IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M?INOTI, JJ.A.)

CIVIL APPEAL NO. 299 OF 2014

BETWEEN

MOSES ONCHIRI

(*Suing on his own behalf and in the interest of 475 other persons being former inhabitants of KPA Maasai Village, Embakasi within Nairobi*)…. **..APPELLANT**

AND

KENYA PORTS AUTHORITY ……..……...……...1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI……..……..……..2ND RESPONDENT

THE MINISTER FOR INTERNAL

SECURITY & PROVINCIAL ADMINISTRATION…....3RD RESPONDENT

MINISTER FOR LANDS ……..……..……4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…....……5TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 18th March, 2014,

in

Petition No. 38 of 2012)

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JUDGMENT OF THE COURT

Until the morning of 29th October, 2011 the appellants together with many others had made their homes and complementary social amenities in Maasai Village in Embakasi area of Nairobi County. It was their case that they settled in an area comprised in thirteen (13) titles from 1982, constructed permanent and semi

permanent dwelling houses, schools, churches, medical facilities and other establishments; that they enjoyed actual and uninterrupted possession for a period of 18 years; and that the Government recognised their occupation, rights and status on the land by providing additional social amenities and security to the residents.

On 15th September, 2011 the Kenya Airports Authority (the 1st respondent) placed a notice which the appellants described as a reminder in the ***Daily Nation*** newspaper of 18th September, 2011 that read;

> **"NOTICE TO VACATE ILLEGALLY DEVELOPED AND ENCROACHED PORTIONS OF KENYA AIRPORTS AUTHORITY LAND L.R. NO.21919 AT KYANGOMBE, AND SYOKIMAU, JOMO KENYATTA INTERNATIONAL AIRPORT AND L.R NO.209/13080 MITUMBA VILLAGE AT WILSON AIRPORT".**

The notice required those who had encroached upon the identified parcels to vacate them within seven days of the reminder. The notice did not affect the appellants as the portions they occupied were only adjacent to **L. R. NO. 21919.** They nonetheless, through their advocate wrote to the 1st respondent drawing its attention to a pending suit being Petition No.103 of 2011 and the existence of an order therein in respect of the parcels of land adjacent to the parcels forming the subject matter of the notice. In the morning of 29th October, 2011, despite this letter, a battalion of police officers, said to be acting on the instructions of the 3rd respondent, officials of the 2nd respondent and other State officials descended on the appellants' structures on the suit land with bulldozers and earth movers, illegally, unlawfully and forcefully evicted the appellants and their families after razing to the ground their dwellings and all other amenities. Following these demolitions, the appellants petitioned the High Court pursuant to numerous provisions of the Bill of Rights under the Constitution alleging that their rights and fundamental freedoms to privacy, property, housing, dignity, and against any form of violence or torture, were violated by the actions of the respondents and prayed for;

> **"a) A DECLARATION that the said actions and omissions of the Respondents in, destroying, demolishing the Petitioners household properties, permanent and semi-permanent structures on the suit premises and the subsequent evictions were unlawful, illegal, unprocedural, unjustified, inhuman and in violation of the Constitution more so in breach of the Petitioner's' Fundamental rights and Freedoms as espoused under Articles 27, 28, 29, 31, 40, 43, 45, 47, 53, 54, 56 and 57 of the Constitution of the Republic of Kenya.**
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> **b) A DECLARATION that the said actions and inactions of the Respondents in destroying, demolishing the Petitioners household properties, permanent and semi-permanent structure on the suit premises and the subsequent evictions were in breach of international Law and International Human Rights Law as espoused under the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic Social and Cultural Rights and the African (Banjul) Charter on Human and Peoples Rights.**
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> **c) A DECLARATION that the said actions and inactions of the Respondents in destroying, demolishing the Petitioners household properties, permanent and semi-permanent structure on the suit premises and the subsequent evictions were in breach of the principle of legitimate expectation, the doctrine or Reasonableness and proportionality.**
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> **d) A DECLARATION that the Respondents, particularly the 4th Respondent have a duty to formulate with citizen participation Regulations, policies and standards of Evictions which are in tandem with International principles, that avoid undue declaration and violation of the Rights of Citizen.**
>
> **e) AN ORDER OF MANDATORY INJUNCTION compelling the Respondent to avail all such information relating to the suit premises including but not limited to the following, resolutions of all organs of the Respondents that authorized the demolition, alienation of the**

suit premises and subsequent eviction of the Petitioners.

