason given, was that the plot is public utility, which reason, as we have seen before, was completely without basis. The plaintiff acquired the premises while the building was still standing. He never constructed it. He found it *in situ*. I am certain that the defendant knew that the suit land was being used as a commercial building as they continued to licence businesses to continue operating in the said premises. No notice was ever given to the plaintiff to stop using the suit land as a commercial building. Given the fact that the plaintiff acquired the suit land with a building *in situ*, and having applied for a change of user, I may have some bit of sympathy to the plaintiff, for allowing some time to see whether his application for change of user would

be approved.

18. I agree, that with appropriate notice, the defendant would have been entitled to demolish the building on the suit land, given that it was not in tandem with the user of the premises. However, when the building was demolished, there existed a court order which stopped the defendant from demolishing it. I am of the view that the order was properly served upon an officer of the defendant who was working at the office of the Town Clerk. I do not see how Section 243A of the Local Government Act (now repealed), can assist the defendant. The same was drawn as follows :-

263A.

*Execution of process against local authority.*

*Notwithstanding anything to the contrary in any law—*

*(a) where any judgment or order has been obtained against a local authority, no execution or attachment or process in the nature thereof shall be issued against the local authority or against the immovable property of the local authority or its vehicles or its other operating equipment, machinery, fixtures or fittings, but the clerk of the local authority shall, without delay, cause to be paid out of the revenue of the local authority such amounts as may, by the judgment or order, be awarded against the local authority to the person entitled thereto;*

*(b) no immovable property of the local authority or any of its vehicles or its other operating equipment, machinery, fixture or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the clerk of the local authority.*

19. It will be seen that the said provision has absolutely no bearing on the service of process upon the now defunct local authorities. I am prepared to hold that service was properly effected, and that the defendant knew that there existed a court order before proceeding to demolish the building. Their conduct, of ignoring a court order was repulsive and inexcusable. Whether or not the defendant was justified in demolishing the building, because it did not conform to planning regulations, is immaterial, so long as there was a court order stopping the demolition. The defendant had a duty to obey the court order, whether or not they were in agreement with it. It is therefore my view that the demolition of the building was improper.

20. The only other issue is whether or not the plaintiff is entitled to damages, and if so, the quantification thereof. The plaintiff has pleaded the sum of Kshs. 81,000/= per month as lost income. This is the income that he continuously received from his tenants. He has also pleaded for the costs to be incurred in reconstructing the demolished premises. It will be observed that counsel for the defendant, in his submissions, argued that awarding the plaintiff the claimed sums in damages would be to allow the plaintiff to benefit from a user that was not allowed. I am in agreement. The premises was leased out to be utilized as a petrol station. There must have been a reason behind why this plot was chosen to be a petrol station. Maybe, it is because of its location, or because there is a scarcity of petrol stations within the CBD. That, I do not know. What is not in doubt, is that the plot was to be used as a petrol station. It is imperative that lessees of premises use the premises as directed by the lessor. Land owners, need to follow the planning of a town, for if the plan is not followed, then there will be critical services which will not reach the population. The continued use of the premises by the plaintiff, for a purpose which was not allowed, was clearly in breach of the terms of the lease, and I am not inclined to allow him damages which will allow him to benefit from a use that was not authorized. It matters not that the defendant did not enforce its right to raise the issue of the user of the premises with the plaintiff. Neither can it be argued that the obligation to use the premises in accordance with its user was waived by the defendant granting business licences to the plaintiff's tenants. The duty to use the premises as prescribed remained that of the plaintiff, irrespective of whether or not, the defendant enforced it. The plaintiff cannot therefore claim loss of income based on an illegal user of the suit premises. I therefore disallow the claim for loss of income.

21. The other claim is that of reconstruction. The figures tendered by the plaintiff are to have the premises back in the way that it was before the demolition. The only catch here is that if I am to allow that, then I will essentially be allowing the plaintiff to reconstruct the premises to a user that is not permitted. The cost tabled by the plaintiff is not one to set up a petrol station, which is the permitted user of the premises, but it is to put up a building similar to what was demolished, which is not the permitted user of the premises. If I am to allow the plaintiff to erect a premise similar to what was demolished, then I will be permitting the plaintiff to use the premises in a way which is not permissible. I am unable to bring myself to do that. For this reason, I disallow the claim for reconstruction of the premises.

22. But does this mean that the defendant must go scott free despite its despicable conduct of demolishing a premises in the face of a court order? I think not. At the very least there was a trespass, and I am prepared to award, an amount as general damages for trespass. For this, taking into consideration the nature of the property and the nature of the trespass, I award the sum of Kshs. 500,000/=.

23. Further, in my view, this is a fit case for the award of exemplary damages. In the case of **Rookes v Barnard (1964) 1 All ER 367**, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. **Rookes v Barnard**, received the stamp of approval of the East African Court of Appeal in the case of **Obongo v Kisumu Council (1971) EA 91**. In the matter, Spry V.P stated as follows at page 95 :-

*"I am therefore of the opinion that this court should regard Rookes v Barnard as authoritatively settling out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967."*

24. Apart from the case of **Obongo v Kisumu Council**, the case of **Rookes v Barnard** has been applied in Kenya in various decisions. These include the cases of **C A M v Royal Media Services Limited [2013] eKLR**, **C.A at Nairobi Civil Appeal No. Civil Appeal No. 283 of 2005**, **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR**, **Court of Appeal at Kisumu Civil Appeal No. 84 of 2009**; and, **Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR**, **High Court at Mombasa, Civil Suit No. 290 of 2000**.

25. The basis for awarding exemplary damages is to punish the defendant for its conduct. A wrong doer must not be allowed to benefit from his conduct. If this were not so, a wrongdoer could chose to commit a wrong, being alive to the reality that taking into consideration the amount to be awarded in damages, he would still be better off if he proceeds to commit the wrong.

26. Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building. It may be, that the defendant reasoned that it will get away with demolishing the building, because they may successfully argue that the court cannot award damages for its reconstruction, since it is a building not commensurate with the town plan. They may have thought that since such damages may not be awarded, then they will walk away without paying a cent. If they thought so, then they are very wrong. The court cannot allow the defendant to benefit from its conduct.

27. In my opinion, a sum of Kshs. 15 Million in exemplary damages will be fair in the circumstances. In arriving at this figure, I have taken note of the need to deliver a message to all, that court orders must be obeyed, and I have further taken into consideration the value of the property that was demolished and the general conduct of the defendant, who never at any one time, attempted to make amends or apologize to the plaintiff for its deplorable conduct. A message needs to be sent, that if you commit a wrong, then you have a duty to make amends, and one does not need to wait for litigation to do so. There is no shame in admitting that one has committed a wrong and no shame at all in moving to mitigate the suffering of the victim of a wrong; indeed, one is a hero if does so. I will therefore enter judgment for the plaintiff in the sum of Kshs. 15 Million as exemplary damages.

28. The other prayers sought by the plaintiff were declarations that the defendant is a trespasser, and for a permanent injunction to restrain the defendant from occupying or dealing with the suit land. I think these were brought about by the allegation that the suit land is public utility, which has not been proved by the defendant.

29. The other issue is costs. Costs generally follow the event, and in this case, I do award the plaintiff the costs of this suit.

30. I now make the following final orders :-

(a) That judgement is hereby entered for the plaintiff against the defendant in the sum of Kshs. 15, 500,000/= comprising of Kshs. 500,000/= as general damages for trespass and Kshs. 15,000,000/= as exemplary damages.

(b) That a declaration is hereby issued, that as against the defendant, the plaintiff is the owner of the land parcel Eldoret Municipality/ Block 4/337.

(c) That a permanent injunction is hereby issued, restraining the defendant from interfering with the defendant's occupation of the land parcel Eldoret Municipality/ Block 4/337.

(d) That the plaintiff shall have costs of the suit.

(e) That for the avoidance of any doubt, the liability of the judgement herein will be shouldered by the County Government of Uasin Gishu, who are the successors of the Municipal Council of Eldoret.

It is so ordered.

**DATED and DELIVERED at ELDORET this 30th day of JANUARY 2015.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**In the Presence of:-**

Mrs. Khayo h/b for Mr. Kiarie for the Plaintiff.

No appearance for M/s Kalya & Company Advocates for defendant.