IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & OKWENGU, JJ.A)

CIVIL APPEAL NO. 215 OF 2014

BETWEEN

STANLEY MUNGA GITHUNGURI …….…….……. APPELLANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ……..…. 1ST RESPONDENT

CHINA ROADS AND BRIDGE CONSTRUCTION CO....2ND RESPONDENT

ATTORNEY GENERAL …….. 3RD RESPONDENT

(An appeal from the Judgment and Decree of the High Court of

Kenya at Nairobi, (D. S. Majanja, J.) dated 21st March, 2014

in

Petition No. 402 of 2013)

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JUDGMENT OF THE COURT

1. The appellant (hereinafter, **Stanley)** complains about an award of Sh. 100,000 given to him by the Constitutional Division of the High Court **(Majanja, J.)** in a judgment delivered on 21st March 2014. In his petition filed on 5th August 2013, he averred that the 1st respondent, Kenya National Highways Authority **(Kenha)** and its authorized agent, the 2nd respondent, **(China roads)** had on 2nd August 2013 trespassed into a 9-Acre portion of his land in Karen under the pretext of constructing the Southern bypass road, destroyed a perimeter fence and cut down several trees over an area of 6 Acres. He claimed that his right to the property under **Article 40** of the **Constitution** had been violated through an arbitrary process which ignored the provisions of the **Land Act** and the **Land Acquisition Act**. The respondents had therefore acted in excess and/or want of jurisdiction, he contended, and enjoined the Attorney General **(AG)** in the petition as the legal advisor to the Government.

He sought the following reliefs:-

(a) A conservatory order do issue to restrain the respondents each and all of them, either by themselves or through their agents, servants, nominees or otherwise, from entering, remaining upon, or in any way interfering with the petitioner's enjoyment of the property known as Land Reference Number 12389 and 1055/31.

(b) A declaration do issue that the respondents' actions of entering into the petitioner's said property contravenes the rights of the petitioner to own and acquire property of any description in any part of the Republic as enshrined, guaranteed and protected under Article 40 of the Constitution of Kenya.

(c) A declaration that as a consequence of the violation the petitioner's right to property and the encroachment into the said property by acts of the 1st and 2nd respondents the petitioner is entitled to damages and upon inquiry an award on damages be made.

(d) An order of injunction do issue, restraining the respondents each and all of them, either by themselves or through their agents, servants, nominees or otherwise, from entering, remaining upon, or in any way interfering with the petitioner's enjoyment of the property known as Land Reference Number 12389 and 1055/31.

(e) The petitioner be awarded the costs of these proceedings.

(f) Such other or further order as to this Court may seem just.

2. In response, Kenha denied the accusation of trespass and objected to the matter being filed as a constitutional petition instead of an ordinary suit for trespass where the parties and their witnesses would testify and have the evidence tested in cross examination. They contended that the land where the trees were alleged to have been cut was in the process of compulsory acquisition by the National Land Commission **(NLC)** for construction of the southern bypass which was a public project. Another portion had been acquired from Stanley by NLC for the same purpose several years earlier. The portion to be acquired borders Kenya Forest Services **(KFS)** land, portions of which had also been acquired for the same purpose. According to Kenha, an employee of KFS had been contracted to clear the KFS land but was invited by an employee of Stanley to harvest some trees from Stanley's land for the employee's own profit. No employee or agent of Kenha or China roads entered into the land or cut any trees, they deposed.

3. Three weeks later, on 23rd August 2013, the NLC gazetted the property for compulsory acquisition and it is common ground that Stanley was eventually compensated for that acquisition in accordance with the law, the land vested in the Government on 15th January 2014, and the road construction has since been completed. The claim was therefore limited to the short period of 5 months when Kenha and China roads are alleged to have entered on the land using tractors and bull dozers after the trees were cut, until the property vested in the Government. Stanley denied his workers had been involved in the cutting of trees. He valued the damage caused at Sh. 45 million, assessed punitive damages at Sh. 4 million and exemplary damages at Sh. 4 million, making a total of Sh. 53 million which he sought as compensation.

4. Majanja J., after considering the affidavits on record and the submissions of counsel found that the petition was properly before the Court because the issue that arose was the taking of Stanley's land before the process of acquisition was commenced and completed. An ordinary suit for trespass was not appropriate. The Court also found that China roads as the agent of Kenha had entered the portion of the land using heavy machinery and removed tree stumps in preparation of road construction. Those actions, he held, were inconsistent with the actions of a single person as contended by Kenha. As Stanley's consent was neither sought nor given before compulsory acquisition, Kenha and China roads were jointly and severally liable for the trespass, he held.

5. As for the relief, the learned Judge referred to **Article 23** of the **Constitution** which authorises the court to fashion the remedy depending on the facts of the case. He considered that the same land had been subsequently lawfully acquired and fully compensated. He considered that Stanley had not pleaded or proved any special damages for the trespass. The Judge was therefore of the view that damages lay at

large and assessed them at Sh. 100,000. He stated in the process as follows:-

> ***"22. While the conduct of the respondents in trespassing upon the suit property cannot be excused, this is not a case where punitive or exemplary damages are appropriate. The Court of Appeal in Obongo and Another v Municipal Council of Kisumu (1971) EA 91, established that the exemplary and punitive damages would be awarded where there is oppressive, arbitrary or unconstitutional action by the servants of the government and where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.***
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> ***23. The act of trespass was not one which was done with impunity, malice or in bad faith. There is no allegation that the respondents' employees were high-handed in their conduct towards the petitioner. Perhaps they were only too enthusiastic to take over land that wouldsubsequently be acquired through the legal process. I therefore reject the claim for punitive or exemplary damages."***

6. Stanley was dissatisfied with that award and has laid out four grounds of appeal to challenge it, basically claiming that the award of damages was very low. Learned counsel for him **Mr. Justus Kiunga** instructed by M/S Munga Kibanga & Company Advocates, in his written submissions and oral highlights urged two substantive issues:

- ***Whether the general damages were in accordance with the law and therefore sufficient;***
- ***Whether the appellant was entitled to the remedies sought in his petition***.

7. On the first issue, counsel argued that the rights of a proprietor of land can only be extinguished under ***Article 40(3)*** of the Constitution upon payment of full compensation. The proprietor will otherwise enjoy the right to quiet and exclusive possession and the full protection of the law under ***Section 23*** of the **Registration of Titles Act** (RTA) (now ***Section 26 (1)*** of the **Land Registration Act**). He relied on the case of ***Kenya Hotel Properties Limited vs Willesden Investments Limited [2009] eKLR*** where the Court of Appeal awarded more than Sh. 20 million for trespass. On the 2nd issue, counsel simply made a plea for interference with the award of damages stating that they were inordinately low.

8. In response, learned counsel for Kenha and China roads **Mr. Frederick Orego,** instructed by M/S Orego& Odhiambo Advocates, submitted that the only reason why this court may interfere with the discretion of the trial court in assessing damages is if the trial court took into account an irrelevant factor, left out a relevant one or the amount is so inordinately low or so high that it must be wholly erroneous estimate. He relied on the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.M. Lubia and Olive Lubia [1982 – 88] 1 KAR 727*** for that proposition. He also relied on the case of ***Evelyn College of Design Ltd vs Director of Children's Department & Another [2013] eKLR*** *a* Constitutional petition matter decided by the same judge a few months earlier in September 2013, where the Judge awarded Sh. 100,000 as damages in vindication of breach of the constitutional right to ownership of property. In view of the available evidence before the trial Judge, submitted counsel, he had no option but to follow precedent. Nothing new has been raised in the appeal and so, according to counsel, the claim on general damages must fail.

9. On the 2nd issue, counsel submitted that a claim for special damages must be specifically pleaded and strictly proved as stated by this Court in ***Sande vs Kenya Corporative Creameries Ltd, [1992] LLR 314 (CAK)***. He observed that there was no pleading of any special damages at all in the petition and submitted that the Judge could not be blamed for disregarding their consideration.