f) AN ORDER for restoration of possession of the suit premises to the Petitioners herein and their families restoring the Petitioners herein into possession of the suit premises and upon such orders the Respondents be restrained by way of permanent injunction restraining them whether by themselves, their agents, servants or any other person or state official, organ and/or institution from in any way interfering with the Petitioners such possession until further orders of this Honorable Court.

g) AN ORDER FOR COMPENSATION of the Petitioners by the Respondents for unlawful, illegal, unjustified and unconstitutional evictions for the losses and damages suffered by the Petitioners in terms of the Valuation Report annexed herein.

h) AN ORDER for general, exemplary and punitive damages on an aggravated scale for the damage caused by the Government of the Republic of Kenya through the Respondents acting through its agents, servants and/or officials.

i) Any further orders, writs, directions as the Honorable Court may deem fit to grant."

To the petition the respondents reacted by the 1st respondent filing a notice of preliminary objection insisting that under **section 33** of the Kenya Airports Authority Act the remedy for the matters complained of lies in arbitration hence the court lacked jurisdiction and further that the notice required under section **34(a)** of that Act was not given. The 2nd respondent filed both the grounds of opposition and a replying affidavit, the combined effect of which was that there was no authority to the person named in the petition as the appellant (Moses Onchiri) to bring the petition on behalf of all the 475 persons indicated in the petition; that no cause of action was disclosed by the petition against the 2nd respondent; and that the valuation report by M/S Dantu Valuers were inadmissible. On behalf of the 3rd, 4th and 5th respondents the Attorney General filed grounds of opposition in which it was maintained that the declarations sought by the appellants were not available as the economic and social rights claimed in the petition are limited and progressive under **Articles 21** and **25** of the Constitution; that infringement of the rights as alleged in the petition has not been demonstrated; similarly, that there was no proof that the appellants owned the suit property; that no legitimate expectation can be founded on an illegality; that there was no court order barring the eviction of the appellants; that a notice of eviction was duly served but ignored; that provision of social amenities by the Government to the area did not confer or confirm ownership of the suit property by the appellants; and that eviction was effected in the public interest.

When the petition came up before Majanja, J, by consent of counsel representing all the parties it was agreed that the petition be canvassed through written submissions. But of significance, counsel also agreed that since the cause of action and the issues involved in the petition were similar to those in a previously decided petition by the same court, being Nairobi Petition No. 356 of 2013, **June Seventeenth**

Enterprises Ltd (Suing on behalf of and in the interest of 223 Others) v **Kenya Airports Authority and Others** that only the question of quantum would be tried. The aforesaid earlier petition had involved some 223 residents of Maasai Village whose structures were also damaged in the demolitions of 29th October, 2011, for which reason parties and the learned Judge found it necessary to record that consent and agreed that liability having been settled as against the 3rd, 4th and 5th respondents counsel were to prepare their submissions on quantum of damages. In that previous suit the learned Judge made the following four determinations and declarations;

i. That the case against Kenya Airports Authority and Nairobi City Council be dismissed with no order as to costs as no cause of action against the two was disclosed.

ii. That the State violated the provisions of **Article 21** by failing to develop and enact a policy and legislation to deal with forced evictions.

iii. That the rights and fundamental freedoms of the occupants of LR No. 209/13418, 209/13419, 209/13420 and 209/13421 situated along Airport North Road otherwise known as Maasai Village protected under **Articles 28, 29, 43** and **47(1)** of the Constitution were violated by the 3rd and 4th respondents through eviction from the said land on 29th October 2010, and;

iv. Judgment entered for each of the 223 persons represented in those proceedings in the sum of Kshs.150,000/= as damages for the violation of their rights and fundamental freedoms.

The learned Judge considered the submissions made with regard to quantum for compensation for ***"the losses and damages suffered by the petitioners (appellants) in terms of the valuation report***" as pleaded in paragraph (g) of the petition. In particular he evaluated the submissions around the preliminary report prepared by Dantu Valuers dated 13th January 2012 which estimated the total value of loss to the appellants as Kshs. 1,557,7 billion. He also considered the submissions by the respondents that the question of quantum be restricted only to the 45 persons who authorised, in writing the institution of the petition.

On the first issue the learned Judge held that;

> **"5. The principles upon which the court grants special damages are well settled. They must be pleaded and proved. This has not been done in the petition and furthermore, even the evidence, while demonstrative of some loss, does not point to specific loss by specific individuals. In the circumstances, the pleadings do not support the claim and the evidence lacks a factual basis".**

On the second issue he said;

> **6. Whether the Court should award damages to all the persons whose names are stated is an important issue. In a representative suit such as this one, the parties represented must consent to their names being used in the suit by appending their signatures or some explanation must be given as to the failure to do so…….. The signatures on the list confirm that the persons listed therein have agreed that they be represented in the suit.**
>
> **7. In the circumstances, I find and hold that unless the other claimants establish that their instructions were given at the time of filing the suit, the damages shall be limited to those who have signed the authority"**.

With that, the learned Judge, like he did in the previous petition, entered judgment in favour of only those who had given authority for the bringing of the petition and ordered the case against the 1st and 2nd respondents dismissed with no orders as to costs for failing to disclose a cause of action; issued declarations that the State violated the provisions of **Article 21** by failing to develop a policy and enact legislation to deal with forced evictions; that the rights and fundamental freedoms of the occupants of Maasai Village situated along North Airport Road, Embakasi (the suit land) protected under **Articles 28, 29**, **43** and **47 (1)** of the Constitution, were violated by the 3rdand 4threspondents in the manner in which they were evicted on 29th October 2010; that the persons who executed the legal authority would be awarded Kshs 150,000/= as damages for violation of their fundamental rights and freedoms; and that the costs of the suit would be awarded to the appellants.

Those two conclusions and the award of damages aggrieved the appellants who have challenged them before us on the following grounds.

> **"a) That the learned judge erred in law and fact by failing to consider the matter on its own merit but on the merit of another case Nairobi Petition No. 356 of 2013.**
>
> **b) The learned judge erred in fact and law by failing to consider evidence being the valuation report before awarding the compensation sought.**

c) The learned judge erred in law and fact by failing to consider the valuation report when the same had not been contested by the respondents.

d) The learned judge erred in law and fact when he held that the petitioners had not pleaded for compensation in the Petition when the same had been pleaded for.

e) That the learned judge erred in law and fact in holding that the petitioners who had not signed the consent to institute proceedings when in fact the matter is a representative petition filed on behalf of others".

The appeal was canvassed through written submissions which were subsequently highlighted before us. Although in their written submissions the appellants' submissions touched on both liability and quantum of damages, **Dr. Khaminwa**, **S.C**. by and large restricted his oral submissions to the latter award which he described as ridiculously low. He urged us to disturb it while taking into account the kind of structures that were destroyed, some of which, he submitted, were fit even to be occupied by the Queen of England; were as grand as any palatial home in Muthaiga or Runda. He urged us also to consider the manner the demolition was executed; early on a rainy morning with children and women screaming; violently with the use of arms; lack of opportunity for the appellants to salvage anything; without sufficient notice; and in the face of a court order. Learned counsel further argued us to find that the learned Judge grossly misdirected himself by restricting the award of damages to only those persons who had signed for the filing of the petition.

Mr. Mutua, S.C. for the 1st respondent asked us to dismiss the appeal for, in his view it had no merit; that, even though the only determination made by the learned judge, following a consent by the parties related to the quantum of damages, the memorandum of appeal was brought as if it was challenging liability, which had been settled by consent; that Kshs. 1.5 billion sought in damages was not proved as it was supported by an incompetent valuation report.

Mr. Otieno, learned counsel for the 2nd respondent similarly opposed the appeal arguing that since the suit against the 2nd respondent in Petition No.356 of 2013 was dismissed, and in terms of the consent recorded before the trial court, the 2nd respondent was not liable in the present petition.

The 3rd, 4th, and 5th respondents filed three-page submissions but were not represented when the appeal came up for the highlighting of those submissions. They too urged us to dismiss the appeal in view of the provisions of **order 1 rule 13** of the Civil Procedure Rules under which only those who have given written authority for the institution of an action can benefit from or be affected by its outcome; and that the award of damages is an exercise of judicial discretion by the trial court which will not lightly be interfered with by the appellate court; and that the award was sufficient in the circumstances.

We start with the general principles that apply to the facts of this dispute. As a first appellate court we proceed on the consideration of this appeal by way of a re-hearing based on the evidence on record before we can make our own independent inferences and conclusions. See, **Selle & Another** v **Associated Motor Boat Co. Ltd & Others** [1968] EA 123. We do not, in doing so lightly interfere with the findings and conclusions of the trial court unless the judge is shown to have misdirected himself in some matters with the result that he arrived at a wrong decision or where it is manifest from the case as a whole that the judge was clearly wrong and his decision amounted to an injustice. See also **Peter** v **Sunday Post Ltd** (1958) EA 524.

The second principle is that it is a cardinal rule of procedure that any party who stands to be directly affected by any orders that may be made in any suit and or whose participation is necessary in a suit for effective adjudication of the matters in controversy ought to be made a party in the suit or at least be notified about the existence of the suit. Under **order 1 Rule 13** aforesaid, where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. It is a mandatory requirement that the authority be in writing, signed by the party giving it and filed in the case. **Research International East Africa Ltd. vs. Arisi & Others**,

[2007] 1 EA 348. Under Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules), any person alleging violation or threatened violation can petition the High Court, and any person acting as a member of, or in the interest of a group or class of persons may also petition the High Court on behalf of the members, group or class of persons for redress. The same principle in Order 1 Rule 13 aforesaid must, by necessary implication apply where a petition has been instituted on behalf of many people.

The third principle relates to the powers of the court in awarding damages. It is a function of the exercise of discretion by the trial court. In exercising that discretion certain limits must be borne in mind. Those limits have been the subject of consideration in numerous judicial decisions. But in brief, an appellate court will not normally disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge or magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material aspect and so arrived at a figure which was inordinately high or low. See **Butt** v **Khan** [1977] 1 KLR 1. Damages are awarded to give reasonable compensation to a party for an injury. The following advice of Potter JA, in **Rahima Tayab & Anor** v **Anna Mary Kinanu** (1987 – 88)1 KAR 90 summarizes the rest of the principles in this regard. He said;

> **"I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Sons Ltd v Hepherd (1964) A.C 326 at page 345:-**
>
> **„But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is award sums, which must be regarded as giving reasonable compensation.**
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> **In the process there must be an endeavor to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed with moderation. Further-more, it is eminently desirable that as far as possible comparable injuries should be compensated by comparable awards. When all this is said, it still must be that amounts which are awarded are to a considerable extent conventional**" (our emphasis).

Fourth, the burden of proof is on the party who asserts the existence of a fact and the standard of proof is on preponderance of evidence. See **Miller vs. Minister of Pensions** [1947] 2 ALL ER 372.

The fifth principle is that special damages must be specifically pleaded and proved at the trial. See **Hahn v. Singh** [1985] KLR 716.

The sixth and final point is that a monetary award for constitutional violations is not confined to an award of compensatory damages in the traditional sense. The court is more concerned to uphold, or vindicate, the constitutional right which has been contravened. This point was explained by the Court in **Hon. Gitobu Imanyara & 2 Others** v **The Attorney General**, Civil Appeal NO. 98 OF 2014 as follows;

> **"The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.**
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> **Per Lord Nicholls at Paragraphs 18 & 19:**
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> **„When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a**

useful guide in assessing the amount of this compensation. **But this measure is no more than a guide** ……

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

Apparent from the foregoing is that the nature of the damages awarded may be compensatory but should always be vindicatory, if circumstances demand.

It was agreed by consent of all counsel in the matter before the trial court that the determination on liability in **June Seventeenth Enterprises Ltd** (Supra) be applied to the petition, the subject of this appeal, leaving only the question of damages to be decided by the court. Before the court below Mr. Ayekha, advocate who represented the appellants addressed the court saying;

“MR AYEKHA- Having established liability, the issue is only about assessment of damages.”

It is now well settled law that a consent order like the one in this matter has contractual effect and can only be set aside on grounds which would justify setting a contract aside. See **Hirani** v. **Kassam** [1952] 19 EACA 131. There was no suggestion of misrepresentation, duress, fraud, or undue influence when the consent was recorded.

There cannot be any doubt that the willful and wanton destruction of property, even of a trespasser without due process violates human rights protected under our Constitution and by other international instruments. It is not in contention that the evictions were violent, disruptive to the lives of the victims; that property of various values were destroyed; and that residents and their families were rendered homeless. This was by no means a small claim, considering the sheer numbers of the victims. It is said to have involved 475 or so victims; the type of structures destroyed which learned counsel compared to those in Muthaiga and Runda, suitable for habitation by Her Majesty the Queen. A claim of Kshs 1 billion is not the kind of suit one comes across that often in our courts. Both the appellants and counsel representing them were expected under the overriding objective to assist the court in reaching the proper resolution of the dispute. The appellants’ case was to be presented in a way that would help the court to achieve the correct outcome. The success of a case of this magnitude, involving allegations of human rights violations against the State lies in the way in which the case is assembled and presented to the court. We are constrained, with respect to conclude that no attention was paid to details required for the proof of the claim. When 475 people said to be aggrieved by the actions of the respondents, why would there be only 45 giving authority to petition the court? In case of an award, who was to be paid the money awarded to those who did not give their authority to **Moses Onchiri,** the appellant? This was a critical aspect of the claim considering that there were very many people involved, some of whom, (223) had been compensated in **June Seventeenth Enterprises** (Supra).For all these reasons we cannot find any error in the learned Judge's decision to limit the award to only those who had given authority in writing.

The award of Kshs. 150, 000/= was not only adequate in the circumstances of the case but appears to have been made pursuant to what we said earlier regarding monetary award for constitutional violations; that they are both compensatory and vindicatory. There was absolutely nothing in the valuation report to remotely suggest how the huge figure of Kshs.1.5 billion was arrived at. According to a report prepared by Mwaka Musau Consultants presented by the 1st respondent in rebuttal of that of M/S Dantu Valuers, the latter report did not conform to the requisite conditions of such a report. It had no Land Reference number, terms of reference, description of the location of the parcel of land, its size, tenure, ownership, encumbrances or improvements. In our view it was critical for that report to deal with each destroyed structure, taking into account all these. It is inconceivable how the learned Judge was expected to award damages to the victims on the basis of such a report. It was, to say the least, most incompetent. Written on half-page, yet assessing the loss at Kshs. 1.5m!

The learned Judge concluded that;

> **“5. The principles upon which the court grants special damages are well settled. They must be pleaded and proved. This has not been done in the petition and furthermore, even the evidence, while demonstrative of some loss, does not point to specific loss by specific individuals. In the circumstances, the pleadings do not support the claim and the evidence lacks a factual basis”.**

In the result this appeal lacks substance and is dismissed accordingly with no

orders as to costs.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

……..……

JUDGE OF APPEAL

W. OUKO

……..……

JUDGE OF APPEAL

K. M?INOTI

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR