



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 173 OF 2017

**TELKOM KENYA LIMITED.....PLAINTIFF**

**VS**

**COUNTY GOVERNMENT OF MURANGA.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit on the 24/1/12 against the Defendant seeking the following prayers;

a. General damages for trespass.

b. Mandatory injunction directed at the Defendant, its servants and or agents compelling the Defendant to remove, evict, relocate and/or transfer and /or cause removal, eviction, relocation and/or transfer of all traders and/or persons occupying all that property known as unsurveyed Kiriaini post office and Telephone Exchange

c. Costs of the suit

2. The Plaintiffs claim is for vacant possession of all that property known as **unsurveyed Kiriaini Post Office and Telephone Exchange Reference No 87274/109** vide a letter of allotment dated the 10/9/1999 (the suit land). The Plaintiff avers that the Defendant without notice and or its consent relocated traders from Kiria-ini open air Market to the suit land ostensibly to pave way for reconstruction of the said market denying the Plaintiff the enjoyment and use of the suit land. The Plaintiff asserts that it suffered damages as a result of vandalism by the traders on its equipment and suit land occasioning loss and damage.

3. The Defendant generally denied the Plaintiffs claim in its statement of defence filed on the 7/12/2017. It averred that the allocation of the suit land was not permanent until and unless a lease was issued by the Commissioner of Lands. That the alleged allocation was of an unsurveyed plot and that the Plaintiff failed to take cognizance of the existing rules and regulations relating to land.

4. At the hearing, PW1- Godfrey Migwi Theuri testified on behalf of the Plaintiff and stated that he is a land valuer and a retiree of the Plaintiff having worked for 28 years as a property manager and therefore quite familiar with the subject matter of the case. He informed the Court that the Plaintiff was allocated all that property known as unsurveyed Post office and Telephone exchange measuring 0.012 hectares for the period of 99 years from the 1/9/1999. He produced an allotment letter dated 10/9/99 in that regard. The Plaintiff took possession, fenced and installed telecommunication equipment and connected it to other equipment around the area by means of cabling.

5. On the 12/7/2010 the predecessor of the Defendant, without notice or consent of the Plaintiff relocated traders from the open-air market at Kiria-ini to the premises to pave way for the construction and modernisation of the market under the then ongoing economic stimulus programme. As a consequence of the said relocation the Plaintiff suffered loss and damage occasioned by the vandalism and extensive damage of its installations on site. That the Plaintiff has failed to relocate the said traders from the suit land.

6. The witness informed the Court that the then Clerk to the County Council of Muranga wrote a letter on the 13/7/2010 requesting that the small traders be allowed to operate from the suit land for 3 months and thereafter would be relocated back to the new refurbished open-air market. He informed the Court that on the suit land were; telephone exchange equipment, a generator and telephone and power cables as well as a perimeter fence. That save for the exchange equipment all the rest were vandalised by the traders rendering the total loss suffered by the Plaintiff in the sum of Kshs. 954,179.46 as at 2/7/12. Further he stated that the Plaintiff is entitled to rent in the sum of Kshs 50,000/- per month.

7. The witness stated that since the traders occupied the suit land in the year 2010, the Plaintiff has been prevented from using the suit land. That the estimate rental sum in the sum of Kshs. 50,000/- is the rent obtaining in the area. That the letter dated the 13/7/2010 was authored by the Clerk to Council and the Plaintiff wrote to the District Commissioner requesting for security to secure the telephone installations. No

security was provided.

8. The Defendant informed the Court that it would not be calling any witnesses and elected to close its case without tendering any evidence.

9. Parties have filed Written Submissions which I have read and considered.

10. The Plaintiff reiterated the background of the case and submitted that by virtue of the fact that it holds a valid letter of allotment, complied with the terms and conditions of the said allotment and its continued uninterrupted possession from 1999, the Defendants acknowledgment of its proprietorship in its letter dated the 13/7/2010, it has established on a balance of probability that it is the lawful proprietor of the suit land. The Plaintiff has relied on the following case law to support its case;

a. **Mbau Saw Mills Limited vs Attorney General & 2 others (2014) EKL**R. In this case the Court held that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and the ground rent.

b. **M A Koinange Vs Joyce Ganchuku & 2 others (2015) EKL**R. The Court upheld the claimant's proprietorship of the land on the basis of an allotment letter and due compliance with the terms and conditions of the allotment despite the fact that the title had not been processed and registered and non-occupation of the land. The Court further observed that there is no time limit within which a title may be processed and/or issued following allotment. That the offer by way of allotment letter having been tendered and accepted and the same having not been revoked/cancelled, the Plaintiffs' proprietary interests in the property had crystallised.

11. The Plaintiffs further submitted that it is entitled to an order of mandatory injunction compelling the Defendant to remove the traders from the suit property on the grounds that; the Plaintiff is the proprietor of the suit land; the Defendant relocated the traders to the Plaintiffs land without any prior notice to the Plaintiff; whereas the relocation was temporary for a period of 3 months the traders have continued to remain on the land since 2010 to date; the Defendant has continued to receive rent from the Plaintiff. Relying on the case of **Ahmed Ibrahim Suleiman & Anor Vs Noor Khamis Surur (2013) EKL**R it urged the Court to grant the orders.

12. In addition, the Plaintiff submitted that the traders currently occupying the suit land are trespassers. That the traders were put in occupation by the Defendant as disclosed in their letter dated the 13/7/2010 which urged the Plaintiff to liaise with the District Commissioner for purposes of security for the telecommunication installations on the property. That though the Plaintiff sought for the security as directed by the Defendant none was provided forcing the Plaintiff to demand the removal of the traders in its letter dated 18/8/2011 by the Defendant, a demand that went unheeded to date.

13. The Court was informed in submissions that in assessing general damages for trespass Courts have held that the measure of damages for trespass is the difference in the value of the Plaintiff's property after the trespass or the costs of restoration. The Court was referred to the case of **Philip Aluchio Vs Chrispinus Ngayo (2014) EKL**R. Relying on the case of **Eliud Njoroge Gachiri Vs Stephen Kamau Nganga (2018) EKL**R the Plaintiff submitted that the nature of trespass by the traders on the suit land is continuous. The Plaintiff urged the Court to award the Plaintiff general damages in the sum of Kshs 954,179.46 from July 2012 plus interest at Court rates together with monthly rent in the sum of Kshs 50,000/- from the year 2010 till payment in full.

14. The Defendant submitted and faulted the Plaintiff for seeking general damages instead of special damages as the latter cannot be quantified by production of receipts or stock. As regards the prayer for mandatory injunction, the Defendant submitted that it is empowered in law to acquire land for public purposes and therefore seeking a permanent injunction against it is contrary to the law. Further it faulted the Plaintiffs for presenting a witness in Court who has since retired and strongly protested the evidence of the witness on the ground that the said witness is an outsider and that a current employee of the Plaintiff ought to have testified. Further the Defendant submitted that the Plaintiff failed to prove that there indeed are trespassers on the suit land. It further castigated the Plaintiff for failing to enjoin the third parties, the traders in the suit so that they may defend themselves.

15. Finally, the Defendant submitted that it is impossible to claim trespass or an injunction on land that is unsurveyed like the suit land in question. He averred rather forcefully that the letter of allotment being wielded by the Plaintiff is not recognised in law.

16. Having considered the pleadings, the evidence on record and the Written Submissions where applicable, the issues that commend themselves for determination are;

a. Whether the Plaintiff has proprietary interest on the suit land.

b. Is there trespass on the suit land?

c. Whether mandatory injunction for the removal of the traders can issue.

d. Whether the Plaintiff is entitled to an award of general damages for trespass and special damages in the sum of 945,000/-

#### **Whether the Plaintiff has proprietary interest on the suit land.**

17. To answer this issue, I shall pay homage to decided cases from the appellate and concurrent jurisdictions. I found the following cases useful; **Mbau Saw Mills Limited vs Attorney General & 2 Others (2014) EKL**R and **M A Koinange Vs Joyce Ganchuku & 2 Others (2015) EKL**R for which I have analysed in para 10 above.

18. *Of significant relevance also to the issue at hand is the case of Dr. Joseph Arap Ngok Vs Justice Moiwo Ole Keiwa & 5 Others [1997] eKL*R where the Court held that;

*“it is trite law that landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held”.*

19. Similarly, in the case of ***Wreck Motor Enterprises Vs The Commissioner of Lands & Others (1997)***, the Court of Appeal also held that:-

*“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”*

20. According to the evidence given by the Plaintiff’s witness and the pleadings on record the Plaintiff was allocated the suit land by the Commissioner of Lands vide letter of allotment referenced 87274/109 dated the 10/9/1999. The land is described as Unsurveyed Kiriaini Post office & Telephone Exchange. The letter is addressed to Kenya Posts & Telecommunication Corporation, the predecessor of the Plaintiff. It is issued on behalf of Muranga County Council, the predecessor of the Defendant. It measures 0.102 ha for a term of 99 years w.e.f 1/9/99 with annual rent being Kshs 750/-. The letter called for the acceptance of the offer from the Plaintiff within 30 days accompanied with the banker’s cheque in the sum of Kshs 8,710/- being the total outgoings in respect to rent, stamp duty registration fees, survey fees interalia. PW1 informed the Court that the Plaintiff duly accepted the offer and paid the amounts vide a receipt dated the 2/11/99. He also produced a copy of the bankers cheque no. 6970 drawn in the name of Commissioner of Lands dated the 28/9/99. That thereafter the Plaintiff took possession and fenced the plot and installed its telecommunication equipment, telephone and power cables thereon which was utilised to achieve connection with other telecommunication infrastructure in the area. Further the witness produced a receipt dated 7/2/18 in respect of Kshs 15,000/- in respect of rates payable to the Defendant.

21. The Defendant in its defence challenged the Plaintiff’s proprietorship of land on the basis that it is anchored on a letter of allotment and not a title. That the allocation was for an unsurveyed plot and therefore incapable of identification for purposes of a claim of trespass.

22. The Court has taken cognizance that the Plaintiff’s claim is unchallenged. The Defendant elected not to tender any evidence against the Plaintiffs’ claims. The statements referred to above are mere statements, the veracity of which evidence was not been tendered to challenge the case of the Plaintiff in the suit land.

23. I have noted from the Court record that the parties in 2012 had been given 21 days to reach an amicable settlement and the Court had ordered that a committee comprising of agents of the Plaintiff, the Defendant and the District Commissioner be set upto to evaluate the loss occasioned to the Plaintiffs equipment for compensation by the Defendant and the issue of relocation of the traders from the Plaintiffs land to an alternative site be addressed. It would appear that there is no record of a positive outcome on this.

24. In concurrence with the Plaintiff’s Counsel submissions, the Court notes that the Plaintiff accepted the offer, tendered consideration for the same, took possession and commenced its operations on the suit land. According to the letter dated the 13/7/2010, the Defendant acknowledge that the suit land belongs to the Plaintiff when it stated that it moved the traders to the site set aside for posta. If it did not recognise the suit land as belonging to the Defendant, why would it be writing to it to request the relocation of the traders on a temporary basis for a period of 3 months as it constructed the open-air market? The letter of allotment indicates that the allotment was given by the Commissioner of Lands on behalf of the Defendant. The Defendant did not lay any evidence to show that the position has changed. There is no contrary evidence that the letter of allotment was revoked and or cancelled by the commissioner of Lands on its own motion nor on instigation of the Defendant. The Court in placing reliance on the letter of allotment and the due compliance of the same by the Plaintiff holds that the Plaintiff has an unchallenged proprietary interest in the suit land.

### **Is there trespass on the suit land?**

25. According to the 10th Edition of Black’s Law Dictionary trespass is defined as follows;

*“an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason”.*

Continued trespass is defined as:-

*“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property’s ...*

*“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues” See **Clerk & Lindsel on Torts 16th Edition**, paragraph 23 – 01.*

26. The Plaintiff informed the Court that its possession of the suit land was interrupted by a letter dated the 13/7/99 when the Defendant wrote to it informing it that the Defendant in conjunction with the Provincial administration, the district administration and other relevant departments decided to relocate the traders in the open air market at Kiriaini to interalia the site set aside for Posta (suit land) to enable the contractor to move in and commence the construction of the open air market whose improvements were being carried out under the economic stimulus programme. The Defendant stated that they have learnt that there are installations on the site and regretted not having consulted the Plaintiff earlier. It requested the Plaintiff to liaise with the District Commissioner for official security of the installations on site. It assured that Plaintiff that the relocation was temporary for a period of 3 months to allow for the completion of the market and undertook to relocate the traders to the new market.

27. Following the aforesaid letter the Plaintiff wrote to the District commissioner on the 21/7/10 seeking security for the suit land. The Plaintiff claims it was not provided. It would appear that the Defendant did not relocate the traders within 3 months as assured or at all

prompting the Plaintiff to issues a demand letter on the 18/8/11. The Defendant as stated earlier did not defend the claims except to submit that the Defendant is empowered in law to acquire land or buildings for public services.

28. Any purported acquisition of land contrary to the provisions of the Constitution and the law as set in Kenya is illegal. The Constitution of Kenya under Article 40 (3) requires that the acquirer must make prompt, full and just compensation for such acquisition. This when read together with the provisions of section 107-133 of the Land Act which provides elaborate procedure to be followed when undertaking compulsory acquisition of property for public use, the assertion by the Defendant is dismissive, improper and smirks of arbitrariness. The Defendant has not presented any evidence that such acquisition has been done in this case.

29. In the case of **Patrick Musimba Vs National Land Commission & 4 others (2016) EKLK**, the Court observed as follows;

“In summary, the process of compulsory acquisition now runs as follows;

Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or County Government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land. ....”

30. The Court holds that no evidence has been adduced to show any iota of a procedure of compulsory acquisition as envisaged by the law.

31. Trespass is defined in the case of **Martha Kigen Vs Johnson Tibino (2014) EKLK** as the unjustifiable intrusion by one person upon the land of another without permission.

32. From the evidence on record it is not in dispute that the Defendant has admitted relocating the traders to the Plaintiff's suit land without notice, consent and consultation. It clearly stated that the relocation was for a period of 3 months. It is been over 2 years since the filing of the suit and 9 years todate and the traders have not been removed from the suit land. The traders therefore continue to occupy the Plaintiff's land without its permission and or any justifiable reason.

33. The Court holds and finds that the continued occupation of the traders on the suit land on the instructions of the Defendant amounts to trespass. The trespass is however continuous, that is to say occurring from day to day.

34. **Is the Plaintiff entitled to a mandatory injunction?** The principles of granting a mandatory injunction are well settled and set out in the following cases;

35. In the case of **Nandan Pictures Ltd. Vs. Art Pictures Ltd & others, Air 1956, Cal 428**, Chakravarti, CJ. of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the Plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the Defendant does that act and thereby alters the factual basis upon which the Plaintiff claimed his relief. An injunction issues in such a case in Order that the Defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the Defendant to undo what he has done with notice of the Plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

36. In **Shepherd Homes Limited Vs Sandahm Homes Limited V. Sandahm [1971] 1 CH. 34**, Megarry, J. stated:

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in Order to enforce a contractual obligation.

37. Section 16 (2) of the Government Proceedings Act which provides as follows:-

“The Court shall not in any civil proceedings grant any injunction or make any order against an officer of government, if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government.”

38. There has been a debate as to whether injunctions generally can be issued against the County Government. In the case of **James Muigai**

**Thugu –vs- County Government of Tran Nzoia & 2 Other [2015] EKLR Obaga J** considered the application of the aforesaid provision and in his ruling held as follows:-

“The aforesaid Act forbids Courts from giving an injunction against the government. The section quoted hereinabove extends the same protection to Government Officers. The Act was in place even before the devolved system of Government came into force. The question that arises is whether the Act can extend to the County Government. The County Governments are body corporate with power to sue and be sued. There is no provision in the County Government Act of 2012 which protects them from injunction orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National Government. If this was the intention then the Government Proceedings Act would have been amended expressly to include County Governments. I therefore do not find that the County Government can come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers.”

39. In the case of **Lawrence Ogaro Onyiego & another v Samwel Minika & another [2017] Eklr** the Court held that;

“as have observed earlier in this ruling that the Government Proceedings Act was not amended following the creation of the devolved units to align the same with the new reality. The creation of County Governments came with peculiar and unique challenges which the Government Proceedings Act could not have anticipated. With the decentralization of power to the counties where the County Government was now dealing directly with the citizenry the application of the Government proceedings Act which was tailored to deal with one monolithic Government was always going to pose a challenge and my position is that the Act cannot wholesale apply to the counties without modification. My view is that Section 16 (2) of the Government Proceedings Act would be inapplicable to the County Governments. It is therefore my holding that Section 16(2) of the Government Proceedings Act would be inapplicable to County Governments and hence Section 16(2) of the Government Proceedings Act would not be a bar to an order of injunction being granted against a County Government”.

40. I concur with the holding of the two honourable justices.

41. From the circumstances of this case, the Plaintiff has proved that it is the proprietor of the suit land. It is also not in dispute that the traders were moved to the suit land by the Defendant without notice or consent of the Plaintiff having been sought and obtained and that their continued occupation of the suit land amounts to trespass. This Court is inclined to grant the orders of mandatory injunction to compel the removal of the trespassers from the suit land.

#### **Whether the Plaintiff is entitled to general damages in this case.**

42. In the case of **Park Towers Ltd -Vs- John Mithamo Njika and 7 Others 2014 eKLR** the Court stated as follows:

*“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”*

43. It is trite law that trespass is an actionable tort for which damages are payable. The Plaintiff has sought an award of Kshs 954,179.46 as general damages for trespass from July 2012. PW1 tabled an itemised list of the damages suffered by the Plaintiff. This appears to be a claim for special damages disguised as general damages. The Plaintiff has not pleaded for special damages which in any event must be specifically pleaded and proved in evidence.

44. Having said that, it is not in dispute that the suit property was occupied by the traders since 2012 on instructions and/or authority of the Defendant. The Court has determined that the occupation amounted to constructive trespass which is continuing. Evidence was adduced by the Plaintiff that there was vandalism on the suit land as a result of the trespass. The Defendant did not challenge this claim at all the Court sees no reason to deny the Plaintiff. The Court awards the Plaintiff a nominal figure for general damages for trespass in the sum of Kshs 200,000/-with interest at Court rates from the date of judgment until payment in full.

45. The Court declines to award rent in the sum of Kshs 50,000/- per month on the ground that there was no valuation report to support the figure. The same remains speculative.

46. In the interest of justice, the Court shall grant the Defendant (Ninety) 90 days to remove or cause the relocation of the traders currently on the suit land. The Court has taken into consideration that these are small traders of low income. Their businesses should not be rudely interrupted especially because they were directed by the Defendant to move to the Plaintiff’s property.

47. Before I pen off, the Court wishes to address an issue raised by the Defendant that the Plaintiff had a duty to enjoin its traders as interested parties. Such failure in the Courts view is not fatal to the case. The Defendant already took responsibility for relocating the traders and occasioning trespass on the Plaintiff land and they are duty bound to remove them. The Court relies on Order 1 rule 9 which states as follows;

*“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.*

48. As regards the issue raised by the Defendant that the Plaintiffs witness should not have testified because he is a retired employee of the Plaintiff, it is the Courts view that neither the Court or the Defendant can choose witnesses for parties but parties retain control and independence to prosecute their own cases. It is their duty to put forth their best of cases before the Court for determination. The parties retain the dignified duty to prove their cases with relevant witnesses vis a vis documents and facts relied on. I dismiss it as

a non issue.

**49. Final orders;**

- a. The Defendant is ordered to relocate the traders from the Plaintiff's suit within a period of (ninety) 90 days from the date of this judgment.
- b. If the Defendant fails to comply with order a) above, the Plaintiff shall be at liberty in accordance with section 152G of the Lands Act to remove all the persons on or may be found to have trespassed into the Plaintiff's land.
- c. The OCS, Murang'a shall supervise enforcement and compliance with order b) above.
- d. Mandatory injunction directed at the Defendant, its servants and or agents compelling the Defendant to remove, evict, relocate and/or transfer and /or cause removal, eviction, relocation and/or transfer of all traders and/or persons occupying all that property known as unsurveyed Kiriaini post office and Telephone Exchange.
- e. The Plaintiff is awarded the sum of Kshs 200,000/- being general damages with interest at Court rates from the date of judgment until payment in full.
- f. The Defendant shall meet the costs of the suit.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25<sup>TH</sup> DAY OF MARCH 2019**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Makori HB Ms Weru for the Plaintiff

Opiyo HB Kimwere for the Defendant

Irene and Njeri, Court Assistants