10. The AG in his submissions through learned State Counsel **Mr. Onyiso** cited the principles guiding this court on interference with the assessment of damages in the cases of ***Butt vs Khan [1978] eKLR***, the ***Kemfro case (supra)*** and ***Gicheru vs Morton & Another [2005] 2 KLR 333.*** There was nothing on record, in his view, to show that the Judge proceeded on the wrong principle, misapprehended the evidence or arrived at a low assessment of damages. On the contrary, the Judge gave reasons for the award including the fact of full compensation by the Government after acquisition of the property; the short period of the trespass; and the conduct of the respondents which he did not find contumelious. He

submitted that the purpose of general damages in Constitutional law was to vindicate rights and that compensatory damages were secondary. For this view, he relied on the South African case of ***Dendy vs University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291*** and the Caribbean case of ***Peters vs Marksman & Another [2001] 1 LRC.*** Finally, counsel cautioned that there may well have been double compensation in this case because the appellant had been fully paid for the same property the valuation of which may well have included the monetary aspect of the claim made in the petition.

11. We have considered the appeal record, the submissions of counsel and the authorities cited in aid. The matter before the trial court was a Constitutional petition. There was no plenary hearing and the factual matters stated in the affidavits on record were not tested in cross examination. Nevertheless, the finding made on liability is not in issue as there is no cross appeal. The appeal, as stated earlier, is on the quantum of damages assessed by the trial court.

12. The principles under which this Court may interfere with the assessment of damages awarded by a trial court are now old hat. The ***Kemfro case (supra)*** has provided that guidance and has been followed in numerous other cases. ***Kneller J.A.*** in that case stated***:-***

> ***"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. See Ilango vs. Manyoka [1961] E.A. 705, 709, Lukenya Ranching and Farming Co-operatives Society Ltd vs. Kavoloto [1970] E.A., 414, 418, 419. This court follows the same principles."***

See also the earlier case of ***Butt v Khan [1978] eKLR.***

13. The learned Judge in this case was acutely aware that the matter before him was a constitutional one seeking vindication of rights to ownership of land as guaranteed by the **Constitution** and the **RTA**. That is why he declined to accept the objection that it ought to have been brought by way of an ordinary suit for trespass. The principles for such awards were considered by the Constitutional Court of South Africa in the ***Dendy case (supra)*** cited by the AG as follows:-

> ***"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.***
>
> ***…The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."***

The same principles were also stated in the Caribbean case citing Patterson JA in ***Fuller v A-G of Jamaica (Civil Appeal 91/1995***, (UR) thus:-

> ***"It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable… Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be***

so small as to be nugatory."

14. The Supreme Court of Canada in the case of ***Doucet-Boudreau vs Nova Scotia (Minister of Education)***, ***2003 SCC 62*** made a summary of its own on when a remedy in a Constitutional violation is "just and appropriate". It includes a remedy that will:

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.

15. In awarding general damages at Sh. 100,000, the learned judge in this case followed his own precedent in the ***Evelyn College of Design Ltd case (supra)*** and justified the award by considering relevant other factors like, the length of the trespass which was barely five months; the full compensation made to the appellant after compulsory acquisition which was substantial; and the conduct of the respondents which was not aggravating. In our view, the award accorded with the legal principles for exercise of discretion and we have no basis for interfering with it.

16. The appellant relied on the ***Kenya Hotel Properties Limited case (supra)*** in which damages in excess of Sh. 20million was awarded. With respect, that case is distinguishable. Firstly, the subject matter in that case was a commercial property which was generating active income on daily basis. Secondly, unlike this case, it was commenced by plaint which specifically pleaded loss of *mesne profits* at Sh. 54 million over a period of 4 years and oral evidence tested in cross examination was tendered to strictly prove it. In the end only *mesne profits* of Sh. 22 million was proved over a period of 881 days and this Court reduced the damages accordingly. The Court rejected the claim of Sh. 10 million made for trespass as that would have amounted to double compensation. The appellant here had the option of filing a normal suit for damages which he would have proved in oral evidence but he took a different option. We cannot see how the trial court could have awarded special damages which were neither pleaded nor proved. It would have been contrary to principle.

17. For the foregoing reasons, we find no merit in this appeal and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 30th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR