Kenya National Highways Authority v Mistry Premji Gangji (Investments) Ltd (Civil Appeal E051 of 2021) [2024] KECA 500 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 500 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E051 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT

AND

MISTRY PREMJI GANGJI (INVESTMENTS) LTD ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Environment and Land Court at Mombasa (A. Omollo, J) delivered at Busia on 8th April 2021 in Mombasa ELC Case No 106 of 2015)

JUDGMENT

1. The respondent, Mistry Premji Gangji (Investments) Ltd filed a suit against the appellant Kenya National Highways Authority by way of a plaint seeking;

    a. A declaration that the Certificate of Title CR. 18624 that the plaintiff (the respondent) holds in respect of the said land constitutes conclusive evidence of ownership of the said land and that the plaintiff is the lawful, absolute and indefeasible owner and entitled to immediate possession of all the said land.

    b. A declaration that the notice dated 16th February 2015 wrongly addressed to KTDA and captioned "Notice of Intended demolition/removal of encroachment" is invalid, null, unlawful and/or ultra vires the powers of the defendant (appellant) and therefore of no purpose or effect.

    c. A permanent injunction restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from demolishing or further demolishing or destroying any part of the said land or any structure or structures thereon.

d. A permanent injunction restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from either entering, occupying or any party having a lawful interest in the said land from either entering occupying or using any part of the said land.

e. General damages, aggravated and/or exemplary damages in respect of the unlawful demolition carried out by the defendant on the said land.

f. Damages for trespass;

g. Interest thereon at court rates;

h. Costs;"

2. It was the respondent's case that it is the registered proprietor and entitled to possession of land parcel known as subdivision No. MN/V/735 (originally No. MN/V/626(7) and CR No. 18624 on deed plan No. 129949 (the subject plot). It was stated that the subject plot was currently vacant and adjoined parcel numbers MN/V/730 and MN/V/734 also owned by the company which are developed with several warehouses which were let out on commercial leases amongst them to, Kenya Tea Development Authority (KTDA).

3. On 16th February 2015 the appellant served KTDA with a notice of intended demolition on what it termed as removal of encroachment on a designated road reserve on the Mombasa- Nairobi Highway. KTDA passed on the notice to the respondent who responded by sending the appellant copies of its title deed, surveyed deed plans, site survey, location survey plan and copies of Council Rates receipts.

4. The respondent claimed that the appellant's reply was that the subject plot was created from several sub-divisions the original being plot No. MN/V/393/R from which the government had acquired 0.333ha for road expansion vide Gazette Notices 3581 of 21st November 1969 and 3637 of 28th November 1969 (the Gazette Notices). While they were investigating the history of the title, on 18th May 2015 the appellant demolished 30 metres of their boundary wall, damaged two gates and the electric fence, and trespassed on to the subject plot. The appellant asserted that the notices were issued in flagrant disregard of Articles 40, 47 and 64 of the Constitution and section 22 of the *Kenya Roads Act*. It was therefore the appellant's actions that provoked the suit.

5. It was PW1 Suresh Kanji Patel, a director of the respondent's evidence that the subject plot was purchased in the 1980s; that after receipt of the notice from the appellant, they engaged a surveyor, Denise Malembeka Katunga PW2, to carry out the investigations. PW2 prepared the report dated 14th May 2015, and on 18th May 2015, a bulldozer came and destroyed 30 meters of their wall and the gate wall KTDA used to enter the plots. The electric fence on top of the wall was also demolished together with neighboring temporary structures. KTDA vacated the premises following the demolition as indicated in their letter of 22nd May 2015. PW1 further stated that the land, original number LR No. MN/V/393 was subdivided and the 6th portion registered as LR. No. MN/V/513. This portion was also later sub-divided, and it was the 6th portion that created LR No. MN/V/626, the mother title to the respondent 's land, with the 7th portion numbered as L.R. MN/V/No. 735, the subject plot.

6. PW1 further testified that the respondent has been in occupation of the subject plot since 1985 when it was acquired, and at no time did he receive any notification of encroachment or evidence of compulsory acquisition. He urged the court to grant the prayers sought in the plaint.

7. In cross-examination, he confirmed that there was already a road in 1987, and that from the road to the demolished wall is approximately 10 meters; that before purchasing the land, the existing beacons were pointed out to him. He stated that he was aware of Gazette Notice of 21st November 1969 but not

the Gazette Notice of 28th November 1969. He further confirmed that subdivision of LR No. MN/V/513 was done by a registered surveyor. According to him, the space between his wall and the existing road was sufficient for expansion of the road. In re-examination, he stated that the location plan was a miniature of the surveyor's own drawing. He did not know if LR No. 513/V/MN was allocated to the government, and was not aware of any compensation having been paid pursuant to the gazette notice of 28th November 1969.

8. PW2, is a holder of a BSc in Survey and photogrammetry with 20 years' job experience. His testimony was that he visited the subject plot and prepared his survey report dated 14th May 2015. He explained how the various subdivisions culminating in parcel Nos. 730 – 735 with LR No. MN/V/735 as the subject plot, currently registered in the respondent's name; that the deed plan dated... issued by the Director of Survey and attached to the respondent's title provided the dimensions of the plot as reference on the ground.

9. On cross-examination, he stated that, in terms of the survey plans that he compiled, 0.333ha was not acquired; that the gazette notice of 28th November 1969 gave notice of inquiry of the acreage the government intended to acquire; that therefore, the disputed area was within the fixed boundary of which his report gave the acreage as 0.5166ha, which information was available in the survey records. He explained that an encroachment arises when occupation goes beyond the approved plans of the Director of Survey. He confirmed that LR No. MN/V/626 was further subdivided in 1987 while the road was already in place and that the resultant sub-plots are not served directly by the government road. He also confirmed that the subject plot shared a boundary with the Mombasa- Nairobi Highway; that the length of road as provided by the map was not clear, and he denied that the subdivisions had not taken into account the road reserve.

10. He concluded by stating that there was no encroachment because the respondent's perimeter wall was within the fixed boundary. In re-examination, PW2 stated that the notices served only gave what was proposed to be acquired, but he did not see any evidence that they were compulsorily acquired; that 1.233ha and 0.2694ha are official figures from survey records, and beacons JP10 - JP11 form the boundary between the subject plot and the Mombasa – Nairobi Highway.

11. The appellant in response denied the allegations stating that sub-division creating the subject plot under CR. No. 18624 previously formed part of all that LR No. MN/V/393/R; that 0.333ha was acquired through the Gazette Notices from L.R No. MN/V/393/R. The appellant contended that there was encroachment of 0.05ha by the subject plot; that the provisions of section 22(4) of the *Kenya Roads Act* did not come into play since it had encroached onto a road reserve. The court was thus urged to dismiss the suit with costs.

12. On behalf of the appellant, Thomas Gichira Gachoki, DW1, a qualified surveyor, testified that, when the government decided to construct a road, a preliminary survey is undertaken whereafter, the engineers prepare the designs. The designs in respect of the affected proprietors are then marked out and an acquisition plan is prepared. The plan is sent to National Land Commission (NLC) who then publishes notices to those affected in the Kenya Gazette,alongside a notice of intention to acquire the land. Thereafter, NLC values the affected properties and the owners issued with an award.

13. It was his testimony that the gazette notice showed that the Government acquired approximately 0.333ha and utilised 0.36ha leaving an unutilised portion that was not included in the surrender; that part of this unsurrendered portion is what was comprised within the subject plot, and what resulted in the encroachment on to the road. He further stated that before carrying out the demolition, they served the respondent with notices TG-8 and TG-9. He further stated that from the gazette notices, the road must have been constructed in the 1970s.

14. In cross-examination, he claimed that the deed plan for the subject plot did not take into account the acquisition of 1969. He also confirmed that the demolitions were carried out in May 2015. He nonetheless admitted that TG-2 was not an aerial plan but a document prepared by the Ministry of Public Works, that TG-4 dated 1982 was part of the land to be acquired which was consistent with the gazette Notice of 1969. He stated that the plan annexed to their letter of 13th April 2015 was done based on the acquisition of 1969 and the existing road. He had nothing to say about the survey report by Mombasa County Surveyor dated 27th April 2016 which stated that the road reserves had not been surveyed.

15. In re-examination, he reiterated that their letter of 13th April 2015 explained the extent of the developments, and that since the respondent's title was issued in 1987, the person who carried out the survey ought to have taken into account the existing road reserve.

16. The trial Judge upon considering the evidence, allowed the respondent's claim against the appellant in the following terms;

17. Having found that the defendant wrongly demolished the plaintiff's walls and gates, I make an order that the defendant shall restore the wall together with the gates within 90 days of this judgement. In default, the defendant to re-imburse the equivalent of the cost of construction undertaken by the plaintiff with the plaintiff being at liberty to execute. Secondly, there is sufficient evidence adduced by the plaintiff that her tenant (KTDA) moved out as a consequence to the demolitions making the plaintiff to lose income accruing from the rents. The monthly rents was provided in the lease document produced in evidence. The monthly rent payable in the year 2015 when the demolition took place is given at Kshs1,335,469 and in the year 2016, monthly rent was given at Kshs1,435, 529.

    67. It is therefore my considered opinion that the plaintiff is entitled to compensation for lost rent. The same is now calculated for the year 2015 at Kshs1,335,469 x 7 months and for the year 2016; Kshs1,435,529 x 12 months (being rents for the remainder term of Lease). For the period running from 2017 till when the judgement was rendered, I do award Kshs Fifty Five million (55,000,000) only for general damages for trespass and loss of income.

18. The court ordered:

    (a) A declaration that the certificate of title CR. 18624 that the plaintiff holds in respect of the suit land constitutes conclusive evidence of ownership of the said land and that the plaintiff is the lawful and indefeasible owner and entitled to immediate possession of all the said land.

    b. A permanent injunction be and is hereby issued restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from demolishing or further demolishing or destroying any part of the said land or any structure or structures thereon.

    c. A permanent injunction restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from either entering, occupying or any party having a lawful interest in the said land from either entering occupying or using any part of the said land.

    d. Restoration of the walls unlawfully demolished by the defendant on the said land together with damages of Kshs. 81,574,631 as enumerated in paragraph 67 hereinabove.

    e. A stay of execution for a period of 30 days is hereby given.

    f. Interest thereon at court rates;

    g. Costs."

19. The appellant was aggrieved by the judgment and filed an appeal to this Court on grounds that; the learned Judge misapprehended the appellant's Defence, evidence and submissions; that the learned Judge was in error in granting the respondent special damages of Kshs. 26,574,631 for lost rent when this was neither specifically pleaded; in granting special damages for lost rent from the respondent's properties Nos. MN/523/730, MN/523/731, MN/523/732, MN/523/733 and MN/523/734 occupied by KTDA when the appellant only demolished the perimeter wall and gate of the subject plot which was not occupied by KTDA; in granting a special damages for lost rent for 19 months being the remainder of a lease, without considering the respondent's legal obligation to mitigate any potential loss arising from demolition of a part perimeter wall and gates; in granting special damages for lost rent for 7 months when the respondent's evidence was that KTDA, vacated three (3) months before expiry of the lease; in granting a global sum for general damages for trespass and loss of income (being a special damage) that was not pleaded of Kshs. 55 million without specifying how the award was constituted; in failing to appreciate that the appellant's notice to demolish the encroaching wall was strictly in relation to the subject plot; in granting loss of income of Kshs. 55 million for all subdivisions when they were not the subject matter of the suit; in failing to consider that, the court granted exparte orders against the appellant, hence there could be no further demolition or interference with the subject plot; disregarding the evidence of the compulsory of acquisition of 0.33 hectares of the subject plot in 1969, and failing to appreciate that the appellant has the legal mandate to demolish structures encroaching on the road reserve and that the demolition was legally and procedurally carried out; in awarding damages that were excessive and unproportional, and in failing to appreciate that the appellant afforded the respondent their legal and constitutional right to fair administrative action before effecting the demolition.

20. Both the appellant and the respondent filed written submissions which they highlighted during the hearing on a virtual platform. Learned counsel Mr. Muganda begun by acknowledging that the respondent had conceded the grounds contesting the award for special damages of Kshs. 26,574,631 in respect of lost rent after KTDA vacated the respondent's property; that on the basis of this concession, this award should be set aside.

21. Turning to the question of whether the learned Judge failed to take into account the appellant's case in arriving at a determination; that at the trial, the appellant confirmed that the process of land acquisition of 0.333 ha was undertaken to finality, as evidenced by the Gazette Notices; that the appellant issued a notice of intention to demolish, and afforded the respondent an opportunity to state its case and observed due process after supplying it with documents showing the encroachment, after which, three months later, it demolished the wall and structures that had encroached onto the road reserve.

22. Concerning the award for general damages for trespass, counsel submitted that the learned Judge disregarded the evidence that the demolition affected only, the subject plot that was vacant at the time, and therefore the respondent was not subjected to any loss of income in respect of the other plots; that the particulars of the respondent's claim were set out in the pleadings, and it only pleaded for general damages, aggravated and/or exemplary damages for the unlawful demolition; that the evidence showed that there was damage to the wall, two gates and the electric fence, and that only 0.20 acres were affected; that therefore the learned judge should have appreciated that the damage was limited to a small area. Furthermore, counsel submitted, the respondent's claim was limited to Kshs. 10 million for general damages, and the loss of a tenant.

23. Counsel further submitted that in awarding general damages for trespass and loss of income of Kshs.55 million for the period from 2017 until the judgment date, it was apparent that the court did not address itself to the issue of what portion of the Kshs.55 million was general damages for trespass and what portion was for loss of income. Citing the case of Philip Ayaya Aluchio vs Crispus Ngayo [2014] eKLR

on the measure for general damages, counsel submitted that the correct approach the trial court ought to have adopted so as to vindicate the respondent from the alleged trespass was to calculate the cost of restoration of the wall and gate. The case of Duncan Nderitu Ndegwa vs Kenya Pipeling Company Limited [2013] eKLR was also cited for the proposition that, the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land, and not both; that the award was exaggerated and excessive, and considering that the appellant is a public institution serving the interests of the public, the court ought to have awarded not more than Kshs. 2 million in general damages.

24. Learned counsel, Mr. Inamdar for the respondent begun by conceding the appeal against the award of Kshs. 26,574,631 for special damages for loss of rent.

25. Counsel thereafter went on to submit that the dispute involved the demolition by the appellant demolished of the respondent's 30 metres boundary wall, that destroyed the entire electric fence atop the wall, and damaged 2 access gates for the reason that the respondent was alleged to have encroached on the road reserve of the Mombasa-Nairobi Highway; that this caused KTDA to promptly vacate the leased premises within the respondent's property on the adjacent parcel of land claiming loss of immunity, exposure, insecurity concerns and threats to its personnel and their warehouses by county officials. Counsel submitted that the trespass by the appellant on the respondent's property continued to this day.

26. On liability, counsel submitted that the appellant had not produced any evidence of probative value on two issues; that firstly, whether the land which they claimed had encroached onto a road reserved had itself been compulsorily acquired; and that the Gazette Notices did not constitute evidence of compulsory acquisition; that there were two reports that were considered by the court, one produced by the respondent which showed a history of the land and confirmed that nothing pointed to encroachment by the subject plot onto the road reserved, but more importantly, that the subject plot had been compulsorily acquired. The case of Elizabeth Wambui Githinji & others vs Kenya Urban Roads Authority & others [2019] eKLR was cited to support the contention that failure to comply with the sections 17, 19 and 20 (2) (b) of the Land Acquisition Act (repealed) in the compulsory acquisition of land, meant that there was nothing proved that the land had been compulsorily acquired; that the survey report produced by the district surveyor in Mombasa confirmed that no compulsory acquisition of the subject plot has taken place.

27. On general damages, counsel submitted that the Judge was clear that the award of general damages comprised of loss of rent for the period after KTDA vacated the premises and for trespass. It was further submitted that trespass is computed on the basis of the location of the land, and the length of time the trespass continued. It was submitted that the effects of the trespass persisted, and that 3 years after the date of judgment, there had been no redress for the damage caused; that the conduct of the appellant and the lack of any proper evidence to justify its actions was also a factor to be taken into account.

28. On the loss of rent portion of the award, counsel submitted that a Court is not precluded from making a combined award on general damages; that such award is discretionary, and an appellate Court's discretion to interfere with the exercise of judicial discretion of the trial court only arises when there is a clear misdirection in law, a misapprehension of fact, or where a court takes into consideration matters that it ought not to have considered, or where the decision can be found to have been completely wrong, which is not the case here.

29. On the notice issued, counsel submitted that the Notice of intention to demolish simply warned the respondent, but no particulars were given about the nature, the location or the extent of the alleged encroachment; that, this notwithstanding, the appellant, proceeded exercise its so-called public duty

and undertake the demolitions which was in in breach of Article 47 of *the Constitution* and did not afford the respondent its constitutional right to administrative action being expeditious, efficient, lawful, reasonable and fair considering the respondent had an indefeasible title; that the respondent was not provided an opportunity to be heard or to make proper representations, or provided with full information, materials, and evidence to be relied on before administrative action was taken.

30. On mitigation of the rental, counsel submitted that the issue of mitigation was never raised in the trial Court; that it was not pleaded in its defense and nor was any evidence adduced and hence the issue could not be raised on appeal.

31. This is a first appeal, the duty of this Court as stated in this Court's decision in Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR thus:

> An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

32. Also rule 31 (1)(a) of the Court of Appeal Rules, stipulates that the duty of the court is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw our own conclusions. See also Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2 EA 212.

33. Cognizant of our duty, and having carefully considered the judgment, the record and the submissions of counsel, we find that the issues that falls for this Court's consideration are; i) whether the learned judge rightly concluded that the respondent proved its case beyond reasonable doubt that it had not encroached on the road reserve; and ii) whether the respondent was entitled to the award of general damages of Kshs. 55 million.

34. We begin by observing that since the award for special damages for loss of rent of Kshs. 26,574,631 was conceded, we agree with the parties that the award ought to be set aside.

35. Turning to the first issue of whether the subject plot encroached on the road reserve as alleged by the appellant. In determining this question, it would be necessary to consider firstly, whether there was evidence that the appellant compulsorily acquired the subject plot as a road reserve, and secondly, whether it was demonstrated that the respondent had encroached onto the road reserve.

36. The appellant's case was that the portion of land on which the wall stood had been compulsorily acquired. It relied on two Gazette Notices as proof that the demolished portion of the subject land had been compulsorily acquired. It referred firstly to, Gazette Notice No 3581 of 21st November 1969 which specified,

> ....I hereby give notice that the Government intends to acquire the following land..."

37. Also referred to was, Gazette Notice No. 3637 dated 28th November 1969 which stated:

> ....an inquiry would be held at 10 am, Wednesday the 16th December 1969, at the Lands Office, Treasury Square, Mombasa and on Thursday the 18th December 1969 at the Office of the Chief, Changangwme for the hearing of claims by persons interested in the following lands..."

34. A reading of the above notices merely discloses an intention by the Government to acquire part of the land comprised in the original mother title, LR No. 393/V/MN, while Gazette Notice No. 3637 was an invitation to owners to attend an inquiry for hearing of claims for compensation.

35. In the case of Attorney General vs Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR), the Supreme Court held that:

> The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of article 40(3) of *the Constitution*, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time. .....any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent."

36. Section 17 of the Land Acquisition Act (repealed) which was operational at the time of the alleged acquisition provided that;

> Where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired".

37. This Court elaborated on the provision in the case of Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & 4 others (supra) that:

> The gazette notice of intention to acquire, the Notice of Inquiry and the initial survey constitute what is described in Part 11 of the Land Acquisition Act as "Preliminaries to Acquisition". After this preliminary stage, in terms of section 17 aforesaid, the Commissioner was required to conduct a final survey. A final survey by the Government, in exercise of its powers of eminent domain, is significant as it is only through it that the exact particulars of the acquired land can be ascertained.
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> The Commissioner was also required by section 7 of the Land Acquisition Act, to mark out and measure the land which was to be acquired and to prepare a plan. Survey marks which under section 2 of the *Survey Act* are made up of "trigonometrical station, fundamental benchmark, benchmark, boundary beacon, peg, picket mark or pole" are significant in defining the extent of the land acquired. That is why the law imposes a mandatory duty on every person to protect and not to interfere with the marks on the ground and commands the surveyor to reflect them on the survey plan. There was no proof that the Government erected any form of a mark on the suit property to identify the acquired portion."

38. As did the trial Judge, we too have analysed the evidence, and what becomes apparent is that though the appellant produced the Gazette Notices that indicated an intention by the government to compulsorily acquire the subject plot, the matter seemingly ended there. There is nothing that showed that any further steps were undertaken thereafter to acquire the land. There is also nothing that showed that the land was purchased, and surrendered to the Government. In effect, the only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of Article 40(3) of the Constitution, and the procedure stipulated in the repealed Land Acquisition Act. Nothing disclosed that the process of acquisition was completed in

the manner described by the Act. As such, we agree with the trial Judge that the claim that the portion on which the wall stood was compulsorily acquired by the government had no basis.

39. With respect to whether encroachment was established, the respondent's contention is that, since the process of acquisition was not completed, they remained the owners of the portion in dispute. In support of this assertion, they provided a concise history of the subject plot, complete with the relevant documentation showing how the subject plot was acquired, the subsequent subdivisions and the creation of the subject plot. The documentary evidence included several plans for each of the subdivisions, culminating with the survey plan of 1987 produced by PW2.

40. On its part, save for claiming that the portion had been compulsory acquired, the appellant, provided little or no documentary evidence in support of its claim that a portion of the subject plot had been acquired, leading to encroachment by the respondent. But what comes out clearly is that, the appellant solely relies on the survey plan of 1969 and the Gazette Notices expressing an intention to acquire the land to demonstrate that a portion of the subject plot was acquired. Yet, the respondent had supplied the survey plans, site and location plans for the subject plot issued by the Director of Survey on 18th September 1987, that demarcated the fixed boundary along the Mombasa- Nairobi Highway. Given that the survey plan of the subject plot came much later, and there being nothing to show that the road was recently surveyed so as to ascertain the fixed boundaries, the only conclusion that can be drawn is that the Gazette Notices remained just that, an intention to acquire the land. Without any acquisition being demonstrated to have taken place thereafter, the position of the fixed boundary of the subject plot as delineated by the deed plans remained the prevailing situation on the ground, and therefore, no encroachment could be held to have resulted.

41. Our conclusions are fortified by the report produced by the R. M. Ndambuki, County Surveyor from the Ministry of Lands, pursuant to a Court Order dated 30th November 2015, detailing the disputed parcel and identifying the boundaries of the subject plot. The report dated 27th April 2016, and filed in court, the report read:

> Findings: Plot no. MN/V/735 was a subdivision of plot no. MN/V/626 which was done on 10/9/87 by licensed surveyor KM KASYI. Plot no. MN/V/626 was a subdivision of MNN/513.MNN/513 was a subdivision of MN/V/404 and plot no.MN/V/404 was a subdivision of plot no.MN/V/393/R.As per gazette notice no.3581 within VOL.LXX1-N0.53 dated 21st November 1969; an acquisition was done by the Commissioner of Lands on plot no. MN/V/393/R for a road reserve which has not been surveyed to date. There are no survey records defining the road reserve extents on the suit property.
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> Conclusion: We were able to identify plot no. MN/V/735 on our survey plans and on the ground. We are unable to identify the extents of the road reserve and request the Commissioner of Lands to complete the survey of the acquired road reserve."

42. The County Surveyor's report makes it patently clear that no survey records existed defining the road reserve's extent in relation to the subject plot. And neither was there conclusive evidence of a compulsory acquisition having been undertaken, with the result that without a survey plan and acquisition documentation to show that a portion of the subject plot had been acquired, nothing demonstrated that an encroachment had occurred. As a consequence, in the absence of evidence of encroachment, the learned Judge rightly found that the appellant had no right to demolished the respondent's wall.

43. We would add that, given the finding above, we need not address the question of whether the appellant adhered to the provisions of the Fair Administration Actions Act, which was not in any event addressed by the learned Judge.

44. Having concluded as we have that encroachment on the road reserve was not proved to warrant demolition of the respondent's perimeter wall, gates and electric fence by the appellant, we now turn to consider whether the trial court rightly awarded the respondent Kshs. 55 million for general damages for trespass and loss of income.

45. Under this head, the appellant claimed that the award was excessive and unproportional, and that the learned Judge was in error in failing to establish a basis for the award, or to specify the portion of the award for trespass, and the portion for loss of income. In response to this the respondent has argued that in the judgment, the learned Judge clearly specified that the amount awarded for general damages was for trespass and for loss of income after KTDA vacated the premises; that the judge's award for trespass rightly took into consideration that trespass is computed on the basis of the location of the land, and the length of time the trespass continued; that the effects of the trespass persisted, and the appellant's conduct that gave rise to the cause of action. And that the award for loss of income being a discretionary award was not subject to interference by this Court unless it can be demonstrated that the trial court misdirected itself.

46. A consideration of the judgment shows that, "For the period running from 2017 till when judgment was rendered..." the learned Judge awarded the respondent, Kshs. 55 million "...for general damages for trespass and a loss of income".

47. This Court has variously pronounced itself on the principles for setting aside or interfering with awards of damages. In the case of Kemfro Africa Limited t/a Meru Express Services (1976) & another vs Lubia & Another (No 2) [1985] eKLR thus:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

48. This Court reiterated this position in the case of Butt vs Khan [1981] KLR 349, when he stated that:

> An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

49. Consequently, it is trite law that in order to justify reversing a trial court's decision on quantum, this Court must be satisfied that that the judge acted upon wrong principles of law, or that the amount awarded was extremely high or inordinately low as to amount to an erroneous estimate of the damage the claimant was entitled to.

50. So was the respondent entitled to the combined award for loss of income, and trespass? Beginning with loss of income or in this case loss of rental for the period 2017 until judgement is full, under the head of general damages.

51. In the case of SJ vs Francesco Di Nello & Another [2015] eKLR, this Court defined loss of income in the following terms:

> Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as a diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley V John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg 14 wherein Lord Denning MR said as follows:
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> > "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages".

52. The court went on to state that:

> The correct position as in the Fairley case (supra) was restated by this Court in the case of Cecilia Mwangi & Another v Ruth W. Mwangi Civil Appeal No. 251 of 1996, [1997] eKLR as hereunder: "Loss of earnings is a special damage claim.

53. In the case of Mukhula vs Pioneer Plumbers Limited (Civil Appeal 211 of 2018) [2022] KECA 1397 (KLR) this Court observed that:

> Our understanding is that loss of earnings connotes actual loss of income which can be quantified and assessed based on material evidence adduced"

54. The above cited pronouncements are clear that loss of income, and in this case loss of rental income are special damages claims, which ought to be specifically pleaded and proven. In the case of Capital Fish Kenya Limited vs The Kenya Power and Lighting Company Limited [2016] eKLR, this Court reiterated that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit.

55. Similarly, and in David Bagine vs Martin Bundi [1997] eKLR, this Court, referred to the judgment by Lord Goddard CJ in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177), and again observed that:

> It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

56. In the instant case, the judgment clearly specified that the general damages award included an amount for loss of rental income for the period after KTDA vacated the premises, yet not only was the amount awarded for loss of rental income not specified, it is apparent that it was a special damages claim that had neither been pleaded nor in any was proved. It ought not therefore to have been computed under the head of general damages or at all.

57. In the case of Loice Wanjiku Kagunda vs Julius Gachau Mwangi Civil Application No. 142 of 2003 (UR) the Court held:

> We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)"

58. When the pleadings are considered, it is not in doubt that there was no specific claim for loss of rental income, and neither was any evidence tendered before the trial court to prove the quantum of damages in this regard. Clearly, the learned Judge applied the wrong principles in awarding loss of rental that was neither pleaded nor proved. The trial Judge was also in error in awarding an unspecified amount for loss of income under the head of general damages.

59. As a consequence, it is necessary to interfere with and set aside the award in respect of loss of rental income for this reason. And in view of our findings, clearly, the question of mitigation is superseded.

60. This now leaves the portion of the award for trespass. The respondent's claim was that the appellant destroyed a wall, the electric fence atop the wall and two gates; that there was no restoration 3 years after the date of judgment, and that the effect of the trespass persisted to date; that further, the conduct of the appellant and the lack of any proper evidence to justify its actions was also a factor for the court to take into account. In their submissions before the trial Judge, it is worthy of note that the respondent proposed a sum of Kshs. 10 million in damages for trespass.

61. As concerns awards for trespass, Halsbury's Laws of England, 4th Ed., Vol. 45 (2), (London: Butterworth's 1403 para 526) the law on damages for trespass to land is addressed thus:

> In a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

62. The fundamental rule on recovery for damage to land is that the owner of the land in an action for trespass, as in this case, is entitled to be restored, as far as money can allow for restoration of the plaintiff back to the position they would have been had the injury not occurred. Where actual physical damage to the land can be proved, the normal measure of damages is the diminution in value of the land as a result of the trespass or the cost of reasonable reinstatement. See also McGregor on Damages, 15th ed., paragraphs 1392 to 1397.

63. There is no dispute that the appellant damaged the respondent's wall, the electric fence above the wall, and two gates, and that the damaged property was yet to be restored. It cannot also be disregarded that the respondent suffered other consequential loss, including loss of a tenant arising from the damage to its property. Having regard to all the ensuing circumstances, and doing the best we can, we consider

that an award of Kshs. 8 million for trespass, would be sufficient compensation for the respondent in the circumstances.

64. In sum, the appeal succeeds in part. We uphold the judgement of the Environment and Land Court (A. Omollo, J) dated 8th April 2021 save for the awards of special damages and general damages.

65. Accordingly, we make the following orders;

    i. the special damages award for loss of rent of Kshs. 26,574,631 be and is hereby set aside;

    ii. the award of general damages in the sum of Kshs. 55 million is hereby set aside and substituted for an award of Kshs. 8,000,000 .

iii. Each party to bear their own costs. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR