



Kenya Commercial Bank Limited as trustee of Kenya Cargo handling Services Limited Staff Pension Fund Scheme v Nairobi City County (Environment & Land Case 199 of 2015) [2023] KEELC 341 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 199 OF 2015
LN MBUGUA, J
JANUARY 26, 2023**

BETWEEN

KENYA COMMERCIAL BANK LIMITED AS TRUSTEE OF KENYA CARGO HANDLING SERVICES LIMITED STAFF PENSION FUND SCHEME PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

JUDGMENT

1. This suit was filed on February 26, 2004 as High court civil case No. 180 of 2004, but was later transferred to the Environment and Land Court as case no. 199 of 2015. The plaintiff was amended severally with the final amendment being the Further amended plaintiff dated December 14, 2018. The plaintiff avers that at all material times, it was the registered owner of a piece of land known as L.R. 209/12015 Kaunda Street Nairobi, (the suit land); having been so registered on November 19, 1997. The defendant however trespassed on the land and used the same as a car park manned by its “askaris” thereby deriving income thereof.
2. The plaintiff therefore prays for judgment against the defendant in the following terms:
 - a. Vacant possession
 - b. General damages
 - c. Costs of the suit
 - d. Interest on damages from November 19, 1997 until recovery of possession.
 - e. Any other relief that the Honourable court may deem fit to grant.



3. The defendant filed a statement of defence on March 3, 2004 containing a general denial of plaintiff's claim. However, an amended defence was filed on June 3, 2004 advancing a claim that the suit land is public land.
4. The plaintiff's case was advanced by two witnesses. PW1, Harrison Lusigi Identified himself as a retired personnel from Kenya Ports Authority and a former Trustee of Kenya Ports Authority Staff Pension Fund. He adopted his witness statement dated November 27, 2017 as his evidence. He also produced the 17 items in their bundle of documents dated November 27, 2017 as plaintiff exhibits 1-17.
5. The testimony of PW1 as captured in his statement is that he is a former trustee of the Kenya Ports Authority Pension Scheme formerly known as Kenya Cargo Handling Services Limited Staff Pension Scheme. For ease of reference, I will refer to the said entity as the pension scheme. PW1 averred that in 1996, the members of the pension scheme resolved to purchase a property and erect a commercial building for rent, of which they settled on the suit land as the viable property.
6. To this end, the pension scheme conducted due diligence and established that the Grant in respect of the suit property was first issued in favour of the Defendant and registered as I.R. 61140/1 on December 3, 1993. The lease was for 99 years starting from 1st day of December 1993.
7. That the defendant herein transferred the said property to one Evans Kaburu and Ikiungu Aloysius trading as Wide View Properties, and the transfer thereof was registered on December 16, 1993.
8. The Property was charged to Kenya Commercial Bank Limited to secure advances made to the then owners, (Evans Kaburu and Ikiungu Aloysius trading as Wide View Properties) in the sum of Kenya Shillings Thirty-Seven Million Five Hundred Thousand (Kshs. 37,500,000/-).
9. Thereafter the pension scheme negotiated the price of the suit property with the vendor, finally settling on the price of sh.110,000,000. The parties entered into a sale agreement as captured in Plaintiff - Exhibit 6, whereby the Pension Scheme paid an initial deposit of sh.11,000,000 on July 29, 1997 but by September of the same year, all payments had been made. The discharge of charge in respect of the charge created by the Vendors in favour of Kenya Commercial Bank was drawn and registered at lands office Title registry as I.R. 61140/5.
10. With that, the suit property was transferred to the plaintiff. The defendant amended its records to reflect the new change of ownership and proceeded to recognize the plaintiff as the ratable owner of the suit premises by issuing rate demand notices over the years.
11. It is averred that in December of 1997, the defendant violently took over the suit premises using its askaris and agents and forcefully evicted the plaintiff claiming ownership of the same, and using the premises as a parking lot. That to date, the defendant is still in occupation of that land which actions amount, to trespass.
12. In his oral evidence, PW1 had added that after purchase, they had leased the premises to a third party for 6 years but when the lessee went to the suit premises, they were chased away by the defendant.
13. During cross examination, PW1 reiterated that the suit premises were transferred to the Pension Scheme in 1997 but the scheme was stopped from doing anything in the property in the same year. He is aware that a dispute was tabled before National Land Commission concerning the suit premises but the defendant never showed up and no decision was made. Equally he doesn't know if the property title was recommended for revocation at page 117 of the Ndungu report.
14. PW1 also re-stated that to date the suit property is used as a parking lot by the defendant who collects the proceeds thereof. He avers that the pension scheme had scouted for a big investment, that is why



they settled on the suit property which is situated in the Central Business District of Nairobi (CBD). To this end, the Scheme had requested for change of user from the defendant of which the request was granted.

15. PW2, one John Chau Mwangi introduced himself as a valuer by profession and he is also an employee of Kenya Ports Authority. He produced his report dated March 1, 2019 as his evidence and he also produced documents in plaintiffs supplementary bundle dated 21.3.2019 as their exhibits. The aforementioned report contains an assessment of loss of earnings in the suit land where PW2 pegs the said loss at sh113,500,000 taking into consideration the utilization of the suit plot as a parking lot.
16. During cross examination, PW2 explained that he gave 3 options of the use of the land. The options are to be found at paragraph 7.1, 7.2 and 7.3 of the report. The 1st option is the use of the plot as a parking lot where he found the charges being pegged at sh.300 per a parking bay. There were 77 bays which gives a sum of sh.23,100 per day, adding 30% thereof as a bay can be used severally in a day thus giving a value of sh.30,030 per day. A week of five days (excluding weekends) would yield sh.150,150 while a month would give a sum of sh.600,600 hence the annual income was sh.7,207,200. That the cumulative sum in 10 years (valuation was pegged as from 2009-2019) along with interest would yield a sum of sh. 141,654,513. PW2 considered this as a gross figure so he reduced the sum by 20% to give allowance for expenses, thus arriving at figure of sh.113,323,610.
17. The second option that PW2 had considered was use of the land on ground lease arrangement, an apparently common practice favourable with large institutions. The pension scheme had already tried this arrangement with a third party. The final consideration was use of the land for commercial development.
18. PW2 settled on the first option; that is the use of the suit property as a parking lot because the plot was already being used for that purpose and was generating revenue. The suit property was being used optimally at 100% as parking was back to back and one could even park for just two hours. Thus the use of the suit property as a parking lot was the most realistic use of the land.
19. The defendant had legal representation throughout the trial and even conducted cross examination at length. However, they did not tender any evidence at the trial.
20. After the close of the plaintiffs case on June 13, 2022, the court gave directions for the plaintiff to file and serve their submissions by July 13, 2022 while defence was to file and serve their submissions by August 13, 2022 and the matter was to be mentioned on September 27, 2022. Come the date of September 27, 2022 and there was no compliance by the parties. The court indulged the parties giving plaintiff's side a last chance to file submissions by October 27, 2022 with defence side filing theirs by November 27, 2022. This time round, the court gave a rider that

“ documents filed outside the given timelines shall stand as expunged”. Again there was no compliance with those directions, thus the court has disregarded any submissions filed by the parties.

Determination

21. There appears to be no controversy that the suit property is in the hands of the defendant in so far as physical possession is concerned, and that the same is being used as a parking lot. The issue falling for determination is whether the said occupation of the suit property by the defendants amount to trespass, if so whether the plaintiffs are entitled to get vacant possession and an award of damages.



22. Before delving into the aforementioned issues, I must make a clarification that the pleadings of the defendant were not buttressed by any evidence. It is pertinent to note that the defence side held the litigation hostage for years giving various excuses with the courts indulging them at every step. To this end, the defendants were given a chance to file and serve a paginated bundle of their witness statement and documentary evidence on November 22, 2018 but there was no compliance. Eventually the court granted them a last adjournment on June 2, 2021 albeit reluctantly. The court was to grant them still another last adjournment on February 21, 2022. The defendant however did not file any witness statement or documentary evidence or even tender any kind of evidence at the trial.
23. Notwithstanding the absence of defence evidence in this case, the plaintiff is still bound to proof their case. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the court held that;
- “The court has to consider the case of the plaintiff on its merits: It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest”.

Trespass

24. Section 3 of the *Trespass Act* outlines what amounts to trespass. In the case of *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR Justice P. Ouko. J.A (as he then was) stated that:
- “Nuisance and trespass laws give every property owner the right to use and enjoy his or her property reasonably, without unreasonable interference by others.”
25. I find that PW1 has given a detailed account of how their pension scheme came to own the suit premises. The title document at page 1 of plaintiffs bundle reveals that the defendant was registered as the owner of the land on December 1, 1993 and the said land was transferred to Evans Kaburu and Ikiugu Aloysious trading as wide view properties on December 16, 1993. It was then charged to Kenya Commercial Bank on February 15, 1994, with the discharge of charge being effected on 19.11.1997 at entry No 5. The same date at entry No. 6. The land was transferred to Kenya Commercial Bank Limited as Trustees of Kenya Cargo Handling Services Limited Staff Pension Scheme. The consideration thereof being a sum of ksh.110,000,000. The aforementioned particulars of registration have not in any way been challenged by the defence.
26. At page 16 of plaintiffs’ bundle is a document where the defendant gave a statement of rate payments to Evans Kaburu & others dated November 6, 1997 for the suit property. And on August 22, 1997 wide view properties Ltd were given a Rent Clearance Certificate (at page 17 of plaintiffs bundle).
27. After the plaintiffs acquired the land, they commenced rate payments to the defendant as is evident from page 30 of plaintiffs bundle.
28. This far, it is apparent that the defendant recognized the plaintiff as the rateable owner of the suit property, just as they had made similar recognition to the previous owners (Wide View properties).
29. The provisions of section 25 of the *Land Registration Act* stipulate that:
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”



30. While the provisions of section 26 thereof stipulate that:
- (1) “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.
31. In the case of *Elijah Makeri Nyangwara v Stephen Njuguna & another* [2013] eKLR, the court held that:
- “As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme”.
32. No tangible (or any) evidence was proffered by defendant to impeach plaintiffs title. If anything, the defendant has all along recognized the plaintiff as the owner of the suit property.
33. The *Constitution* of Kenya protects ownership of land as stipulated under article 40 (3). The Supreme Court of Kenya had this to say on the issue in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR;
- “Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under article 40 of the *Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in section 75 of the repealed Constitution.”
34. In the case of *Armacherry Limited v Attorney General* (2014) eKLR the court held that:
- “This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.”
35. Similarly in the case at hand, the take-over of plaintiffs land by the government has lasted close to 25 years. No justification has been offered by the defendant for the occupation of the said land, hence such occupation amounts to trespass. In the circumstances, the prayer for vacant possession is merited.

Damages

36. Is the plaintiff entitled to damages for the trespass? This is a situation whereby the plaintiff has never been allowed to utilize the suit property by the defendant. In the case of *Dodd Properties (Kent) Limited*



and another v Canterbury City Council and others [1980] 1 All ER 928 cited in Miarabo Limited v Synohydro Corporation Limited [2019] eKLR the court stated that:

“The general object underlying the rules for the assessment of damages is, so far as possible by means of monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract....”.

37. In The Court of Appeal in Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR while upholding the decision of Judge Angote in Fleetwood Enterprises Ltd v Kenya Power & Lighting Co Ltd [2015] eKLR stated that where trespass is proven, the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case to case basis.
38. For the case at hand, the plaintiffs have already proved that they suffered damages since they were denied use of their land as from 1997. PW2 has given 3 methods in which the loss of earnings could be calculated and this is well captured in paragraph 7.1, 7.2 and 7.3 of his report. He picked the method of vehicle parking at paragraph 7.1. As the most realistic option because the suit property has all along been used (albeit by the defendant) as a parking bay.
39. The computation of sh.300 per bay made by PW2 is however in my view on the higher side considering that these were the charges he found at the time of assessment, of which the report is dated 28.2.2019. But again the loss of earnings were only calculated for a period of 10 years from 2009 to 2019. The fact of the matter is that since 1997, the pensioners who put their hard earned resources into a viable investment to cushion them in their sunset years was snatched by the defendant for no justifiable grounds other than the reason that the defendant could use brute force; To Make matters worse, as the defendant was generating revenue from the suit land, they continued levying rates upon the plaintiff. This is conduct which is unlawful, and untenable. Considering that the loss of earning has persisted from 1997 to date, I am inclined to grant the plaintiffs a round off figure of sh.90,000,000 (ninety million).
40. In the final analysis I hereby enter judgment for the plaintiff against the defendant as follows:
1. The defendant is to give vacant possession of the suit property within 30 days.
 2. The plaintiff is awarded general damages for trespass against the defendant to the tune of ksh.90,000,000 (ninety million).
 3. The defendant is condemned to pay costs and interest to run from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Wangui Koech for plaintiff

Odhiambo Isaach for Defendant

Court assistant: Eddel

