IN THE COURT OF APPEAL

AT NYERI

SITTING IN MERU

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 80 OF 2016

BETWEEN

THE COUNTY GOVERNMENT OF MERU.....APPELLANT

AND

ISAIAH MUGAMBI M'MUKETHA.....RESPONDENT

(Being an Appeal from the Judgment of the Environment & Land Court at Meru, (Njoroge, J) dated on 27th April, 2016

in

E. L. C. No. 63 of 2004)

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JUDGMENT OF THE COURT

1. **Isaya Mugambi M'Muketha**, the respondent in this appeal, is described in the amended plaint in Suit No. 63 of 2004 in which the impugned judgment was delivered on 27th April 2016 as a businessman in Meru Town. He is and was at all material time the registered owner as lessee of the leasehold interest in the parcel of land known as **MUNICIPALITY/BLOCK1/230** and **BLOCK1/231** which measures 0.062 hectares (hereinafter referred to as "the suit premises"). The term of the lease of the suit premises was 99 years from 1st May 1995. The appellant is the County Government of Meru.

2. On 5th August 2004, the respondent sued **The Attorney General, The Permanent Secretaries in the Ministries of Lands** and **Housing** and **Local Government** and the **Municipal Council of Meru** which is the appellant in this appeal. The respondent averred that he was the legal owner of the suit premises. The respondent alleged that during the currency of the two leases, he started developing the suit premises but the appellant unlawfully ordered him to stop the development as a result of which the respondent sued the appellant in **Meru H. C. Misc. Civil Application No. 33 of 2003** seeking an order of Prohibition and leave to institute Judicial Review proceedings. On 5th March 2003, the High Court in Meru granted leave to file judicial review proceedings which operated as a stay. It was averred by the respondent that on 6th March 2004, the appellant illegally demolished or caused to be demolished the respondent's buildings under construction on the suit premises valued at Kshs 2,880,000/= notwithstanding the court order. The respondent made a demand which was neglected and consequently filed suit No. 63 of 2004 in the High Court at Meru which was determined in a judgment delivered on 27th April 2016 by the Environment and Land Court **(M. Njoroge, J.)** in which the learned Judge found in favour of the respondent to whom he awarded the following:

"1. Kshs Two Million and Eight hundred and fifty Thousand (Ksh. 2,850,000) being the value of the demolished and destroyed building/property.

2. Loss of User of the intended premises for 89 years being the period of the unexpired lease in the sum of Kshs. Sixty Three Million One Hundred Thousand (Kshs. 63,100,000/=).

3. General damages in the sum of Ksh. One Million (Kshs. 1,000,000/=)

4. Exemplary and aggravated damages in the sum of Ksh. Two Million (Ksh, 2,000,000/=).

5. Costs of this suit.

6. Interest on 1,2,3,4 and 5 above from the date of delivery of this judgment."

It is that judgment that prompted this appeal.

3. Aggrieved, the appellant gave Notice of Appeal on 9th May 2016 and lodged record of appeal on 4th November 2016.

4. On 14th November 2016, the respondent filed a Cross-Appeal in which he sought variation or reversal of the judgment to the extent and in the manner and/or on the grounds that:

"1. The learned Superior Court Judge erred in law in failing to find that a claim for "loss of user" is ascertainable and quantifiable as it is in the nature of special damages and once the same is specifically pleaded and proved it should be awarded as prayed.

2. The learned Superior Court Judge erred in law in awarding 63,100,000/= on the heading of loss of user where the sum specifically pleaded and proved was Kshs 126,200,000/=.

3. The learned judge erred in law in speculating on the vagaries of nature which was not pleaded by the defence nor part of the evidence before him and misdirected himself in making an award based on speculation and personal hypothesis of the trade customs which was wrong.

4. All other awards granted by the superior Court do remain uninterrupted."

5. The respondent prays in the Cross-Appeal that the award of Kshs 63,000,000/= for loss of user be enhanced to Kshs 126,200,000/= "as specifically pleaded and proved" in the amended plaint and further, that the Court be pleased to affirm other awards granted in the judgment of the High Court.

6. In the Memorandum of Appeal dated 31st October 2016, the appellant submits that the learned Judge erred in law and fact in finding that the appellant had participated in the demolition of the respondent's property on the suit premises; in finding that the appellant had disobeyed the court order issued in H. C. Misc. Application No. 33 of 2003; in finding the appellant liable in damages to the respondent; in awarding damages for loss of user notwithstanding the respondent's rejection of the valuation report offered as evidence in support of the claim; in failing to find that failure by the respondent to challenge the restrictions registered against the suit premises was fatal to the respondent's claim for damages for loss of user; and that the award of Kshs 63,100,000/= as damages for loss of user was without any basis. The appellant further submitted that the Judge erred in awarding special damages on the basis of two contradictory valuation reports and in awarding general damages and exemplary damages to the respondent. The appellant urges that the appeal be allowed with costs and the impugned judgment be set aside with orders that the respondent's claim be dismissed with costs.

7. The appeal came up for hearing on 10th October 2017 when **Mr. Gatari Ringera** appeared for the appellant and **Mr. A. G. Ricingu** appeared for the respondent.

8. Mr. G. Ringera submitted on the issue of liability on grounds 1, 2, 3 and 4 together and on the issue of damages on grounds 5, 6,

7 and 8 together.

9. Mr. Ringera contended that there was no evidence to prove that the appellant was involved in demolition of the respondent's structures on the suit premises. He contended that the structures were destroyed by "government people" in a GK vehicle. He submitted that the plaint did not implicate the appellant. It was counsel's submission that no employees of the appellant were identified by the respondent. Referring to the amended plaint, counsel pointed out that there was no prayer for cancellation of restriction – which were in place even at the time of delivery of judgment. Counsel pointed out that Meru High Court issued orders to stop demolition but the respondent failed to cite any one for contempt. It was counsel's view that special damages was not proved and the Judge erred in granting the same. It was contended that the learned Judge agreed that the valuation report was speculative but inspite of this, he gave Kshs 63 million when there was no basis for it. Although the respondent had a duty to mitigate damages, he did not, contended counsel. Our attention was drawn to the list of authorities on damages especially to the case of **Kenya Hotel Properties Limited vs. Willesden Investments Ltd [CA No. 149 of 2017] (**unreported); and relied on his written submissions and list of authorities.

10. On behalf of the respondent, learned counsel, **Mr. Riungu** opposed the appeal and relied in doing so on the respondent's written submissions and list of authorities. He urged that the respondent had both legal title and possession of the suit premises which he was developing; that the appellant took over the suit premises and gave the same the name of "Green Park". He referred to the orders issued by the High Court in Meru restraining interference with the suit premises but the appellant did not, said counsel, heed the order. Building materials were carted away and buildings demolished, said counsel. In counsel's opinion, the damage suffered by the respondent entitled the respondent to compensation. Counsel urged that the appeal has no merit and should be dismissed.

11. We have perused the record of appeal and the written submissions and authorities filed by the parties. We have also given due consideration to the oral highlighting of the submissions. We are alive to the requirement for the parties to get a retrial of their case in this appeal in line with Rule 29(1)(a) and the principles in the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123.**

12. The issues raised in this appeal are two and relate to liability and award of damages.

13. The facts of this appeal are not complicated. It is conceded that the respondent had both legal title and possession of the suit premises. He was in the process of developing the suit premises and had purchased and stored building materials on the site. It is not in dispute that the leasehold title had an unexpired term of 89 years from 1st May 1995. The respondent testified that in 2003, the Clerk of the predecessor to the appellant, that is, the defunct Municipal Council of Meru directed the respondent to stop any construction on the two plots that constitute the suit premises. Aggrieved, the respondent sought and obtained a court order of stay in Judicial Review Application No. 33 of 2003. Inspite of the court intervention, the buildings were pulled down. The respondent filed suit seeking damages which was determined on 27th April 2016 in a judgment that gave rise to this appeal.

14. The evidence adduced at the trial shows that the appellant and its predecessor were interfering with the respondent's quiet enjoyment of the suit premises. The fact that they (the Municipal Council of Meru) tried to stop the construction of the buildings on the suit premises coupled with the evidence of **Joseph Mwithimbu – DW2** who testified that the Municipal Council of Meru, and hence the appellant, participated in destruction of the respondent's property, puts the issue of liability beyond challenge. The buildings being put up on the suit premises had received approval as shown in evidence and testimony of Joseph Mwithimbu. The appellant did not rebut this evidence. After perusing the evidence, it is our finding that the learned Judge arrived at the correct decision on liability.

15. As regards damages, the respondent tendered proof of the construction materials and on the balance of probabilities proved that he was entitled to the sum of Kshs 2,850,000/=. As regards general damages, we think that the sum of Kshs 1,000,000/= award by the learned Judge was reasonable and there would be no basis to interfere with it, nor would there be any basis for interfering with the award of Kshs 2,000,000/= granted towards exemplary damages in item No. 4 of the judgment under review.

16. Accordingly and pursuant to Rule 31 of the Court of Appeal Rules, we allow damages awarded in item No. 1 (i.e. Kshs 2,850,000/=) and in item No. 3 (Kshs 1,000,000/=) and item No. 4 (Kshs 2,000,000/=) of the judgment dated 27th April 2016 by P. M. Njoroge, J. and uphold the judgment only to that extent but we decline to allow the award in item No. 2 (Kshs 63,100,000/=) of the said judgment. In our view, there was not enough material before the learned Judge on the basis of which an assessment of an award of damages could be made. Additional evidence is called for to facilitate a fair determination of damages. Accordingly, we direct that the trial Judge shall take further evidence on item No. 2 and proceed to assess reasonable damages for loss of user.

17. We dismiss the Cross-Appeal.

18. We award the costs of the appeal to the respondent.

Dated and delivered at Nairobi this 29th day of December, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR