



Muiruri (Suing as the legal representative of the Estate of the Late Edward Muiruri) v Athi Water Services Board & 8 others (Environment & Land Case E202 of 2020) [2024] KEELC 3913 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E202 OF 2020**

**AA OMOLLO, J
APRIL 24, 2024**

BETWEEN

HELLEN WAMBUI MUIRURI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE EDWARD MUIRURI) PLAINTIFF

AND

**ATHI WATER SERVICES BOARD 1ST DEFENDANT
COUNTY GOVERNMENT 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
SAMSON MWENJE 4TH DEFENDANT
SOCIETY LIMITED 5TH DEFENDANT
SOPHIA NJOKI KARANJA 6TH DEFENDANT
JOHN BOSCO NDUNGU KARANJA 7TH DEFENDANT
KIRAGU KIGONDU 8TH DEFENDANT
MARTIN MBUGU KANYIRI WAMAE 9TH DEFENDANT**

JUDGMENT

1. Hellen Wambui Muiruri brought this suit as the administrator of the Estate of Edward Muiruri who was the registered owner of land parcel number Dagoretti/Riruta/17. Initially nine (9) defendants were sued but on 2nd May, 2023, the plaintiff withdrew the case against the 2nd, 4th and 6th – 9th defendants. Consequently, the suit proceeded against the 1st, 3rd and 5th Defendants.



2. The plaintiff avers that the 1st defendant has encroached on their land Dagoretti/Riruta/17 (hereinafter referred to as the suit land) by constructing a wayleave yet the pipeline should pass through Waithaka area. She listed the particulars of the encroachment as follows;
 - a. The Defendants have continued to encroach the deceased's land and there is need to have the boundaries established.
 - b. A plan from the Nairobi County Government dated 15th August, 1984 indicates that the way leave should pass on Dagoretti Waithaka and not Dagoretti Riruta.
 - c. Putting up building on the suit property and digging trenches for the water pipes without the consent of the plaintiff.
 - d. Implementing the water project on an area that is not gazette and in contravention of the approved plans.
3. She added that they had raised concerns and objections on the pipeline being constructed on the suit land but the 1st Defendant has resorted to intimidating the family using the police to agree to the construction. That despite notice of intention to sue given, the Defendants have not heeded. The plaintiff prays for judgment as follows;
 - a. A permanent injunction do issue restraining the Defendants whether by themselves, their agents and or servants or any other person from further encroaching, trespassing, and constructing a water way leave or dealing in any manner with the property Title deed number Dagoretti/Riruta/17.
 - b. A mandatory injunction do issue compelling the 1st Defendant to remove all pipes, structures and materials placed beneath and on the suit land. In the alternative to compensate at the current market rates the plaintiff's father's estate for the loss and use of the suit property to the extent so encroached.
 - c. The court order the supervision of the OCS Kabete Police Station during the demolition and removal of the illegal, structures and water pipes erected on Dagoretti/Ritura/17 by the Defendants.
 - d. General damages
 - e. Interests thereon.
 - f. Costs of the suit together with interest thereon at court rates from the date of judgment until payment in full.
4. The 1st Defendant filed a statement of defence dated 16th February, 2022 denying the claim. The 1st Defendant pleaded that it obtained consent to enter the suit property so they are not trespassing/encroaching. They aver that after inspection conducted by the Water Resources Management Authority, it was established that the area falls within Waithaka area. Further that the land is within Ndwaru swamp measuring 0.28 km along the Gachecha stream.
5. The 1st Defendant denied the contents of paragraphs 16 – 19 of the plaint. In answer to paragraph 20, it stated that there were engagements with the representatives of the estate of Edward Muiruri where a valuation for the affected area was initially put at Kshs.2,480,625.60. That there has been ongoing succession dispute in HC Succession Cause No. 1926 of 2009 concerning the suit property.



6. The 1st Defendant pleaded further that the claim does not meet the threshold for granting a permanent injunction. Instead, the balance of convenience weighs heavily on the 1st defendants being allowed to undertake the project which will supply water to a targeted population of 622590. They urged that the suit area falls within a public land hence the construction is lawful.
7. The 5th Defendant also filed a statement of defence dated 11th March, 2021 also denying the claim as filed by the plaintiff. The 5th defendant admitted that it is the owner of land reference number Dagoretti/Riruta/1340 bordering the suit property. The 5th defendant denied encroaching on the suit property and denied the particulars of encroachment set out in paragraph 16 of the plaint. Further, it is their plea that the suit does not disclose any cause of action against them.
8. At the close of pleadings, parties agreed to call oral evidence. The plaintiff relying on the evidence of a sole witness gave her testimony on 13th June, 2023. Ms. Muiruri said she is a resident of Degoretti Riruta and is a businesswoman. She added that she is one of the administrators of the estate of Edward Muiruri-deceased who owns the suit property. She adopted her written statement as her evidence in Chief where she stated inter alia that the 1st Defendant was intermeddling with property of a deceased person. She asserted that the neighbouring plot belonged to the area MCA Mr. Kiragu who together with other neighbours have encroached the suit property and are influencing the re-routing of the wayleave at their expense.
9. PW stated that the matter has been widely discussed and several meetings held with the 1st defendant to halt the construction of the pipeline to no avail. That the 1st Defendant issued them with a grant of easement which is fatally defective and it is being forced down her throat. That it is important to have the boundary dispute resolved and boundary ascertained to determine the extent of the trespass.
10. In cross-examination, Ms. Muiruri stated that David Kamau who is a co-administrator was aware that she had instituted this suit. She conceded seeing the consent given to the 1st Defendant but alleged that the names of people giving consent were hidden. It is her evidence that she was given an amount of Kshs.37 million as compensation but no money has been paid. She was unaware that the valuation prepared by the 1st defendant was less than Kshs.37 million.
11. In further cross-examination by Mr. Chemutai learned counsel for the 5th defendant, the plaintiff answered that the 5th defendant was sued because she wanted to know the boundary. She added there is an existing boundary dispute between the suit property and the 5th defendants parcel dating back from 1995 but she had not produced the letter to corroborate the assertion. She was aware of a survey exercise on 20th April, 2021 and not on 24th May, 2021. Showed the survey report filed by the 5th defendant, the witness insisted there is encroachment by the 5th defendant.
12. In re-examination, the witness said the boundary dispute between their land and the 5th defendant's land has not been resolved. That the suit has been brought for the benefit of the estate of Edward Muiruri who has never been paid any money. This marked the close of the plaintiff's case.
13. Mr. James Githanga gave evidence on behalf of the 5th defendant (DW1). The witness adopted his written statement and produced the bundle of documents filed. He said that their survey report dated 24th May, 2021 filed confirmed they had not encroached on the suit property. That it is the 1st defendant who had encroached on their land and they had sued it vide CMC CC E6192 of 2020.
14. During cross-examination by Mr. Mbuthia – Kinyanjui learned Counsel for the plaintiff, DW 1 admitted they share a boundary with the plaintiff. That there was no boundary dispute until the plaintiff filed this suit. That their survey report dated 25th May, 2021 does not make reference to the suit property and the Registrar only estimate beacons to their land. He confirmed that the pipeline by



- the 1st defendant crosses through their property. That during the survey exercise, all their neighbours were present as witnesses. In re-examination, DW 1 asserted that the surveyor established their beacons were in the right places. This marked the close of the 5th defendant's case.
15. On 19th October, 2023, Benson Maina Githinji gave evidence on behalf of the 1st defendant testifying as DW 2. He introduced himself as a practicing valuer with a valid practicing certificate for the year 2023. That he was engaged by management at I. B. Patel Ltd to undertake a valuation on Nairobi City Water distribution network. He referred to the valuation report dated February, 2020 over the suit property. That the site inspection was done on 7th August, 2019 which curved out the affected area measuring 0.24 acres.
 16. The witness listed at page 3 of the report the assets that were to be affected including Sukuma wiki, wooden fence, flower bush etc. It is his evidence that they adopted different ideologies for giving value to the items to be affected as explained in their report. He concluded that the compensation amount of Kshs.11,183,080.13 arrived at was reasonable as it was based on market rates and the amount of Kshs.35 million proposed by the plaintiff is exaggerated.
 17. Under cross-examination by the plaintiff, DW 2 stated that he visited the suit property although he is not the originator of the report. He agreed that currently a plot measuring 50 x 100 costs between Kshs.7 – 10 million. That the suit property has water and electricity supply nearby. According to the plaintiff, the affected area is 0.32 acres which in his assessment on the lower side is Kshs.13.44 million plus 15% total of Kshs.15,495,475 while on the higher side, it would be valued at Kshs.22,119,675. That based on the size of land given by the director of survey, the approximate value of Kshs.35 million is correct.
 18. DW2 conceded that when they when they visited the suit land, there was no one from the office of the director of survey to point out the beacons. He was not aware of the 1st report by the plaintiff. In re-examination, DW 2 said he was shown the area required by the engineer who did the design. That the length of the pipeline (easement) is 281.3m with a width of 3.5 million gives 0.2461 acres. He maintained that the area affected was 0.2461 acres. That they had put a value of the land at Kshs.50 million per acre. This marked the close of the 1st Defendant's case.
 19. Parties took time and filed their written submissions. The submissions are dated 14th November, 2023 for the plaintiff, 4th December, 2023 for the 1st Defendant and 1st December 2023 for the 5th Defendant. The 1st Defendant raised two issues which they discussed in their submissions to wit;
 - a. Whether the trespassed on the suit land and breached the plaintiff's right under article 40 of *the Constitution*.
 - b. Whether the compensation amount was commensurate.
 20. The 1st Defendant in submitting that they did not trespass cited the provisions of article 40(3) of *the Constitution* 2010 which provides as follows;-

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--



- i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
21. Further they relied on the meaning of trespass as given in the case of *Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a* [2018] ECLR paragraph 22 thus;

“The court describe trespass as where any person who without reasonable enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier.”
22. The 1st defendant also said they produced a copy of consent letter dated 26th February, 2020 as Dex. 5 signed by David Kamau and other beneficiaries giving them permission to the suit land for purposes of implementing the works. They also referred to Dex 7, 8 and 9 which are correspondences dated 1st November, 2019, 1st January, 2020 and 27th, April, 2021 exchanged between the 1st Defendant and David Kamau acting on behalf of the deceased family. Thus, their argument is hey have not trespassed/ encroached as alleged in this suit.
23. On whether the compensation offered was commensurate, they relied on section 148(1) of the *Land Act* 2012 which stipulates thus;

“(1) Subject to the provisions of this section, compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees, crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified Valuer.”
24. The 1st Defendant submits that at the time of conducting the valuation, they have highlighted the assets to be affected by laying the pipeline on the suit land. that although the value of an acre of land was placed at Kshs.50million, a reduction of 25% was applied since the easement was for a public right of way to reduce the value to 37,500,000 per acre.
25. In critiquing the valuation report of the plaintiff, the 1st defendant cited the case of *Patrick Tuinda Maingi v Kenya Electricity Transmission Company Limited* [2017] eCLR which stated thus;

“It is trite that several factors always affect the value of land at any given time. These factors ought to be stated in the valuation report as to enable the reader to understand how a Valuer arrived at a particular Current figure as the open market value of the land in question.”

and *Zum Zum Investments Ltd v Habib Bank Ltd.* [2014] eCLR which observed thus;

“In my view, the plaintiff has not demonstrated satisfactory why this court should disregard the Defendant’s valuation report and only rely on the Plaintiff’s valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactory demonstrate why the valuation report that the Defendant intends to rely on disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant’s valuer is not qualified or



competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before time of the intended sale.”

26. The Plaintiff framed one question for determination of the dispute to wit;
 - a. What would be the fair compensation for the illegal encroachment?
27. The plaintiff submitted that it relies on two valuation reports; one by a private valuer (not filed) and a second one by the Ministry of Land and Physical Planning. That the former gave the value of Kshs.37,500,000/= while the latter gave the value at Kshs.25,000,000. The plaintiff averred that since the report by the 1st Defendant included affected assets and a disturbance allowance of 15%, the same should be added for in their valuation report of Kshs.25,000,000 which then gives a summative figure of Kshs.28,773,175.
28. The plaintiff supported its submissions by citing the provisions inter alia article 65 and 40 (3) of *the Constitution* 2010. She also cited the case of *Katra Jama Issa v A. G. & 3 Others* [2018] eKLR which held thus;

“... Compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority” (emphasis added)”
29. The plaintiff contends that the valuation as proposed by the 1st Defendant is below market rates. She proposes that compensation be computed as hereunder.
 - a. Area of land acquired 1295M equivalent to 0.32 Acres Approx.
 - b. The Value of the land Kshs.25,600,000.
 - c. The value of the improvements Kshs.21,500
 - d. The 15% disturbance allowance Kshs.3,843,225
 - e. The total compensation payable for the land and improvements inclusive of 15% disturbance allowance and any other applicable statutory additions (if any) Kshs.29,464,725.
30. I adopt the two issues framed by the 1st Defendant for determination of the dispute. I am also persuaded by the 1st Defendant that it explained itself well in answering the allegation that it had encroached on the suit property. Probably, it is based on the documents produced by the 1st defendant that the plaintiff abandoned the claim on trespass/encroachment and now submitted only on the question of compensation.
31. Therefore, this court is called upon to determine whether or not the sum of Kshs.10,652,552 offered by the 1st defendant is fair compensation to the plaintiff. According to the 1st Defendant, the area affected was 0.2461 acres calculated from the length of the pipes and width 102 x 30). DW 2 said they adopted an active market rate of an acre at Kshs.50,000,000 reduced by 25% for its easement rate to give a sum of Kshs.37.5 million per acre. He added that in easement, the land owner retains ownership of land with restricted use of easement corridor.
32. In the plaintiff's valuation report dated 27th October, 2021 the size of the land affected is given as 0.32 acres. The value is put at Kshs.25 million. The 1st Defendant faulted this valuation report for failing to give reasons/breakdown on how the said figure was arrived at by citing the case of Patrick Tunda



vs Kenya Electricity Transmission Ltd supra for the proposition that factor considered must be stated in the valuation report to enable a reader know how a valuer arrived at a particular current figure. The Plaintiff instead submit that since their report did not include the affected assets, the same should be added which then raises the value of the compensation to Kshs.29 million.

33. To begin with the plaintiff did not call the make of her valuation report as a witness so that this court cannot delve into was assessed and what was not assessed. I can only assume that the report gave an inclusive value of what they felt was fair compensation to the plaintiff. I decline the invitation to re-assess the items as computed in the 2nd last paragraph of the plaintiff's submissions.

34. In so far as the size of the land affected, I will go by the size stated by plaintiff of 0.32 acres (as per the survey report dated 27th October, 2021) taking into consideration the admission of the 1st Defendant's witness that he visited the land before the construction of the pipes and even then, he did not take measurements.

35. Taking note that the size of the land encroached is 0.32 acres, the question for determination would be the commensurate amount for just and fair compensation. The survey report relied upon by the plaintiff gave the approximate value of the portion at Kshs.25 million. The 1st Defendant has critiqued this valuation for not breaking it down and relied on the case of Patrick Tunda Maingi v Kenya Electricity Transmission Co. Ltd. [2017] eKLR which held that:

“It is trite that several factors always affect the value of land at any given time. These factors ought to be stated in the valuation report as to enable the reader to understand how a valuer arrived at a particular current figure at the open market value of the land in question.”

36. In the valuation report dated February, 2020 by the 1st Defendant, it stated that the owner (plaintiff) retains his ownership of the suit land despite the laying of the easement with restricted use of easement corridor. To this extent, I agree that a blanket valuation of the suit portion as stated in the valuation report by the provincial surveyor does not offer useful guide in assessing the value of compensation payable to the plaintiff.

37. Having stated the above, and having taken note of the value given at Kshs.10,650,552.60 for the size of land 0.2461 acres which is smaller in size than the actual land taken (small by 0.08 acres) consequently in determining the commensurate value, I have considered the additional size of land not assessed by the 1st defendant as well as the decision in Zum Zum Investments Ltd vs. Habib Bank Ltd (2014) eKLR at paragraph 27 thus;

“In my view, the Plaintiff has not demonstrated satisfactory why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendants intends to rely on in disposing of the suit property of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale.”

38. The additional land size forms approximately 1/3 of the size of land assessed by the 1st Defendant which then attracts additional sum of approximately Kshs.3.5 million per the valuation by the 1st Defendant. Therefore, the Kshs. 3.5 million is added to the sum of Kshs.10,650,552.60 gives total of



Kshs.14,150,552.60. This court then increases minimally the assessment by the 1st Defendant because the evidence of the expert witness is to guide the court and not to bind it.

39. In light of the foregoing analysis, I hold that the plaintiff estate is entitled to the sum of Kshs.18,000,000 as fair and just compensation for the 0.32 acres of their land taken by the easement constructed by the 1st Defendant. The said sum is payable immediately and shall attract an interest at court rates from the date of this judgment until payment is made in full. Costs of the suit is also awarded to the plaintiff payable by the 1st defendant. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2024

A. OMOLLO

JUDGE

