



**Nyangaga v County Government of Mombasa (Land Case
284 of 2018) [2023] KEELC 18490 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18490 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 284 OF 2018**

**LL NAIKUNI, J
JUNE 19, 2023**

BETWEEN

JOSEPH OBURA NYANGAGA PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement by this Honorable Court pertains to a civil suit instituted by Mr. Joseph Obura Nyangaga, the Plaintiff herein vide a Plaint dated 6th December, 2018 against the Defendant herein.
2. Upon service of the Summons to Enter Appearance dated 11th December, 2014, on 19th December, 2018 the Defendant not only entered appearance dated 18th December, 2018 but also filed grounds of opposition. Subsequently, on 25th March, 2019 the Defendant filed Statement of Defence dated even date.
3. On 3rd March, 2022 Pre – trial conference on case management was conducted under the provision of Order 11 of the Civil Procedure Rules, 2010 and on noting full compliance by the parties the matter was fixed for hearing and commenced hearing from 16th February, 2023 with both the Plaintiff and the Defendant’s case upto its logical conclusion on the same material date. Thereafter, the Honorable Court retired to render its Judgement accordingly on 19th June, 2023.

II. The Plaintiff’s case

4. From the filed pleadings, the brief facts of the case are that at all material to the suit herein, the Plaintiff was and is the owner of a five storey building on a portion of land on Plot No.133/V/MS (hereinafter known as “The Suit Land”) . On 30th November 2018 the Defendant’s agents/servants/employees forcibly gained entry onto the Plaintiff’s premises and pinned a notice thereon. The Defendant had



through the said notice given the Plaintiff nine (9) days to vacate the plot and remove all equipment from the site in default the Defendant would enforce the notice at the Plaintiff's own costs.

5. The Plot or portion of Plot No. 133/V/MS is private property which allegedly belonged to Amirali Hassanali Mohamed. The Defendant had no authority whatsoever and no legal or Constitutional right to give the Plaintiff the said notice and to enforce the same. The alleged owner of Plot No.133/V/MS filed a case against the Plaintiff in HCCC NO. 265 of 2008 and got a Judgment in his favour but the Plaintiff obtained orders of stay of execution pending hearing and determination of the appeal filed by the Plaintiff.
6. The Plaintiff constructed the building since the year 2008 and completed the same sometimes in the year 2011 and the issue of approval by the Defendant to the Plaintiff to construct was not a requirement. The Plaintiff was aggrieved by the notice issued by the Defendant and claimed that the same was unlawful/illegal, baseless malicious and was aimed at helping the said Amirali Hassanali Mohamed to have vacant possession of the Plaintiff's building or to demolish the said building in order to have vacant possession of the portion of the plot on which the Plaintiff's building was situate.
7. The Plaintiff impleaded the Defendant in this suit and prayed for Judgement against the Defendant for:
 - a. A declaration that the notice issued by the Defendant is unlawful/illegal, unconstitutional and therefore null and void *abi initio*;
 - b. A declaration that there approval of development of the building by the Defendant was not necessary since the Plaintiff had/has no title to the portion of land on which the building is situate.
 - c. A declaration that the issue of encroachment on private property being Plot No.133/V/MS is not within the jurisdiction of the Defendant.
 - d. A permanent injunction restraining the Defendant and its agents/servants/hirelings from demolishing the Plaintiff's building or having any dealings with the same.
 - e. Damages for mental and/or psychological torture occasioned to the Plaintiff.
 - f. Costs of and incidental to this suit.

III. The testimony by the Plaintiff.

8. The Plaintiff called PW 1, JOHN OBURA NYANGAGA, of I.D No. 2640117. He informed Court that he lived in Nairobi. He was a Civil Servant but had retired. He signed a statement on the 12th February, 2019 and further statement on 25th October, 2022 which he adopted his evidence in chief. He stated that he filed a list of documents dated 12th February, 2019 which had seven documents to be admitted as Plaintiff Exhibit Numbers 1 to 7.

He told Court that under the contents of Paragraph 3 of the Defence by the County Government, it was held that his property was an illegal building. However, he denied this allegation by telling the court that he approached the Municipal Council who refused to approve the building as they told him that he did not have a title deed. By that time, in the year 2008, the NEMA were not in existence. The Municipal Council never asked him to show them the approval. He testified that he finished his building in 2011 and they came in 2018, which is 7 years after and told him to remove the equipment and workers/ labourers. He had none of that in site. From the enforcement notice, they said that they were to demolish the building if he failed to comply. He came to court to stop them from demolishing



the house. There was an active case in another Court ELC NO. 265 OF 2008 between himself and the person claiming the suit property.

9. When cross examined he stated that from his first statement dated 12th February, 2019, the property PLOT NO. 133/V/MS was his property. He had said that he had filed an appeal which was not heard. Mr. Amirali Hassan Ali Mohammed was the one who lodged a complaint against him with the DCI and caused the Defendant to issue him with the Enforcement notice. By the time he had already constructed his building. He heard that the Defendant never approved the development on parcel of land which did not have a title deed.
10. He told the court that with regard to obtaining approval from the Defendant, the same was not applicable twice. He never had a title deed for the land on which his building was developed on. He never had any proof of title of the land when he constructed the building. He was the one who took the photographs. He did not have a certificate. He filed the appeal out of time but the Court of Appeal declined his application to file the appeal out of time.
11. On re - examined he stated that the house on the suit property belonged to him, but the land belonged to Amirali Hassan Ali Mohammed. The complaint was lodged by Amirali Hassan Ali Mohammed at the Municipal Council. He admitted that he never got an approval for the construction. The Council refused to issue him with an approval as they claim he did not have a title. The Council never asked him for architectural plans/designs. He had finalized construction within a period of 7 years.

IV. The Defendant's case

12. The Defendant through a Statement of Defense dated on 25th March, 2019 and having entered appearance of the same date went ahead to averred that save as what was hereby expressly admitted the Defendant denied each and every allegation set out in the Plaint. The Defendant admitted the descriptive contents of Paragraphs 1 and 2 but denied the content of paragraph 3 of the plaint and puts the plaintiff to strict proof particularly on the aspect of ownership of the said illegal building.
13. The Defendant relied on the following particulars of illegality:-
 - a. The said illegal structure lacked any or all approvals from the Defendant's having in mind it was a statutory requirement.
 - b. The said Plaintiff was not the true owner of Plot No. 133/V/MS and the same had expressly been declared by the Plaintiff.
 - c. The said illegal structure did not only lack statutory approvals but it did not have an Environmental Impact Assessment report which was a requirement when constructing.
 - d. The said illegal structure does lack an architectural plan.
14. The Defendant admitted the contents of Paragraph 4 of the Plaint in so far as pinning a notice on the illegal structure. The Defendant averred that without prejudice the Defendant had statutory authority to enter into a private property as planning and development was part of the mandate of the Defendant as per Part 2 of Schedule 4 of *the Constitution* of Kenya 2010 and the Physical Planning Act. The Defendant also denied the contents of Paragraph 5 of the Plaint arguing that the Defendant did give nine (9) days to the Plaintiff with regards to appealing their decision of which they had not done so. In the alternative, the Defendant contended that it was vested with all the powers both legally and constitutionally to issue a notice to the Plaintiff or any private individual where there was contravention of the Physical Planning laws as per the Physical Planning Act and *the Constitution* of Kenya 2010. The stay of execution was granted for purposes of the Plaintiff herein to file an appeal which was a right



but a right that should not be misused and taken advantage of. The appeal had since been rendered time barred and the Plaintiff continued to enjoy the orders of the court granted in illegal occupying someone else's property. Ownership of the said plot was established in HCCC NO. 265 of 2008.

15. The Defendant deposed that building approvals had always been a legal requirement as per the Physical Planning Act, Chapter 6 Laws of Kenya.

V. Response to the Defendant's Defence

16. On the 4th April, 2019, the Plaintiff responded to the statement of defense by the Defendant as follows:
- a. Save as it contained express admissions, the Plaintiff joined issues with the Defendant on its Defence.
 - b. In reply to Paragraph 3 of the Defence, the Plaintiff reiterated the contents of Paragraph 3 of the Plaintiff in toto and puts the Defendant to strict proof thereof.
 - c. Further and without prejudice to Paragraph 2 above, the Plaintiff denied the particulars of illegality and stated that the Defendant had no statutory or constitutional right to deal with the issues/dispute between the Plaintiff and the proprietor of the parcel of land.
 - d. The Plaintiff denied the contents of Paragraph 5 of the Defence and reiterates the contents of Paragraphs 5, 6, 7 and 8 of the Plaintiff.
 - e. In reply to Paragraph 6 of the Defence, the Plaintiff reiterated the contents of Paragraph 5 of the Plaintiff.
 - f. In reply to Paragraphs 7 and 10 of the Defence, the Plaintiff reiterated the contents of the Plaintiff in its entirety.
 - g. In reply to Paragraphs 8 and 9 of the Defence, the Plaintiff reiterated the contents of Paragraphs 6 and 7 of the Plaintiff.
 - h. In reply to paragraph 11 of the Defence, the Plaintiff reiterated the contents of Paragraphs 6 and 7 of the Plaintiff.
 - i. In reply to Paragraph 12 of the Defence, the Plaintiff reiterated the contents of Paragraph 8 of the Plaintiff and stated that the Plaintiff had not misused and taken advantage of the orders of stay of execution and the appeal was not time barred.
 - j. In reply to Paragraph 13 of the Defence, the Plaintiff reiterated the contents of Paragraph 9 of the Plaintiff.
 - k. In reply to Paragraph 14, the Plaintiff stated that building approvals were only required in a case where the developer had a document to prove ownership of land.
 - l. In reply to Paragraph 15, the Plaintiff reiterated the contents of Paragraph 11 of the Plaintiff.
 - m. In reply to Paragraphs 16, 17 and 18, the Plaintiff stated that this was the forum through which the Plaintiff could approach this Honourable Court and not through judicial review as stated by the Defendant.

VI. The testimony by the Defendant

17. Mr. Tajbhai Advocate for the Defendant told the court that the Defendant wished to rely on the Defendant's pleadings and defense dated 25th March, 2019 and the documents.



VII. Submissions

18. On 16th February, 2023 after the closure of both the Plaintiff's and Defendant's cases, in the presence of both parties the Court directed that the suit be dispensed off by way of written submissions. On 19th April, 2023 after the Honourable Court confirmed that both parties had complied and their written submissions were on record, the Honorable Court reserved to deliver its Judgment on 19th June, 2023 accordingly.

A. The Written Submissions by the Plaintiff

19. On 24th March, 2023, the Learned Counsel for the Plaintiff through the Law firm of Messrs. Odhiambo S. E. & CO. Advocates filed their written submissions dated 23rd March, 2023. Mr. Odhiambo Advocate commenced his submission by providing a detailed background on the matter at hand. He stated that the Plaintiff filed this suit on 8th December, 2018 pursuant to a notice pinned on the Plaintiff's building on Plot No. 133/V/MS. The said notice required the Plaintiff to vacate the site and remove any equipment and labourers on the site immediately from the date of the notice. Reasons for giving the notice to the Plaintiff was that the Plaintiff was constructing without approval from the Defendant and developing and encroaching into private property. The Defendant filed defence on 25th March, 2019 denying that the Plaintiff is the owner of the premises/building on plot No. 133/V/MS which building it pleaded was illegal. The Defendant admitted pinning the notice on the structure and stated that it had authority pursuant to part 2 of Schedule 4 of *the Constitution* of Kenya and the Physical Planning Act to enter into a Private Property. On all these, the Defendant denied and admitted some of the averments in the Plaintiff.
20. The Learned Counsel relied on both the oral and documentary the evidence adduced in Court and adopted as evidence, the statement and further statement dated 12th February, 2019 and 25th October, 2022 and filed on 4th March, 2019 and 15th November, 2022 respectively by the Plaintiff herein. He produced as exhibits 1 to 7 the documents attached to his list of documents dated 12th February, 2019 and filed on 4th March, 2019. The Defendant did not call a witness to give evidence in support of the pleadings in its defence.
21. To support his case, the Learned Counsel framed the following two (2) issues which he wished the Court to rely on for the determination of the case by the Plaintiff. These were:-
- Firstly, on the legality of the notice issued by the Defendant. The Learned Counsel submitted that the notice pinned on the Plaintiff's premises was not legal but done with a view to have the Plaintiff to vacate the premises. The evidence of the Plaintiff was that the construction of the building was completed in the year 2011 which was seven (7) years before the Defendant issued the said notice. It was also the Plaintiff's evidence that there was no construction going on and there were no equipment on site at the time the Defendant issued/pinned the said notice.
22. The Learned Counsel averred that it was the Plaintiff's evidence that there was no requirement to obtain a license from NEMA because by that time the said Authority had not been established when he began the construction. According to the Learned Counsel, the Environment and Management Co - Ordination Act, 1999 which establishes the National Environment & Management Authority (NEMA) came into operation sometimes in the year 2003. Thus, an approval for construction could only be obtained by the person doing construction if he had a Title Deed for the land or any document allowing her/him to construct/develop a plot. The Defendant had no business giving the notice on the ground that the Plaintiff had no permit from NEMA. Therefore, he argued that the Defendant



- disabused its powers by giving the notice because the Plaintiff had applied for approval of the building plans but was told that the same could not be approved because the Plaintiff did not have a title deed.
23. The Learned Counsel submitted further that, at the time of giving the notice there was no construction going on to warrant the Defendant to state in the notice that the Plaintiff was constructing a structure without approval from the County.
 24. On the issue of developing and encroaching into a private property, the Learned Counsel submitted that the Defendant had no business dealing with the same because the plot did not belong to the Defendant and so such a dispute ought to have been referred to Court by the owner of the plot in question. The Defendant did not rebut the Plaintiff's evidence during cross-examination and there was no rebuttal of the Plaintiff's evidence in that the Defendant did not call a witness to testify. The provisions of the Physical Planning Act were very clear and there was no requirement for the approval of building plans when a developer had no title deed. Further, NEMA could not approve development when the developer had no title deed.
 25. The Learned Counsel opined that the Defendant had no authority to act on behalf of NEMA which was a statutory body and had powers to deal with developers who had not obtained a license from it prior to commencement of development.
 26. The contention by the Learned Counsel was that the Defendant failed to support its pleadings in the statement of Defence in that no witness testified for and on behalf of the Defendant. The notice given to the Plaintiff by the Defendant which stated that the Plaintiff encroached on plot No. 133/V/MS and developing and constructing with approval from the County was done with ulterior motives since the Plaintiff was not constructing and developing at the time of issuance of the notice.
 27. Secondly, whether or not the Plaintiff was entitled to the prayers sought in the Plaint. The Learned Counsel submitted that the Plaintiff was entitled to the prayers in the Plaint since he had proved that the notice ought not to have been issued to him. In conclusion, the Learned Counsel urged the Court to find that the Plaintiff had proved his case on a balance of probabilities and Judgment be delivered in his favour as pleaded in the Plaint.

B. The Written Submissions by the Defendant

28. On 30th March, 2023, the Learned Counsel for the Defendant through the Office of the County Attorney filed their written submissions dated the same day. Mr. Tajbhai Murtaza Advocate started by stating that the Plaintiff moved this Honourable Court through a Plaint dated 6th December 2018. On its part, the Defendant prepared a Defence dated 25th March 2019 and which was filed on the same date.
29. For his submissions, the Learned Counsel relied on the following four (4) issues:
30. Firstly, whether a developer could cause development without an approval. On this issue, the Learned Counsel submitted that the applicable law during the filing of this suit was the Physical Planning Act No. 6 of 1996 (Hereinafter referred to as "The PPA). Under the PPA, no development within the local authority could be carried out without a valid approval. Under the provision of Section 29 of the PPA gave powers to local authorities and provides as follows:-

“ Subject to the provisions of this Act, each local authority shall have the power-

- a. to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area:



- b. to control or prohibit the subdivision of land or existing plots into smaller areas;
- c. to consider and approve all development applications and grant all development permissions,
- d. to ensure the proper execution and implementation of approved physical development plans;
- e.
- f.

31. The Learned Counsel submitted that now that the power vested upon the Defendant was clear, they wished to venture into the aspect of whether a developer could undertake development without an approval from the Defendant. The answer to the above question was retrieved from the provision of Section 30 of the PPA and it provides as follows:-

- (1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both.
- (3) Any dealing in connection with any development in respect of which an offence is committed under this section shall be null and void and such development shall be discontinued.

32. The Learned Counsel argued that it was clear being a requirement that a development permission was required by any person before commencing a construction and in this instant case the Plaintiff did not have any development permission whatsoever. The Learned Counsel held that the Plaintiff had the audacity to claim and admit first that indeed he was not the proprietor of the land and that he did not have a title deed to the land. Further, the Plaintiff claimed that due to that fact he was not entitled to apply for a development permission. That was the very reason apart from ensuring a building was safe and conformed to the structural and architectural plans, there was need to have ownership documents to protect interests of land owners from trespass and criminal sanctions. A criminal sanction would arise where a development was erected without a valid development permission.

33. In the current dispensation under the Physical and Land Use Act No.13 of 2019 (hereinafter referred to as “The PLUA”) the case remained the same as per the provision of Section 57 which states that no development shall be carried out without a development permission. Therefore, the Plaintiff herein should not be entertained and the law should apply to him as no one was beyond the law. It was expressly admitted by the Plaintiff that he did not have a development permission.

34. Secondly, on whether the Defendant had the authority to issue an enforcement notice. The learned Counsel informed Court that under the fourth schedule of *the Constitution* of Kenya 2010 at part two, the Defendant had been vested with powers to ensure proper planning and control developments. Furthermore, the PPA and the current PLUA gave powers to the Defendant to plan and control developments within the jurisdiction of the County. One of the measures in ensuring proper planning and to be able to control developments was by being able to enforce where an individual had contravened the law. Thus the issuance of an enforcement notice.



35. The Learned Counsel submitted that the provision of Section 38 of the PPA had provided for instances where an enforcement notice may be issued and the ingredients therein. The PLUA at the provision of Section 72 in the current dispensation provides for the same. It was therefore, the legal duty and the powers vested upon the Defendant to issue such a notice where there had been a breach of the law. The Plaintiff herein had clearly breached the law and the Defendant within its mandate issued an enforcement notice. Unfortunately, the enforcement notice was never complied with and the Plaintiff rushed to this Honourable Court by using the back door means and stopped its enforcement.
36. Thirdly, on whether the Plaintiff exhausted all the other avenues before moving this Honourable Court. The contention by the Learned Counsel was that the Plaintiff during examination in chief testified that he had sought for an approval. However, despite all these efforts, he was denied one on the grounds that he did not have ownership documents. However, during cross examination it was clear that he had not adduced any evidence to prove that indeed he had submitted the plans and architectural drawings to the Defendant as required by law and that he was denied the approval or whether he had even applied for a development permission.
37. In addition, there was no evidence or proof by the Plaintiff that guided his testimony that he was not constructing and/or had developed the building way before, as much as that was not a valid defense for developing without a valid development permission. Nonetheless, if it were true that indeed he had submitted his application for a development permission and was denied one, the PPA had provided for an avenue for appeal. On this point, the Learned Counsel relied on the provision of Section 13 (1) of the PPA which provided as follows:-
- “Any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed.”
38. The Learned Counsel submitted that once more, there was no evidence or proof provided to this Honourable Court that where the Plaintiff was denied a development permission he appealed or moved to the liaison committee for redress. On the contrary, what the Plaintiff did was to make a decision to proceed on causing development by using force and with no respect to the law. Finally, at the provision of Section 38 (4) of the PPA, the law had provided for an alternative avenue for redress where an enforcement notice was issued by the Defendant herein. Therefore, with due respect, this Honourable Court lacked jurisdiction to entertain the suit on the ground that the Plaintiff had not exhausted all the alternative dispute mechanisms before approaching this Honourable Court.
39. Finally, it was on the issue of which party should bear the costs of this suit. The Learned Counsel submitted that in view of the above, the costs of this suit be in the favour of the Defendants as the Plaintiff had not fulfilled the dictum “he who alleges must prove”. In addition the Plaintiff did not exhaust all the alternative dispute mechanisms and finally it is within the mandate of the Defendant to ensure proper planning and control developments.
40. The Learned Counsel concluded by asking the Honourable Court to dismiss the suit with costs and for the Honourable Court to allow the Defendant to execute its mandate as per the law.

VIII. Analysis and Determination

41. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submissions, the cited authorities made by the Plaintiff and the Defendant and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.



42. For the Honorable Court to arrive at an informed, Just, fair and reasonable decision, it is of the opinion of the Honorable Court that the following three (3) salient issues do arise for its determination herein. These are:-
- a. Whether this Honorable Court has jurisdiction to entertain the suit filed by the Plaintiff herein.
 - b. Whether the suit by the Plaintiff has any merit and if so he is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

ISSUE No. a) Whether this Honorable Court has jurisdiction to entertain the suit.

43. Under this Sub – heading, a critical issue as to whether this Court has Jurisdiction to have entertained the suit by the Plaintiff or not has emerged from the submissions in particular that of the learned Counsel for the Defendant. Though belatedly raised, nevertheless, as the proverbial saying goes, the Honorable Court can not hide its head under the sand and pretend it's a non – issue whatsoever. The Court will have to tackle it head on.

44. In so doing, the Court has considered the material and submission on record on this issue. Indeed, as indicated, the Learned Counsel for the Defendant raised the issue of the Doctrine of exhaustion in their written submissions. He argued that under the provision of Section 38 (4) of the PPA, the law that governed operations at the time the development by the Plaintiff was taking place and which is the subject matter then, the law had provided for an alternative avenue for redress where an enforcement notice was issued by the Defendant herein and it stated as follows:-

“If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under Section 13.”

45. It is now well established under the Classicus locus case of “The Owners of the Motor Vessel “Lillian S” – Versus - Caltex Oil (Kenya) Ltd [1989] KLR 1 it was held by the Court of Appeal that the jurisdiction of a court or tribunal to entertain a dispute is so crucial that whenever an objection to its jurisdiction is taken the issue should be decided right away as a preliminary matter. A court which has no jurisdiction has no business taking one more step in the matter. Nyarangi J as was then held that:

“Jurisdiction was everything. Without it, a Court has no powers to make one more step. Where a Court ‘has no Jurisdiction there would be no basis for a continuation of proceedings pending other evidence, A court of law downs its tools in respect of the matter before it the moment it holds the opinion that is without Jurisdiction”

46. The Court in several decisions have held, inter alia, that:

“The functions of the County Physical and Land Use Planning Liaison Committee shall be to-

- (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;



- (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
- (d) hear appeals with respect to enforcement notices”.

47. Unfortunately, in its submissions, the Learned Counsel for the Defendant failed to pointed out through empirical documentary information as to whether the Defendant had upto date appointed the said committee or not. The only thing he emphatically did was to merely and casually refute the jurisdiction of this Honourable Court stating that the Plaintiff had not exhausted all the avenues of recourse before coming to the court. Clearly, that is not adequate at all and this Court being a temple of Justice and one that dispenses it to all will categorically decline and refuse to be taken through that dark lane.

48. I say so through the following reasoning. Parliament enacted the *Physical and Land Use Planning Act*, 2019. Part V of the Act contains an elaborate framework on enforcement. The provision of Section 72(1) empowers the County Executive Committee member to serve the owner, occupier, or developer of property or land with an enforcement notice relating to developments on the land. The provision of Section 72(1) provides thus:

“72.

- (1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—
 - (a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or
 - (b) any condition of a development permission granted under this Act has not been complied with.

49. Further to this, the provision of Section 72 (3) and (4) provides the following framework on how a party who was aggrieved by an enforcement notice is required to seek redress:-

“72.

- (3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

72.

- (4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.”



50. However, the Defendant did not point out other relevant provisions of the law such as Section 93 of the *Physical and Land Use Planning Act* which has a bearing on the instant suit. The said section stipulates as follows:

“ All disputes relating to physical and land use planning, before establishment of the national and county physical and land use liaison committees shall be heard and determined by the Environment and Land Court.”

51. The Material on record indicated that by the time the enforcement notice 30th November, 2018 was issued and by the time the suit was filed on 8th December, 2018 the said committee had not been constituted by the Defendant. This Court has stated in its numerous decisions stated that it would, therefore, follow that the only option for redress that the Plaintiff had was this court as provided for by the above cited statutory provision. In the given circumstances, where was the Plaintiff under the guidance and the safeguards of the provisions of Article 25 (c), 40 (1) (2) & (3), 48, 50 (1) & (2); 70 (1), (2), (3) & (4) and 162 (2) (b) of *the Constitution* of Kenya, 2010 on the right to private property, a fair hearing, access to Justice and enforcement of the violation, threats and denial of the fundamental rights fall expected to do or go. Indeed the scripture under Psalms 121 states:

“ I lift up my eyes in the Mountain. From whence does my help come?. My held comes from the Lord. Who made heaven and earth. He will not let your foot be moved, he who keeps you will not slumber. Behold, he who keeps Israel will neither slumber nor sleep. The Lord is your keeper, the Lord is your shade on your right hand.....” . Guided by this important scripture, the Plaintiff had no alternative but to turn to the this Court for redress.

52. Furthermore, the court is the opinion that matters of jurisdiction of the Court ought to raised as an objection at the commencement of proceedings and not at the end of such proceedings. One cannot be allowed to take a chalice of poison halfway and expected to survive. Certainly, the Defendant should not be allowed to have a second bite at Cherry. So, if the court had jurisdiction at the commencement of the proceedings it could not be said to have lost it through the unilateral action of the Defendant.

53. Consequently, having stated all these, the Honorable Court finds and holds that it has jurisdiction to entertain the instant suit.

ISSUE No. b) Whether the Plaintiff is entitled to the reliefs sought in the suit.

54. Under this sub heading, the court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law. It must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about. From the very onset, it is instructive to note that for no apparent good reason nor justifiable cause the Defendant decided not to rebut its case by summoning any witness nor adduce any oral nor documentary evidence. This Court was perplexed by that action or strategy. Nonetheless, the Defendant mounted such a strong submission based on matters of law. Be that as it may, they say that two wrongs do not make a right. I am compelled to quote Archbishop Fulton Sheen (1895 to 1979), an American Bishop



of the Catholic Church known for his preaching and especially works on television and Radio when he stated:-

“Moral principles do not depend on majority vote. A wrong is Wrong, even if everybody is Wrong. Right is Right even nobody is right”. Based on this, I will endeavor to exhaustively extrapolate on these assertions herein below.

55. In the case of “Republic – Versus - Kombo and 3 Others Ex - Parte Waweru [2008] 3 KLR (EP) 478 which held, inter alia, that:-

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

56. The Honorable Court is of the opinion that even though the Plaintiff has elaborately demonstrated a violation of his legal and constitutional rights, and with all due respect to the Defendant, it was not rebutted, it is not entitled to all the reliefs sought. It is evident from the material on record that the Plaintiff’s main grievance relates to the issuance of an enforcement notice without due process and the Defendant’s failure to set up the committee.

57. The Honorable Court further observes that, on its admission from the filed pleadings and evidence adduced in Court, the Plaintiff herein has emphatically held that he has no proprietary rights to the suit property in form of a Certificate of title Deed as required under the provisions of Sections 24, 25 and 26 of the [land registration Act](#), No. 3 of 2012 or any other relevant provisions of the law. Indeed, he admitted, the suit property was registered in the names of one Amirali Hassan Ali Mohammed as the absolute and legal owner of the suit land. The owner of the land is a third party who is not a party to this suit. From the records, though he never testified but he once lodged a complaint with the then Municipal Council (now defunct) on the atrocities meted by the Plaintiff onto his property. It is not clear what tangible action was taken by the then Council. Honestly, this was like music in the ears of the Court! How on earth would there be such an arrangement where the Plaintiff proceeds to construct a structure to its completion on another person’s land without his consent and knowledge without it being termed constructive and express trespass? My conclusion this should be an addition to the seven wonders of this world!!!

58. Nonetheless, and in all fairness, it is my view that since the Plaintiff is not the owner of the land, his rights to occupy a Portion of the suit property on which he claimed his building stood ought to be premised either on a lease or sale of that particular portion of land.

59. Further, I am of the considered opinion that the Plaintiff has categorically failed to satisfy this Honorable Court that he is entitled nor warrant the grant of the prayers sought in the filed Plaintiff. The Plaintiff in his testimony told the court that the suit property was owned by a third party. Being that he is not a registered proprietor of the suit property, then the Plaintiff’s rights are not protected under the provisions of Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012.



60. Additionally, I cannot agree with the Learned Counsel more that the development that was undertaken by the Plaintiff fails to meet the fundamental thresholds and standards for such architectural designs and constructions requirements. These are in form of approvals and development plans. In so doing, it will not only compromise constructions structures but also put human beings into exposure and risks under the Public Order, safety, security and health. For all these reasons, not only will I under the inherent powers vested in me under the provisions of Article 159 (1) & (2) of *the Constitution* of Kenya, 2010; Sections 3 & 13 of the Environment Act, No. 19 of 2011; Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Sections 150 of the *land Act*, No. 6 of 2012 direct that the suit for the Plaintiff be dismissed but also the removal of the illegal and unlawful structures through demolition under the provisions of Section 152E of the *Land Act*, No. 6 of 2012.

ISSUE No. c) Who shall bear the costs of the Suit

61. It is now well established that the issue of costs is at the discretion of the court. Costs mean any award that a party is granted at the conclusion of a legal action or proceeding in any litigation. The general rule is that costs shall follow the event in accordance with the proviso to the provision of Section 27 (1) of the *Civil Procedure Act* (Cap. 21). By the event it means the result or outcome of the legal action or proceedings. See the Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalans” (2014) eKLR; the Court of Appeal cases of “Cecilia Karuru ngayu – Versus – Barclays Bank of Kenya & Another (2016) eKLR”; Rosemary Wambui Mnene – Versus – Ihururu Dairy Cooperatives Societies Limited (2014) eKLR; and Kenya Sugar Board – Ndungu Gathini (2013) eKLR where the Courts held “inter alia”:-

“The basic rule on attribution of costs is that Costs follow the events.....its well recognized that the principles Costs follow the events is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case.....”

62. Additionally, a successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Ltd [1967] EA 28. The court finds no good reason why the successful party should not be awarded costs of the action.
63. Accordingly, and from the instant case, the Plaintiff has failed to prove its case as from the filed pleadings and the evidence adduced in Court. It follows therefore that the Defendant shall be entitled to be awarded the costs of the Suit.

IX. Conclusion and Disposition

64. The upshot of the foregoing is that in the absence of clear evidence of the Defendant’s alleged encroachment it was not possible to find fault on the part of the Defendant. The Plaintiff has not proved its case on the required standard of balance of probabilities. Therefore, the Plaintiff has not satisfied the Honorable Court that it deserves to be granted the orders sought from the filed Plaintiff. For avoidance of doubt, the Honorable Court proceeds to make the following orders:-
- a. THAT Judgement be and is hereby entered whereby the suit by the Plaintiff and the reliefs sought in the Plaintiff dated 8th December, 2018 are dismissed with costs.
 - b. THAT an order be made for the Plaintiff within the next ninety (90) days to remove any structures and/or properties development on the suit land pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012. Failure to do so the Defendant to be at liberty to do so at the expense of the Plaintiff.



c. THAT the matter is now closed.

d. THAT costs of the suit to be awarded to the Defendant to be borne by the Plaintiff herein.

65 It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT MOMBASA THIS19THDAY OFJUNE.....2023.**

.....

**HON. JUSTICE L.L NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Yumna – the Court Assistant.
- b. Mr. Odhiambo Advocate for the Plaintiff.
- c. Mr. Tajbhai Advocate for the Defendant

