County Government of Meru v M'Muktha (Civil Appeal 28 of 2019)
[2024] KECA 1616 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1616 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 28 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 8, 2024

BETWEEN

THE COUNTY GOVERNMENT OF MERU ..... APPELLANT

AND

ISAYA MUGAMBI M'MUKTHA ..... RESPONDENT

(An appeal from the Judgment and decree of the Environment and Land Court at Chuka (P.M. Njoroge, J.) delivered on 3rd December, 2018 in Malindi ELC Case No. 4 of 2018)

JUDGMENT

1. Isaya Mugambi M'Muketha, the respondent, is and was at all material time the registered owner as lessee of the leasehold interest in the parcel of land known as Municipality/Block 1/230 and Block 1/231 which measures 0.062 hectares (hereinafter referred to as "the suit premises"). The term of the lease of the suit premises was 99 years from 1st May 1995. The appellant is the County Government of Meru.

2. On 5th August 2004, the respondent sued The Attorney General, The Permanent Secretaries in the Ministries of Lands and Housing and Local Government and the Municipal Council of Meru. The respondent averred that he was the legal

   {}owner of the suit premises. He started developing the suit premises but the appellant unlawfully ordered him to stop the development, giving rise to the suit in which the respondent sued the appellant in Meru H. C. Misc. Civil Application No. 33 of 2003 seeking an order of Prohibition and leave to institute Judicial Review proceedings. On 5th March 2003, the High Court in Meru granted leave to file judicial review proceedings which operated as a stay.

3. It was averred by the respondent that on 6th March 2004, the appellant illegally demolished or caused to be demolished the respondent's buildings under construction on the suit premises valued at Kshs.2,880,000 notwithstanding the court order. The respondent made a demand which was

neglected and consequently filed HCCC No. 63 of 2004 in the High Court at Meru which was determined in a judgment delivered on 27th April 2016 by the Environment and Land Court (M. Njoroge, J.) in which the learned Judge found in favour of the respondent to whom he awarded the following:

1. Kshs Two Million and Eight hundred and fifty Thousand (Ksh. 2,850,000) being the value of the demolished and destroyed building/property.

2. Loss of User of the intended premises for 89 years being the period of the unexpired lease in the sum of Kshs. Sixty-Three

   Million One Hundred Thousand (Kshs. 63,100,000/=).

3. General damages in the sum of Ksh. One Million (Kshs. 1,000,000/=).

4. Exemplary and aggravated damages in the sum of Ksh. Two Million (Ksh, 2,000,000/=).

5. Costs of this suit.

6. Interest on 1,2,3,4 and 5 above from the

   date of delivery of this judgment."

4. {}Aggrieved, the appellant filed a Notice of Appeal on 9th May 2016 and lodged an appeal on 4th November 2016.

5. On 14th November 2016, the respondent filed a Cross-Appeal in which he sought variation or reversal of the judgment to the extent and in the manner and/or on the grounds that:

   1. The learned Superior Court Judge erred in law in failing to find that a claim for "loss of user" is ascertainable and quantifiable as it is in the nature of special damages and once the same is specifically pleaded and proved it should be awarded as prayed.

   2. The learned Superior Court Judge erred in law in awarding 63,100,000/= on the heading of loss of user where the sum specifically pleaded and proved was Kshs 126,200,000/=.

   3. The learned judge erred in law in speculating on the vagaries of nature which was not pleaded by the defence nor part of the evidence before him and misdirected himself in making an award based on speculation and personal hypothesis of the trade customs which was wrong.

   4. All other awards granted by the superior Court do remain uninterrupted."

6. The respondent prayed in the cross-appeal that the award of Kshs.63,000,000 for loss of user be enhanced to Kshs.126,200,000 "as specifically pleaded and proved" in the amended plaint and further, that the Court be pleased to affirm other awards granted in the judgment of the High Court.

7. {}In the Memorandum of Appeal dated 31st October 2016, the appellant submitted that the learned Judge erred in law and fact in finding that the appellant had participated in the demolition of the respondent's property on the suit premises; in finding that the appellant had disobeyed the court order issued in H. C. Misc. Application No. 33 of 2003; in finding the appellant liable in damages to the respondent; in awarding damages for loss of user notwithstanding the respondent's rejection of the valuation report offered as evidence in support of the claim; in failing to find that failure by the respondent to challenge the restrictions registered against the suit premises was fatal to the respondent's claim for damages for loss of user; and that the award of Kshs.63,100,000 as damages for loss of user was without any basis.

8. The appellant further submitted that the Judge erred in awarding special damages on the basis of two contradictory valuation reports and in awarding general damages and exemplary damages to the respondent. The appellant urges that the appeal be allowed

with costs and the impugned judgment be set aside with orders that the respondent's claim be dismissed with costs.

9. The appeal came up for hearing on 10th October 2017 when Mr.

{}Gatari Ringera appeared for the appellant and Mr. A.G. Riungu appeared for the respondent.

10. After considering the appeal and submissions filed by the advocates for the parties, this Court, differently constituted, on

29th December, 2017,

delivered its judgment and held, inter alia, that the learned Judge arrived at the correct decision on the issue of liability. PARAGRAPH 11.

As regards damages, the Court upheld the award on loss of the construction materials and affirmed the sum of Kshs.2,850,000. As regards general damages, the Court found 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.

12. The Court nonetheless declined to allow the award in item No. 2 (Kshs 63,100,000) of the said judgment stating that there was not enough material before the learned Judge on the basis of which an assessment of an award of damages could be made. The

Court remitted the matter to the trial court with directions that

> "the trial Judge takes further evidence on item No. 2 "and
>
> proceed to assess reasonable damages for loss of user""

(Emphasis ours).

13. {}Pursuant to the above directions, the Environment and Land Court (ELC), reheard the matter and the respondent called two witnesses. At the further hearing one Vincent Kibet Kiptoo, a licensed valuer, testified and produced a valuation report which he had been instructed to prepare by the respondent pursuant to the Court directions. In an interesting turn of events, his report came up with an amount of Kshs.109,585,488.65 as the general damages for loss of user for the remainder of the lease, which was

89 years. We do not find it necessary to go into the details contained in the report. It suffices to say that the report was based on projections and speculations.

14. The learned trial Judge (P. M. Njoroge J.) found, in his judgment delivered on 3rd December, 2018 as follows;

> 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 defendant's 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 3rd 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.1,000,000/= 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 27th 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."

16. Being dissatisfied with the decision of the ELC, The County Government of Meru, filed this appeal where they have raised five

grounds of appeal in their memorandum of appeal dated 11th

February 2019, namely:

i. The Honourable Judge erred in law and fact in finding that the evidence offered by the respondent was sufficient to enable the court assess reasonable damages for loss of user;

ii. The Honourable Judge erred in law and fact in relying on uncorroborated evidence;

iii. The Honourable Judge erred in law and fact by wrongly applying the principles relating to award of damages for loss of user;

iv. The learned Judge erred in law and fact in disregarding the respondent's evidence in support of the claim for damages for loss of user already on record;

v. The learned Judge erred in law and fact in finding that an award of Ksh.109,585,488.65 was justified.

17. The appeal was heard on the Court's virtual platform on 26th June 2023, and learned counsel Mr. Munga Kibanga and Mr. Riungu, appeared for the appellant and the respondent respectively.

Learned counsel highlighted their respective submissions dated 30th November 2022 and 5th December 2022 respectively.

18. {}We have considered the evidence adduced before the trial court in respect of the award for loss of user along with the grounds of appeal and the submissions by learned counsel. In a first appeal as this one, the obligations of the Court are as set out in Selle

and Another -vs- Associated Motor Boat Ltd & others (1968)

EA 123, namely to reconsider the evidence, evaluate it and to draw its own conclusions of facts and law, and the Court will only depart from the findings by the trial court if they were not based on the evidence of record, where the said court is shown to have acted on wrong principles as held in Jabane -vs- Olenja (1968)

KLR 661, or if its discretion was exercised injudiciously as held in Mbogo & Another -vs- Shah (1968) EA 93.

19. Our focal point of reference for guidance in this matter is the direction given by the Court when remitting the issue to the trial court for retrial. In the course of reviewing and re-evaluating the evidence before it, the Court observed that there was paucity of evidence produced before it to support the claim on loss of user. However, instead of allowing or dismissing the claim in total, it referred the matter back for determination of that point after

calling further evidence, with a view to arriving at a reasonable award. The word "reasonable" in this case was open to different interpretations. From the resultant award after the hearing, the ELC appears to have taken the view that "reasonable" meant a bigger award. We hold a different view.

20. {}The issue we have grappled with in this judgment is whether our remit is restricted to the question whether the 2nd award was reasonable or not. We are not persuaded that we must confine ourselves to the reasonableness or otherwise of the award given for loss of user. Our duty to re-evaluate the evidence and come up with our own independent decision is unfettered and the only caveat is that we cannot consider extraneous matters that were not part of the record. We must also consider the relevant applicable law, whether the same came up in the earlier judgement or not. This is so because the Court is enjoined to consider points of law at any stage, suo moto, even where the said point of law has not been raised.

21. In our reconsideration of the evidence in regard to the appeal before us, we shall not restrict ourselves to the further evidence adduced before the trial Judge after the matter was sent back to the ELC for retrial but will consider all the relevant evidence on record and the law.

22. We observe that there was a valuation report, prepared by one

{}E.K. Mburu, a registered practising valuer who carried out a valuation on the suit premises in April 2014. The value of both plots was given as two million, eight hundred and eighty shillings (KSh.2,850,000).

23. The value of the damaged buildings and other materials was assessed and awards given based on the valuation done earlier. Those awards were confirmed by this Court earlier, and we cannot revisit the matter.

24. On the issue of loss of user, we note that the valuation report was purely based on speculation. The estimates were done in respect of a hotel building that did not exist, the amount to be charged for each room, and the projected profits for the reminder of the lease term, which was said to be 89 years. The

first question we pose, is how the respondent, his witnesses or even the trial court would with certainty state that the lease would survive for the rest of the 89 years.

25. In our view the trial court failed to consider the fact that County Government had already expressed its interest on the suit property and the Chief Registrar had already placed a caveat on the property saying that the same was public land. This brings us

to the question whether the appellant had a right to compulsorily acquire the property and thus lawfully end the 89 years remainder of the lease on which the respondent's claim was based. This brings us to the principle of Eminent domain.

26. {}Eminent Domain is a concept in law which provides that the government has power to take private property for public use, provided they compensate the property owner fairly. This principle is based on the notion that private property rights are subordinate to the needs of society. This universally acceptable principle of constitutional law may be international in origin but is now well grounded locally and has taken its pride of place in Article 40(3) of *the Constitution*. The property acquired under eminent domain must be for public benefit, like roads, schools, hospitals or even public recreation Parks, like in this case.

27. The process is regulated by statutes and constitutional provisions that outline how and when the government can exercise this power. There are typically procedural safeguards to ensure that property owners receive due process and just compensation. This means, the government must provide fair market value for the property taken. The compensation must be made in full and with promptitude. Fair compensation would mean the market value of the property, or even in some instances exchange of the property

with another suitable property of equivalent value. The idea is to make the property owner fully compensated and not to profit or suffer a loss from the acquisition.

28. {}This, in our considered view was the only remedy available to the respondent and not damages for loss of user based purely on speculative estimates. We shall, therefore, assess the damages for loss of user from that standpoint. The respondent had purchased the two plots from another party in 1995. The first valuation report on record, which was prepared in 2014 gave the value of the property at Kshs.2,901,000. From the record, there is evidence that the respondent used to pay the Municipal council, the predecessor of the appellant Kshs.4,800 per year as land rates. This must have been for the period between 1995 and 2005 when the cause of action arose. For the 10 years, the respondent could have paid a maximum of Kshs.48,000 in land rates. This would have brought the value of the property to Kshs.2,949,000. We take the rates for 10years on the presumption that since the appellant had placed a caveat on the plot in 2005, the respondent ought not to have continued to pay the rates thereafter. However, in the event that he could have paid more, we will factor that in our final award.

29. This in our view is the figure that should have guided the learned Judge in assessing the award of damages under the head of "loss of user". Guided by that figure, we find an award of ten million shillings (Kshs.10,000,000) would be more than fair compensation for loss of user.

30. {}For the forgoing reasons, we partially allow this appeal, set aside the orders of P.M. Njoroge dated 3rd August 2018 in regard to order No. (d) and substitute therefor the amount of Kshs.109,585,488.65 with an award of Kshs.10,000,000. Interest on this amount to accrue from the date of that judgment.

31. As the appeal has only partially succeeded, we order that each party bears their own costs of this appeal. We so order.

DATED AND DELIVERED AT NYERI THIS 8TH DAY OF NOVEMBER 2024

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL