Maisiba v Athi Water Services Board (Environment & Land Case 582 of 2017) [2025] KEELC 1329 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1329 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 582 OF 2017

LN MBUGUA, J

FEBRUARY 12, 2025

BETWEEN

STEPHEN ONTITA MAISIBA ..... PLAINTIFF

AND

ATHI WATER SERVICES BOARD ..... DEFENDANT

JUDGMENT

1. Vide a plaint dated 13.9.2017, the plaintiff claims that he is the owner of two parcels of land namely; Nairobi Block 122/292 and 293 located at Kasarani in Nairobi County. That vide a letter dated 7.3.2011, the defendant informed him of a project involving the construction of a Trunk sewer line that would run through a small portion of his land, of which, the defendant was to compensate the plaintiff accordingly. The defendant however proceeded to take possession of the two parcels of land without compensation.

2. The plaintiff therefore prays for judgment against the defendant for;

    i. Just and adequate compensation to be determination by the Court for the perpetual right and easement over Plot No. 122/292 and Plot No. 122/293 according to law;

    ii. Independent valuation of the two plots at the expense of the Defendant;

    iii. Damages for gross misrepresentation of facts;

    iv. A declaration that the arbitrary acquisition of way leave through the two parcels of land by the Defendant is illegal and contrary to the provisions of Article 40 of the *Constitution* of Kenya 2010;

    v. Interests on (a) and (b) above; and

    vi. Any other order or further relief this Hon. Court may deem just and fit to grant.

3. The defendant opposed the suit vide its statement of defence dated 10.5.2019 where it concedes to the proposals made in the letter dated 7.3.2011, but avers that compensation was dependent on the determination of the acreage covered by the sewer line. That the original construction was deemed as economically not viable as the sewer line would cut across large tracts of private land, hence the same was redesigned to minimize private land encroachment, such that the new design did not cover parcel 293, while compensation for parcel 292 was assessed at Ksh.392,162, plus Ksh.10,799 for the damaged crops.

4. During the trial, plaintiff testified as the sole witness for his case. He adopted his witness statement dated 11.9.2017 as his evidence. He also produced the 10 documents (they are actually 8) in his list dated 13.9.2017 as P-Exhibits 1-10, one document in his supplementary list dated 21.2.2022 as his P-exhibit 11 (a valuation report) and another document in a list dated 25.3.2024 (the leases for the two parcels) as P-exhibit 12.

5. In his witness statement, PW1 reiterated the averments set out in the plaint. He contended that the defendant irrevocably committed to compensate him, but the amount was not disclosed. He agreed to the proposal on the understanding that the sewer line would only occupy a small portion of his parcel 292, that both parties would execute the Deed of the Grant of the Way leave before commencement of the project, that the project would not affect the productivity of his land and that he would get adequate compensation.

6. That in October 2011, before the parties could agree on the portion to be affected, the defendant commenced construction of the sewer line on the two parcels of land, and in February 2012, the defendant remitted the sum of Ksh.10,799 into his bank account and he was informed that the money was compensation for the damaged crops. Then in April 2012, he was issued with the unsigned Deed of Grant of Way leave where defendant undertook to compensate him to the tune of Ksh.393,162 for parcel 292, but there was no mention of parcel 293. He was also not informed of the formula used to reach that amount, and his efforts to have the amount increased did not bear fruits. The plaintiff avers that to date, he has not been compensated.

7. During cross examination, PW1 stated that indeed he had agreed to give the defendant Way leave on parcel 292 but on the conditions set out in the letter of 7.3.2011, where by the defendant agreed to compensate him but the offer was not made. Probed further on the contents of the Grant of the Way leave at page 16 of his trial bundle, PW1 stated that the offer was made in the said document but it didn't cover parcel 293 and the amount was not for parcel 292. Still in reference to the Deed of Grant of the Way leave, Pw1 stated that he refused to sign it because it was not signed by the defendants.

8. He admits to having received money for the crop damage, but there was no specification as to which parcel of land was factored. He reiterated that the defendant was acquiring the two parcels, but they were only compensating for one.

9. PW1 denies that he was seeking for more money and that that is why he failed to sign the Deed of Grant of Way leave. He also added that he is still in possession of the two parcels.

10. The case for the defence was advanced by Alphaxard Kitheko (DW1) who introduced himself as the principal engineer of the defendant. He adopted his witness statement dated 28.11.2023 as his evidence. He produced the 3 documents in their list dated 15.7.2019 as their exhibits. He contends that the defendant was undertaking a project known as Gatharaini Trunk Sewer which entailed the construction of a sewer line infrastructure covering the North Eastern part of Nairobi city.

11. The scope of the project was the laying of 49 kilometre sewer line covering areas of Mwiki, Kasarani, Zimmerman, Githurai, Ruai Clayworks, Thome and Garden city of which the original path was to

traverse plaintiff's land parcel nos.292 and 293. This original plan however required large tracks of land, and was deemed to be economically not viable. Thus the sewer line was redesigned to minimize encroachment on private land.

12. The defendant therefore gave the plaintiff the letter dated 7.3.2011 requesting the plaintiff for a grant of a way leave through plaintiff's parcel 292. The redesigned sewer line was built on the road reserve of parcel 293, and it then cut across a portion of parcel 292, following which, the said portion was valued and assessed at Ksh. 392,162, and there was further compensation for damaged crops assessed at Ksh.10,799.

13. The defendant then presented the plaintiff with a Deed for Grant of way leave geared towards settlement of the easement over plaintiff's property, but the plaintiff declined to execute the said Deed citing additional compensation for the property known as 293.

14. In cross examination. DW1 stated that the defendant is the one who drafted the Deed, but the same is unsigned and only bears the year 2012. The said Deed refers to parcel 292 where compensation was pegged at Ksh. 393,162 and there is no mention of Ksh.10,799. He contends that the sewer line passes through parcel 292, then unto the road reserve of parcel 293. He further avers that the project was financed by the world bank through the Kenyan Government where the defendant was the implementing agency. However, the component of compensation was being undertaken by the Government.

15. He reiterates that the initial proposal was for the sewer line to run through parcel 293, but it was redesigned to pass through the road reserve, thus the sewer line is next to parcel 293 but it is on public land.

16. In his submissions dated 13.8.2024, the plaintiff rehashes his evidence adding that the arbitrary acquisition of parts of his land is illegal and he is entitled to full and just compensation as outlined in section 144 and 148 of the *Land Act* as well as Article 40 (3) of the *Constitution* of Kenya. To this end, the plaintiff relies on the case of Machareus Obaga Anunda v Kenya Electricity Transmission Co. Ltd (2015) eKLR.

17. The plaintiff further submits that he is unable to utilize 1/3 of his two properties and he is therefore claiming compensation to the tune of Ksh. 8,931,667 in terms of the valuation report dated 6.11.2019, where the two plots have been valued at Ksh. 26,795,000 jointly.

18. The plaintiff is also seeking exemplary and aggravated damages, seeing that the actions of the defendant were oppressive, arbitrary and unconstitutional. To buttress this point, the plaintiff relies on the case of Titus Gatitu Njau v Municipal Council of Eldoret (2015) eKLR amongst other decisions.

19. The submissions of the defendant are dated 6.9.2024 where it is averred that plaintiff's submissions and evidence are a departure from his pleadings, since in the former, he is asserting a claim of trespass contrary to the provisions of Order 2 rule 16 of the Civil Procedure Rules. On this point, reference was made to the case of James Githua Karongo v Margret Kirigo Karogo [2017] eKLR amongst other cases.

20. On the law applicable, the defendant avers that the construction of the sewer line commenced in year 2011, hence the law applicable was the repealed Wayleave Act and not the *Land Act*. It is submitted that the plaintiff did allow the defendant to construct the sewer line on parcel 292, adding that if the defendant had carried out construction on parcel 293, the plaintiff could have lodged an objection under section 5 (1) of the repealed Way leave Act. The defendant contends that there is no evidence of construction on parcel 293 as the manhole is on parcel 292.

21. It is submitted that the plaintiff despite having full knowledge of the defendant's construction of the sewer project by dint of his advocate's letter dated 31st July 2012, chose not to institute any proceedings to injunct the defendant from allegedly constructing in the property known as Nairobi Block 122/293. The plaintiff's advocates were well aware of the legal process that would have been undertaken to ensure that the defendant who was not authorized to construct on the property known as Nairobi Block 122/293 as alleged by the plaintiff did not do so and yet they failed to do so.

22. It is also further submitted that no evidence was adduced to indicate that the construction of the sewer line was hazardous to the environment. On the contrary, the plaintiff admitted that he is still in possession of the two parcels.

23. It is also submitted that the defendant is the one who drafted the Way leave agreement, and submitted the same for execution by the plaintiff, but the latter declined to do so. Thus the plaintiff waived his rights to stop the construction.

24. On the question of compensation, it was submitted that the defendant offered the plaintiff Ksh.393,162 for parcel 292, which offer was rejected, but the plaintiff never made a counter offer , hence there is no justification for the plaintiff to claim that the amount was too low. In the end, the defendant seeks for the dismissal of the suit.

Determination

25. I have considered the pleadings, the evidence and the rival submissions and it is quite apparent that a sewer line was built through plaintiff's land. There is also no controversy that the sewer line did affect parcel 292. The questions therefore falling for determination are; Whether parcel 293 was affected by the construction; Did the plaintiff consent to the construction; What reliefs are available in the circumstances.

26. Before delving into the above mentioned issues, the court will interrogate the question of the applicable law. The plaintiff submits that the law applicable is the *Land Act* and the *Constitution* of Kenya. The document at page 12 of plaintiff's bundle (letter dated 7.3.2011) is the one which triggered the laying of the Way leave infrastructure. By then, the *Land Act* did not exist. Thus the legal frame work governing matters relating to Way leave was the now Repealed Way leave Act, Cap 292 laws of Kenya.

27. Section 2 of the aforementioned statute provides that;

> " The Government may carry any sewer, drain or pipeline into, through, over or under any lands whatsoever but may not in so doing interfere with any existing building".

28. DW1 has stated that they were undertaking the sewer line project through International Development Association support under the Water Services Improvement Project of the Government of Kenya. Thus in essence, this project was a government project hence falling within the ambit of the cited provisions of Section 2 of the Wayleave Act.

29. Was parcel 293 affected by the project?. The plaintiff contends that the sewer line cuts across both properties 292 and 293. The valuation report also has a sketch plan indicating that the sewer line cuts cross the two parcels. DW1 has rebutted this evidence averring that in the initial plan, the project was indeed to run through both parcels, but this was found to be economically not viable as there was too much encroachment on private property.

30. The letter dated 7.3.2011 refers to "WAYLEAVE through block 122/292". The said letter contains information that; "In case of any queries, contact the undersigned or the Resident Engineer Telephone

0722, 324 316". Similarly, the draft Deed of Grant of Wayleave (page 16 of plaintiff's bundle of documents) refers to Parcel 122/292. That being the case, then it was incumbent upon the plaintiff to raise queries the moment the project touched parcel 293. The gist of the complaint in plaintiff's letters of 31.7.2012, 15.8.2012 and 20.9.2012 was that the line had covered "large tracts of our client's two plots" instead of small portions. There is no specific complaint made to the defendant before the suit was filed to the effect that the line had cut through parcel 293 contrary to the initial letter of 7.3.2011 and the draft agreement for the Way leave made in April 2012. In particular, there is no evidence to indicate that the plaintiff expressed his dissatisfaction with the project and raised his concerns with Mr. Misigo or the Resident Engineer as stated in the letter of 7.3.2011.

31. It can be presumed that by the time the plaintiff was raising their complaints with the defendant through their letters of 20.9.2012 and 8.5.2017, he already had the surveyors report dated 29.8.2012 done by Geomatics Services. This report indicates the nature and extent of the encroachment of the sewer line unto both parcels. The logical trend would have required the plaintiff to avail this report to the defendant as a basis of his complaint. However, nowhere in his evidence has the plaintiff demonstrated that the said report was forwarded to the defendant, and it is conspicuously absent in all those complaint letters. The said report cannot therefore be a basis to conclude that the sewer line had passed through parcel 293.

32. Finally, I find that the valuation report indicates that the manhole is on parcel 292, a fact confirmed by the plaintiff in his evidence.

33. In terms of the provisions of Section 107 of the *Evidence Act*, the plaintiff has not discharged the burden of prove that the sewer line had cut through parcel 293. See Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR, Philip Ayaya v Crispinus Ngayo [2014] eKLR as well as the case of Nakuru Industries Limited v SS Mehta & Sons [2016] eKLR.

34. I now come to the question as to whether the plaintiff consented to the construction of the sewer line. At paragraph 8 of his witness statement, the plaintiff stated as follows:

> " I agreed to consider the Defendant's request on the understanding that;
>
> i. The sewer line would occupy only a small portion of Plot No. 122/292 for which I would be compensated;
>
> ii. The defendant and myself shall, before commencement of the project on the said Plot, execute a Deed of Grant of Wayleave;
>
> iii. The project would not affect the productivity of the said parcel; and
>
> iv. I would receive adequate compensation for defendant's perpetual right and easement over the said parcel."

35. The plaintiff has not demonstrated as to how the conditions set out above were agreed upon since they are not factored in the letter of 7.3.2011.

36. The provisions of Section 5 (1) of the Wayleave Act stipulate that

> " If any owner, lessee or occupier of any private land through, over or under which it is intended that any sewer, drain or pipeline shall be carried objects to the intended work and serves notice in writing of his objection at the office of the District Commissioner of the district in which the land is situated at any time within that month, the intended work, in so

far as it affects the land of the person serving the notice of objection shall not be commenced without the sanction of the Minister." [emphasis ours]

37. It is pertinent to note that the plaintiff has admitted to having received some money in his account and he was told that it was for crop destruction. For this to have happened, it means that the plaintiff had given out his account details meaning that he had consented to the development of the project.

38. As rightly submitted by the defendant, the plaintiff did consent to the construction of the sewer line, and his various complaint letters relate to such issues as occupation of a larger track of land. I come to the conclusion that there was consent on the part of the plaintiff.

39. What reliefs are available. The plaintiff contends that he is entitled to just compensation for the arbitrary acquisition of his land in tandem with the provisions of Article 40 (3) of the *Constitution*. However, in cross examination, the plaintiff stated that he still has the titles to his two parcels and that he is in occupation of the same. Indeed as per his valuers report (page 34 of his bundle of documents), the plaintiff was constructing a residential house on parcel 292, mark you, this is the plot with a man hole. The bottom line is that this is not a case of compulsory acquisition of land, rather, the way leave is but a right of way allowing infrastructures of sewer lines, power lines, pipe lines, drainages etc to pass into, through, over or under some land which was provided for under the legal regime of the Way Leave Act prior to the coming into force of the *Land Act* of year 2012.

40. The provisions of Section 6 of the Way Leave Act stipulated that;

> "(1) The Government shall make good all damage done, and shall pay compensation to the owner of any tree or crops destroyed or damaged, in the execution of any power conferred by this Act.
>
> (2) In the event of disagreement as to the amount of the compensation to be paid or as to the person entitled to receive compensation, any person interested may apply to the District Commissioner, who shall award to the person entitled to receive compensation such compensation as he thinks reasonable; and that award, subject to appeal to the Provincial Commissioner, shall be final".

41. Since plaintiffs parcel 292 was affected by the project, then he was required to be compensated. The plaintiff contends that he was not given an offer, but admits during cross examination that the draft agreement contained an offer of Ksh.393,162, but he didn't sigh it because it did not capture parcel 293 and it was not signed by the defendant. However, in the letter of 31.7.2012, the plaintiffs admit that the claim was computed at Ksh.393,162 but went ahead to state that;

> "We have been instructed to demand from yourselves, which we hereby do, admission of liability in respect of occupation of and damage to the whole of the two parcels of land above arising from the extensive works and unauthorized works across on his property and trespass on to other parts of his properties."

42. As rightly submitted by the defendant, the plaintiff never made a counter offer, not even for the undisputed parcel 292. He cannot therefore state that he does not know the formula used to arrive at the figure.

43. During cross examination, PW1 stated that;

> "It is not true that I sought for more money and that that is why I didn't sign the deed."

44. However, at paragraph 16 of his witness statement, he states that

> " So far, my efforts to have the defendant to increase the amount of compensation because of the extensive damage caused to my parcels of land and the continued enjoyment of the two parcels have been met with utter silence."

The above evidence buttresses the defendant's claim that the plaintiff declined to sign the deed because he was asking for more money.

45. Thus this is a situation whereby the plaintiff gave out his bank details awaiting compensation for the use of his land by the defendant, but when he was dissatisfied by the actions of the defendant, he failed to tabulate his claim, outrightly rejecting the entire draft deed without offering any proposals, yet by then, the project had commenced as at October 2011 and he never stopped it going by the contents of his statement at paragraph *9*. To this end, I find that the plaintiff is guilty of acquiescence.

46. The term 'acquiescence' is defined in Halsbury's Laws of England, 4th Edition, Volume 16 at page 994 as follows:

> " The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act."

47. However, I find that the amount offered to the plaintiff still stands. Thus in the end, I find that plaintiffs claim is unmerited and the same is hereby dismissed save that an order is hereby given for the defendant to pay the plaintiff a sum of Ksh.393,162. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF FEBRUARY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Awiti holding brief for Rauto for the Plaintiffs

Onyancha for the Defendant

Court Assistant; Nancy Mwangi