Muturi & 32 others v Njogu & 3 others (Environment & Land Case 71 of 2018) [2023] KEELC 17941 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17941 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 71 OF 2018

FO NYAGAKA, J

JUNE 14, 2023

BETWEEN

CHARLES MUTURI ..... 1ST PLAINTIFF

CHARLES WAIMIRI ..... 2ND PLAINTIFF

PETER KIMANI ..... 3RD PLAINTIFF

PETER N. MUNJUGA ..... 4TH PLAINTIFF

GIBSON GITONGA ..... 5TH PLAINTIFF

PETER MWANGI ..... 6TH PLAINTIFF

MILKAH WANJIKU ..... 7TH PLAINTIFF

PAUL WAHOME ..... 8TH PLAINTIFF

LEAH N. OKUMU ..... 9TH PLAINTIFF

GRACE MWIHAKI ..... 10TH PLAINTIFF

NICHOLAS KAHORA ..... 11TH PLAINTIFF

PAUL KAMAU ..... 12TH PLAINTIFF

PETER MAINA NJOROGE ..... 13TH PLAINTIFF

PETER NG'ANG'A ..... 14TH PLAINTIFF

MOSES M. GITONGA ..... 15TH PLAINTIFF

KENNEDY MUIRURI ..... 16TH PLAINTIFF

JOSEPH KAMAU ..... 17TH PLAINTIFF

JAMES NJAU ..... 18TH PLAINTIFF

BETH WANGARI ..... 19TH PLAINTIFF

RUTH W. KAMAU ..... 20TH PLAINTIFF

MARGARET WATETU ..... 21ST PLAINTIFF

ALI M. ADAN ..... 22ND PLAINTIFF

ABDI KADIR ..... 23RD PLAINTIFF

CHARLES MUGO ..... 24TH PLAINTIFF

JOSEPH MBURU ..... 25TH PLAINTIFF

JOEL WAWERU ..... 26TH PLAINTIFF

HENRY KASAMBA ..... 27TH PLAINTIFF

JOHN WAHOME ..... 28TH PLAINTIFF

ESTHER MUKUHI ..... 29TH PLAINTIFF

MARRIAM MUCHIRI ..... 30TH PLAINTIFF

EVANS NDIRANGU ..... 31ST PLAINTIFF

JACKSON GITAU ..... 32ND PLAINTIFF

DEBORAH MBUGUA ..... 33RD PLAINTIFF

AND

LUCAS NGARAI NJOGU ..... 1ST DEFENDANT

SAMSON OTIENO WASEKA ..... 2ND DEFENDANT

JOSEPH WAWERU AS TRUSTEES OF NYAYO MARKET SELF HELP GROUP ..... 3RD DEFENDANT

THE COUNTY GOVERNMENT OF TRAN NZOIA ..... 4TH DEFENDANT

JUDGMENT

Introduction

1. The Plaintiffs brought the present suit jointly on 27/07/2018 by way of a Plaint dated 27/07/2018. It was filed by the firm of Ms. Kiarie & Company Advocates. They prayed for:

    a. A declaration that the Plaintiffs herein are lawful tenants of the 1st, 2nd and 3rd Defendants in the business premises standing on parcel No. L.R. No. 2116/27/111.

    b. A declaration that the intended/threatened eviction of the Plaintiffs from their business premises standing on parcel No. L.R. No. 2116/27/111 and the threatened demolition of the business premises is illegal.

    c. A permanent and temporary injunction to restrain the Defendants from interfering with the Plaintiffs' business premises standing on parcel No. L.R. No. 2116/27/111 save in the manner provided by the law.

    d. Costs.

e. Interests.

f. Any other relief that this Honorable Court may deem fit.

2. The 1st, 2nd and 3rd Defendants appointed the firm of M/S Onyancha & Company Advocates on 03/08/2018 to act on their behalf. The said firm subsequently entered appearance on 15/08/2018. Further, through the firm, they drew and filed a joint statement of Defence on 22/08/2022. They denied the contents of the Plaint. Centrally they averred that the Plaintiffs were in illegal occupation of the suit premises which subsisted without complying with the law. They urged this Court to find that the suit was incompetently bad and as such, be dismissed with costs.

3. Pursuant to leave granted on 20/06/2019, the 1st, 2nd and 3rd Defendants filed a joint Amended Statement of Defence and Counterclaim. It was dated and filed on 30/09/2019. It sought the following reliefs:

a. The Plaintiffs suit be dismissed with costs to the 1st 2nd and 3rd Defendants;

b. An order do issue against the Plaintiffs and/or their agents, servants and/or persons claiming title through them that all illegal structures, stalls, extensions built in the suit property Kitale Municipality L.R. No. 2116/27/111 be demolished;

c. The 1st, 2nd and 3rd Defendants be granted costs of the Counterclaim;

d. Any other order/relief the court may deem fit to award in the circumstances.

4. The 4th Defendant on the other hand entered appearance on 15/08/2018 through the firm of M/S Mukele Moni & Company Advocates. It's Statement of Defence dated 29/08/2018 was filed on 03/09/2018. It denied the averments contained in the Plaint, averring that the issues were res judicata and/or res sub judice and that the Plaintiffs were operating in premises that were non-compliant with the regulatory framework. It thus urged this Court to dismiss the suit with costs.

5. In response to the 1st, 2nd and 3rd Defendants' Amended Statement of Defence and Counterclaim, the Plaintiffs filed a Reply to Defence and Defence to Counterclaim dated 22/10/2019 on filed. They urged the Court to dismiss the Counterclaim with costs.

The Plaintiffs' Case

6. The Plaintiffs' authorized the 1st Plaintiff, one CHARLES MUTURI, a shareholder of Nyayo Market Self Help Group to testify on their behalf. He did so as PW1. He testified that the Plaintiffs enjoyed a landlord-tenant relationship with the 1st - 3rd Defendants, who were the Trustees of Nyayo Market Self Help Group (hereinafter 'the Group'). Further, that they had been tenants in a commercial building situated in all that parcel of land namely L.R. No. 2116/27/111. The title deed, a copy of which they produced as P. Exhibit 1, was registered in the names of the 1st, 2nd, and 3rd Defendants as Trustees of the Group on 20/12/2000.

7. The Plaintiffs produced lease/rental agreements which were all executed by the Chairman, Treasurer and Secretary of the Group to commence on 01/07/2012. The three acted in their capacity as the management committee. It was the Plaintiffs' evidence that the term of leadership of the officials was between 2012 and 2016. They produced and marked P. Exhibit 2 (a) - (e) rental agreements in respect to the 5th, 11th, 13th, 14th and 21st Plaintiffs respectively. According to the Plaintiffs, the management committee was the trustee of the Group.

8. PW1 testified that the terms encapsulated in the adduced agreements were the same to all Plaintiffs. He adduced evidence that it was, inter alia, agreed that the tenants would erect temporary constructed stalls. The approvals from the relevant authorities for construction were to be obtained by the management of the Group that allowed them to construct on the open spaces/hallways. Furthermore, after being permitted to constructed they used metallic sheets. Finally, that it was a term of the agreement that the cost of construction would be paid through rental income for a certain period. Premised on those terms, PW1 denied that stalls caused congestion and blockage in the suit premises.

9. The Plaintiffs also produced as P. Exhibit 3(a) - (f) copies of receipts in support of payment of rent by the 33rd, a receipt, Abdikadir Yakub, 22nd, 13th Plaintiffs respectively for 2018. They also produced P. Exhibit 4 (a) - (d) licences to operate the businesses for the year 2018. These were issued by the 4th Defendant to Wedlock Center, the 29th Plaintiff, Abdikadir Yakub Mamo, Edin Jirow and Kipawa Salon respectively.

10. The Plaintiffs' case was that they were protected tenants since their tenancies were controlled and fell under the ambit of the Landlord and Tenants Act. In spite of the provisions, the Plaintiffs testified that since 2016, the 1st, 2nd and 3rd Defendants had been intent on evicting the Plaintiffs contrary to the law as evidence through Referrals to the Tribunal as follows:

    a. In Eldoret BPRT Case Nos. 18 - 47 of 2016; Esther Mukuhi & 29 Others vs. Nyayo Market Self Help Group, the Tribunal upheld their preliminary objection on 05/05/2017, by which it struck out the landlord's tenancy termination notices. They produced the Order and marked it as P. Exhibit 5 (a);

    b. In Eldoret BPRT Case Nos. 22 - 55 of 2017; Maina David & 34 Others vs. the Trustees of Nyayo Market Self Help Group, the landlord's letter dated 31/05/2017 demanding vacation of the premises was withdrawn on 21/08/2017, with the landlord being given liberty to serve the tenants with fresh notices in compliance with Section 4 (2) of the Landlord and Tenant Act. They produced the Order and marked it as P. Exhibit .5 (b);

    c. In Eldoret BPRT Case No. 8 of 2018; Joseph Mburu Kariuki vs. Nyayo Market Self Help Group, the Tribunal ordered the landlord on 12/07/2018 to open and allow access to the premises immediately failing which the tenant was at liberty to break in an access the premises. They produced the Order and marked it as P. Exhibit 5 (c).

11. The Plaintiffs' case was that since 2017, they have never been threatened with termination notices or in the alternative, alternate terms of the subsisting tenancies. Additionally, between 2016 and 2017, the 1st, 2nd and 3rd Defendants had on several occasions colluded to write condemnation reports against them to the National Environment and Management Authority (NEMA), Trans Nzoia County offices.

12. On 31/05/2017, the 1st - 3rd Defendants wrote a letter to the 2nd Plaintiff, a copy which the Plaintiffs produced as P. Exhibit 6, asking him to remove his stalls/kiosks/bandas on the suit property since they were allegedly illegally erected and caused interference with the open spaces designed for lighting, ventilation and surfaced drainages. On the same day, NEMA issued a restoration order.

13. PW1 testified that on 25/09/2017, the 4th Defendant issued a statutory notice to the 1st, 2nd and 3rd Defendants to carry out repairs in the building. He could not confirm if the directives had been complied.

14. An Annual General Meeting (AGM) of the Self-Help Group took place on 12/05/2018. It was chaired by one Alex Wangegi. According to the Minutes, produced and marked as P. Exhibit 10, it

was addressed in it that the Group faced resistance towards issuance of notices to several tenants since several disputes successfully challenged their eviction. Further, that the said tenants owed the Group a total of Kshs. 2,600,000.00 being rent arrears. Amongst the defaulters listed were the 2nd, 18th, 5th, 15th, 1st, 26th, 19th, 21st and 13th Plaintiffs respectively.

15. The 4th Defendant sent a reminder regarding the statutory notice earlier issued on 21/02/2018. On 17/07/2018, the 1st (Chairman) 2nd and 3rd Defendants held a special emergency general meeting to the exclusion of the Plaintiffs. PW1 produced the Minutes thereof and marked them as P. Exhibit 7. Part of the agenda was the eviction of tenants with illegal structures and their demolition.

16. It was resolved in the meeting, inter alia, that those will illegal structures would be evicted procedurally by obtaining court orders on the strength of the letters and/or notices from NEMA and the Public Health office. Furthermore, it was resolved that tenants would be notified not to pay the August 2018 rent with those who had paid already being refunded accordingly.

17. On the same day, the Secretary to the Group addressed a letter to the 4th Defendant. Through his letter, produced as P. Exhibit 8, the 4th Defendant was requested to intervene on the allegation that there had been thirty-nine (39) illegal structures set up in the premises at the open spaces causing serious dilapidation of the building and making illegal power connections.

18. It was further reported that a number of unknown arsonists set fire on the 1st Defendant Chairman's shop on the night of 14/07/2018. The letter indicated that it had attached the architect's instruction letter dated 02/10/2017, the NEMA assessment report dated 31/05/2017, the fire department assessment report and a human rights letter to the Director of Public Health. The latter was dated 17/09/2017.

19. Two days later, the Plaintiffs' Counsel wrote to the 4th Defendant a letter which the Plaintiffs produced and marked as P. Exhibit 9. It informed that contrary to the letter of 17/07/2018, the Plaintiffs were lawfully in occupation of the suit premises. They cautioned the 4th Defendant against demolishing their premises and that they would seek court redress if need be.

20. On 15/01/2019, the Tribunal in BPRT No. 08 of 2018, whose order was produced as P. Exhibit 11, directed the Group to pay Kshs. 10,000.00 to the 25th Plaintiff which sum was deducted from the rent. The 25th Defendant was further at liberty to seek damages for unlawful closure of the premises.

21. The 1st, 4th, 13th, 16th and 19th Plaintiffs as well as one Godfrey Mbugua, Judy Wamboi, Mary Wambui Kinyanjui, Moses Wang'ombe, Abdikadir Yakub and Edin Jirow obtained health clearance certificates on diverse dates in 2019 from the County Public Health Officer. They produced and marked them as P. Exhibit 12 (a) - (j).

22. The 4th, 11th, 14th and 25th Plaintiffs and Peter Njoroge were issued by the first three defendants with demand notices on 31/03/2019 for rent arears on diverse dates between March 2018 and February 2019 in respect to several amounts. They produced and marked as P. Exhibit 13 (a) - (f) the notices.

23. PW1 testified further that the Plaintiffs were not given approvals by any office towards construction of their stalls. However, they were of the view that the responsibility for obtaining such approvals vested with the management who are the Trustees of the Group. Additionally, to the exclusion of the tenants' stalls, the building plans were approved as per the architectural drawings of Dr. Magomere. He continued that the 4th Defendant had authority to maintain public health standards in accordance with the *Public Health Act*.

24. PW1 testified that the present suit was not res judicata and/or res sub judice since the disputes in the BPRT focused on rent while the present suit sought to injunct the Defendants from demolishing their

stalls. He was however cross examined as to P. Exhibit 5 (c) which confirmed that the landlord was prohibited from demolishing the stalls.

25. The Plaintiffs were apprehensive that if the demolition was allowed to take place as scheduled on 29/07/2018, they would be greatly prejudiced and condemned without a fair hearing. The Plaintiffs ultimately prayed that their Plaint be allowed and the 1st, 2nd and 3rd Defendants' Counterclaim be dismissed.

The 1st, 2nd and 3rd Defendants' Case

26. The 1st 2nd and 3rd Defendants are the Trustees of Nyayo Market Self Help Group, which was said to be the proprietor of all that parcel of land namely L.R. No. 2116/27/111 as stated in P. Exhibit 1. They called the 1st Defendant as DW1. He testified that on the suit parcel of land, a business premises was constructed for members following the approval of the architectural plans/drawings by the relevant government authorities in October, 2004. He produced the Plans as D. Exhibit 1 (a) and (b). They were drawn by DW2, one David Wechesa Magomere, a registered Architect.

27. According to the 1st, 2nd and 3rd Defendants, the approved plans intended to operate 204 businesses being the number of shares individually owned by the shareholders. The 1st Defendant as a shareholder was among the members who benefited from the issuance of stalls.

28. The Architectural Plans culminated in the construction of a three (3) storey building. DW2 explained that provisions for voids (empty spaces) were created in the floor plans reserved for ventilation and lighting of the building.

29. DW1 testified that presently, there were 250 stalls within the premises arising from the construction of illegal structures along both sides of its walkways with intent to sub-let to other tenants. Further, that those illegal structures were not approved lawfully or at all. They were constructed when he was not the chair of the Group.

30. The suit premises were later inspected by government authorities in 2016 pursuant to their yearly inspection mandates. In their findings captured in several reports, their unanimous conclusions were that the extra structures were illegal. Furthermore, the structures posed a risk to the structural integrity and fire safety of the suit premises since they were constructed using metallic sheets. They all recommended for demolition. The findings, according to DW1, were shared with the Plaintiffs.

31. Further evidence was that in May, 2016, DW2 was called by the Group to establish simple plan boundaries that would have the effect of creating sectional titling of the property.

32. According to DW2's findings which were captured in his report dated 06/05/2016, produced as D. Exhibit 2 (d), the open yards that had been designed for lighting, ventilation and surface draining had been filled up with uncoordinated constructions. This had the effect of endangering the support structure, flooding and causing health hazards. He added that they were unplanned and were not captured in the approved plans for the suit premises. That they had not sought for amendment approval to change the overall structure of the premises.

33. DW2 noted that the extra stalls reduced the path ways by two (2) metres; originally 4.8 metres. He explained that the interferences had the effect of blocking the storm water drain. Consequently, the inevitable flooding would affect the structure of the building. He added that structural foundations are designed on the basis of the bearing capacity of the soil. He stated that if water sips into the soil under the foundation, it would change the bearing capacity of the ground under the foundation. This

would lead to wading of the building by eccentric forces such as earthquakes, causing total or partial collapsing.

34. DW2 narrated that when the sun hits the open spaces, hot air rises creating room for air flow. However, the movement of such air was impeded by the illegal structures, consequently leading to a health hazard.

35. DW2 informed the court that in his line of duty he has to work with a structural engineer to ascertain if a building fits with his drawings. DW2 stated that while his opinion on the effect of the illegal structures was tendered, it would be best informed by a structural engineer.

36. Admitting that he did not furnish his practicing certificate, DW2 explained that he had been a practicing Architect for over thirty eight (38) years. Secondly, that his building plans would not have been approved if he was not licenced to practice.

37. The fire Department of the 4th Defendant similarly inspected the premises. Its findings were that the property was in bad state. It recommended that the illegal structures be removed. Its report dated 22/07/2016 was produced and marked as D. Exhibit 2(c). The report of the NEMA, dated 31/05/2017, was also produced and marked as D. Exhibit 2 (b).

38. The Defendants also produced a damning report dated 02/10/2017 from the Architect Transport and Infrastructure Development of the Trans Nzoia County one Mr. Thuranira William (DW3) and it as marked D. Exhibit 2(a). The Defendants testified that following the findings of experts, the Trustees were on several occasions advised by the 4th Defendant to demolish the structures.

39. The Plaintiffs were accused of interfering with the process by seeking intervention from Tribunals to defeat those directives instead of taking the compliance route, yet they have never challenged the reports.

40. The Defendants denied that the Plaintiffs had tenancy agreements in subsistence. They also denied that they had misused authorities to obtain adverse orders against the Plaintiffs.

41. DW1 testified that in spite of the orders of the Tribunal dated 05/05/2017, they did not issue fresh notices to the Plaintiffs. Looking at the sample rental agreements produced by the Plaintiffs, DW1 observed that the agreements were operated to run for four (4) years ending 30/06/2016. He observed that the agreements were not executed by the Trustees whose mandate was reserved to issuance of termination notices.

42. DW1 continued that Samson Otieno owned a stall while Joseph was no longer a shareholder since he sold his stall. According to DW1, the management company of the Group was composed of seven (7) to eleven (11) elected members serving up to two (2) terms that ran for one (1) year. He added that as a trustee, he was elected to be in the Committee twice between 2001 and 2007 and from 2016 to date.

43. He continued that the duties of the management company included but were not limited to managing the building, collection of rent, issuing receipts on payment of rent and issuing annual reports. he admitted that, however, over the years no dividends had been paid to members. He added that since 2016, they did not collect rent from the illegal structures alone.

44. DW1 added that the management committee had been chaired by three (3) people thus far including Jack Muse and Alex Wangegi. DW1 did not recognize the 3rd, 4th, 6th, 7th, 8th, 10th, 11th, 12th, 14th, 16th, 17th, 20th, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 31st, 32nd and 33rd Plaintiffs as tenants. But later he admitted in cross examination that he recognized the 25th Plaintiff by virtue of the court order marked as P. Exhibit 5(c). He did not recognize the 5th Plaintiff's agreement, produced as P. Exhibit 2(a), stating that it did not bear his signature.

45. Testifying on the stall agreements whose clauses were to the effect that part of the rent paid was for construction, DW1 denied that he received rent from the illegal stalls. He stated that while the Group owned an account, he did not know the account number but stated that the account was operated in Family Bank.

46. He testified that on 31/05/2017, it was resolved that all the illegal structures belonged to the Group. He admitted that several cases were filed challenging the eviction notices they issued. He further admitted that the Trustees had never served the Plaintiffs with eviction notices and they continue to remain as tenants.

47. DW1 testified that thirty-seven (37) stalls were illegally erected. Further, that some of them were demolished. He confirmed that he was present in the meeting held on 12/05/2018 whose chair was Alex Wangengi. But he had testified that since he did not execute his signature, he (DW1) was not the chairman. For this reason, DW1 reneged his earlier evidence, testifying instead that he was appointed chair sometime between 2018 and 2019. DW1 admitted as captured in the Minutes that tenants had been paying rent in 2018.

48. He gave evidence further that the Defendants received a statutory notice dated 25/09/2017. It recommended that they open all pass ways in the building according to the approved plans. The report urged that all illegal structures be removed or demolished.

49. DW1 affirmed the contents in the letter dated 17/07/2018 which had been produced as P. Exhibit 8 as true. He also confirmed that the Minutes produced as P. Exhibit 7 of the meeting that he chaired on 17/07/2018 captured the true facts. In particular they captured that the constructed stalls belonged to the Group. It was also agreed that the tenants would operate without paying rent for six (6) to twelve (12) months of construction.

50. DW1 denied that the Plaintiffs, particularly the 1st Plaintiff, were tenants. This was cross referenced to paragraph three (3) of the 1st - 3rd Defendants' Amended Statement of Defence and Counterclaim where they averred that they did not know any of the Plaintiffs.

51. In view of the foregoing, the 1st, 2nd and 3rd Defendants urged this Court to dismiss the Plaintiffs' suit and allow the Counterclaim by ordering that the illegal, unplanned stalls by the Plaintiffs be demolished.

The 4th Defendant's Case

52. The 4th Defendant called DW3 Senior Superintendent Architect Thuranira William of the 4th Defendant to the stand. His testimony was that he had been in the employment of the 4th Defendant under the department of Public Works, Transport and Infrastructure since July, 2016.

53. That upon receipt of instructions issued on 16/05/2016 from the County Secretary, it was DW3's testimony that the 4th Defendant through its Fire and Disaster Management Department instructed him (DW3), DW4 one Wafula Richard, and two (2) other officers to visit the suit premises on 28/09/2017 to assess and satisfy its credibility.

54. DW4 on the other hand testified that on 21/07/2016, the 4th Defendant conducted a fire safety audit of the suit premises. It was conducted by him, DW3 and the Chief Fire Officer one Bishop Mukwana and the team authored the report dated 22/07/2016 which was produced as D. Exhibit 2.

55. DW4 observed that the areas identified for mounting firefighting equipment were taken over by illegal kiosks. Additionally, the firefighting equipment was inadequate. He further observed that the exits and

fire assembly points were congested since they were occupied by the illegal kiosks. This had the effect of curtailing rescue efforts in the event of a fire.

56. DW4 continued that the open spaces were blocked by the structures, the columns and walls eroded by rain due to poor drainage system and the stalls failed to observe rules and regulations of fire safety.

57. It was recommended that the firefighting equipment be mounted, unplanned stalls be removed, a decongestion of entrances to ease movements and a label of the exits. Furthermore, that proper servicing of portable equipment and a plan to designate fire points, emergency assembly points, escape routes and response plans was recommended.

58. On 31/05/2017, the NEMA inspected the suit premises and discovered that the stalls set up exceeded the business capacity by sixty (60), contrary to its original intent. It also observed that the entrance to the market hindered human flow into and out of the market due to congestion. His apprehension as a result was that it would imminently pose major risk in the event of an emergency.

59. It was also discovered that the walkways had been blocked leading to poor flow of air and the drainage system had compromised the structural integrity of the suit premises. Finally, the operation of a hotel at the top most floor endangered the public since it operated on "open fire". For these reasons, an environmental restoration order marked as D. Exhibit 3 was issued and executed by the County Environment Officer one Michael Wahome.

60. In their letter of 17/09/2017 produced as D. Exhibit 4, the Justice and Peace Centre, an NGO informed the 4th Defendant that the suit premises risked collapsing due to its poor status. This stemmed from the fact that it was over set up as sixty (60) structures illegally existed on the premises creating poor drainage systems and haphazard wiring. It thus demanded the 4th Defendant to take action to avert potential loss of lives and property. In the meantime, it recognized and lauded the efforts of Michael Wahome for issuing a restoration order. It urged the 4th Defendant's Director of Public Health to intervene and take action to ensure that the occupants had complied.

61. The 4th Defendant's Public Health Department on 25/09/2017 issued a statutory notice, produced as D. Exhibit 5, to the Chairman of the suit premises highlighting that the property had faded external walls, chipped floors, poor lighting, poor and defective drainage system, blocked pass ways and blocked escape doors in the case of emergency. For those reasons, the Chairman of the Group was ordered to, within fourteen (14) days, repair and repaint the walls and leaking roofs, the chipping floors and internal walls, remove or demolish illegal structures, repair and replace all defective drainage fittings and fitments to the satisfaction of the Health Inspector, open all pass ways, provide standard dustbin and open escape doors.

62. DW3 in his findings captured in a report dated 02/10/2017, produced as D. Exhibit 6, established that in the event of a fire, safety and evacuation mechanisms would be curtailed because of illegal structures set up therein. It was thus their recommendation to remove the structures since they were constructed without approval, unblock and clean the drainage channels, remove all illegal power connections, conduct a structural integrity analysis, installation of firefighting equipment and restoration of the damaged floors.

63. He stated that there were unauthorized constructions in existence that caused poor ventilation, compromised the safety of the occupants, blocked the drainage channels causing a peel off of the plaster, terrazzo floor finish and the concrete cover of the ground beams. This exposed the reinforcement bars that greatly affected the structural integrity of the building.

64. DW3 continued that the illegal structures haphazardly connected to the power. In some other instances, open cabling was noted without conduits and use of sub-standard wires. He also took note of the fact that the illegal structures had eaten up the space designed for firefighting equipment. Finally, some of the structures had been anchored to beams and columns by drilling into the structural beams supporting the building. This posed a threat to life.

65. Thus on 21/02/2018, the 4th Defendant through its Public Health Department issues a Statutory Notice reminder, produced as D. Exhibit 7, to the chair of the Group to comply with the notice. Thereafter on 17/07/2018, the Secretary of the Self Help Group informed the 4th Defendant in its letter produced as D. Exhibit 8 that they had been unable to comply with the statutory notices and restoration orders due to resistance from the owners. The letter disclosed that it had successfully demolished eleven (11) out of the fifty (50) illegal structures. It sought intervention to remove the remaining structures.

66. DW3 maintained that the 4th Defendant did not approve for construction of the illegal structures that continue to compromise the structural integrity of the suit premises. It was the 4th Defendant's considered view that the illegal structures be demolished after obtaining expert opinions from several departments in accordance with the law.

67. Though giving his evidence as above, DW3 informed the Court that they did not have a structural engineer who was best suited to assess the structural defects, if any. He maintained that his report was independent and had been made without any external influence.

68. DW4 testified that no fire certificate was issued since the premises did not meet the requirements. He stated that he visited the premises alongside the Chief Fire Officer, DW4 as well as an officer from Public Health.

69. In the interest of the public, the 4th Defendant urged that the suit be dismissed with costs as it was premature.

Submissions

70. At the close of viva voce evidence, parties summed up their cases with their respective rival written submissions. The Plaintiff's submissions dated 15/11/2022 and filed the following day framed seven (7) issues for determination. They submitted that they were protected tenants of the 1st, 2nd and 3rd Defendants based on the terms embedded in the agreements, the termination notices and demand for rent produced in evidence as well as the several disputes lodged at the Business Premises Rent Tribunal (BPRT). They fortified their arguments by relying on case law as well as the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act CAP 301 Laws of Kenya further stating that termination of such tenancies ought to comply with statute and the rules of natural justice.

71. The Plaintiffs continued they argument that the temporary stalls/structures set up were approved by the 1st, 2nd and 3rd Defendants for construction expressly and by inference from the conduct of the parties. It was thus their considered view that they were not illegal. For this reason, coupled with the fact that no structural engineer produced a structural analysis report, the Plaintiffs argued that the construction of the temporary stalls did not compromise the structural integrity of the commercial building in the suit property.

72. On whether lawful eviction was carried out, the Plaintiffs submitted in the negative. They accused the 1st, 2nd and 3rd Defendants for taking matters in their own hands by colluding with public officers to

draft callous reports against them. Furthermore, they accused the Defendants of deliberately failing to comply with the law given the fact that litigious suits were filed on several occasions.

73. The Plaintiffs accused the 1st, 2nd and 3rd Defendants of contempt for failing to comply with the restoration order. Further that while the public officers informed the Court that their reports were made in compliance with their mandate, they failed to furnish reports done on the suit premises since 2012 when the temporary structures were constructed. That while they said that they conduct inspection reports annually, they also stated that they had never visited the suit premises prior to receipt of instructions. For this reasons, they cited that the Defendants were malicious in exercising their mandate.

74. The Plaintiffs were disturbed by the evidence of the 4th Defendants. They took note of the fact that though the officers testified that they received instructions from the County Secretary, the instructions letter was not produced. Furthermore, those reports were not copied to the County Secretary, the very person who had issued instructions.

75. The Plaintiffs accused the Defendants of taking matters in their own hands since they demolished structures without complying with the law. The Plaintiffs further took issue with the fact that all correspondence and reports were not copied to the Plaintiffs yet they would suffer the brink of demolition since they were in occupation of the same. For these reasons, the Plaintiffs prayed that their claim be allowed and that the 1st, 2nd and 3rd Defendants' Counterclaim be dismissed with costs.

76. The 1st, 2nd and 3rd Defendants' joint submissions, dated and filed on 20/12/2022 argued that the suit property belonged to them. As such, no Plaintiff could claim proprietary ownership. It was their submission further that the documents tendered in evidence were too scanty to make a conclusion that they were lawful tenants. Furthermore, the rental agreements furnished did not bear the signature of the Defendants herein. For these reasons alone, the Defendants urged this court to dismiss the Plaintiffs' claim.

77. The Defendants further denied that they compromised public officers to make reports against the interests of the Plaintiffs. They scrutinized several of the Plaintiffs' documents tendered in evidence stating that there were several discrepancies far from the truth. These included the stall numbers and the documents of parties not included in the suit. They further anchored their arguments to have the suit dismissed on an observation that not only were they ever not served with Tribunal orders prior to this suit but also the rental agreements had expired by effluxion of time. For this reason, no landlord-tenant relationship exists between the Plaintiffs and the 1st, 2nd and 3rd Defendants.

78. The Defendants further submitted that the Plaintiffs admitted from their evidence that the structures were illegal and ought to be removed lawfully. They relied on their evidence from expert reports and the spirit of maintaining the structural integrity to urge this court to allow for demolition of the illegal structures. In light of the above, the 1st, 2nd and 3rd Defendants urged this court to dismiss the Plaintiffs' claim and allow their Counterclaim with costs.

79. The 4th Defendant relied on its written submissions dated 16/03/2023 and filed on 17/03/2023 together with its list and bundle of authorities dated 16/03/2023 and filed on 20/03/2023 to frame four (4) issues for determination. In summary, the 4th Defendant submitted that based on the tenancy agreements adduced in evidence which sought to declare that the Plaintiffs were tenants, the suit ought to have been filed at the High Court by dint of Article 163 (3) of *the Constitution*.

80. According to the 4th Defendant, the issues raised did not deal with land use and occupation of land, a mandate purely reserved for this court as provided in Article 162 (2) (b) of *the Constitution* and Section

13 (2) (d) of the *Environment and Land Court Act*. Several authorities were cited to urge this Court to find that it lacked jurisdiction to entertain the subject matter.

81. In furtherance of the above, it was submitted that the Plaintiffs' suit was inchoate as they had not exhausted the internal dispute resolutions mechanisms available in law. In their view, the Plaintiffs complaint was that they were dissatisfied with the restoration order. For that reason, they ought to have challenged the same at the NEMA Tribunal as set out in Section 126 (2), 129 and 130 of the Environmental Management and Coordination Act. They cited several authorities to state that the Plaintiffs failed to establish that they were exempted from the doctrine of exhaustion.

82. Taking another cue, the 4th Defendant submitted that based on the subsisting illegal structures that ought to be demolished, the Plaintiffs could not purport to hold that they held legal tenancy agreements. In that regard, they had no right or remedy in Court since it would negate the principle of public policy. They cited several authorities in support.

83. The 4th Defendant further framed their contention that the issuance of a business premises permit did not exempt the Plaintiffs from complying with the provisions of the *Public Health Act* as provided in Section 115 and 118 as well as Article 24 and 42 of *the Constitution*. As a matter of fact, the Plaintiffs were notified from their business permits that they were mandated to comply with the necessary regulations on health and safety.

84. Lastly, citing Article 21 of *the Constitution* and Section 116 of the *Public Health Act*, the 4th Defendant submitted that the right to the highest standards of health and sanitation is guaranteed by Article 43 of *the Constitution*. By inspecting the premises thus, the 4th Defendant was fulfilling its mandate. That consequently, it was in the interest of the public that the unplanned illegal structures be demolished to avert possible loss of life and property.

85. In the end, the 4th Defendant urged this court to dismiss the Plaintiffs' suit with costs.

Analysis and Disposition

86. I have extensively and anxiously considered the pleadings herein, carefully analyzed the facts and evidence and taken into account the submissions relied on by parties herein. I have also given due consideration to the law applicable. I begin by summarizing the uncontested facts.

87. The uncontested facts are that the 1st, 2nd and 3rd Defendants are Trustees of the Nyayo Market Self Help Group. The had been the registered proprietors of all that parcel of land namely L.R. No. 2116/27/111 since 20/12/2000.

88. Desirous of setting up a business establishment for members of the Group, the 1st, 2nd and 3rd Defendants approached DW2 David Wechesa Magomere, a registered Architect, to prepare architectural plans/drawings in October 2004.

89. DW2 complied with the instructions. His plans approved for construction, a three (3) storey 204 stalls building in tandem with the numbers of shares from each individual shareholder. There were also provisions made for voids (empty spaces) reserved for ventilation and lighting.

90. In 2012 an additional number stalls were constructed distinctively made from mabati (iron sheets and metal) materials, pursuant to several rental agreements entered into between a number of people and the management committee of the Group in that year, as approved then by the management committee of the Group. The stalls were erected along the empty spaces and on the walkways. Total stalls currently are 250.

91. According to the rental agreements, the cost of construction of the stalls, was met by the occupants in quid pro quo that they would not pay rent for up to six (6) months. Thereafter the occupants would start paying rent to the Group on the occupancy of the stalls.

92. The above were the findings of DW2 captured in his report dated 06/05/2016 who stated as follows: "the open yards that had been designed for lighting, ventilation and surface draining had been filled up with uncoordinated constructions. This had the effect of endangering the support structure, flooding and causing health hazards."

93. DW2 noted that the extra stalls reduced the path ways by two (2) metres, from the original 4.8 metres. He explained that this had the effect of blocking storm water drain leading to flooding. He added that generally, structural foundations are designed on the basis of the bearing capacity of the soil. He was apprehensive that if water sipped to the foundation, the building would wade off by eccentric forces such as earthquakes causing total or partial collapsing. DW2 further found that the absence free flow of air was curtailed by the existence of the structures that he termed "illegal", leading to a health hazard.

94. DW3 Senior Superintendent Architect Thuranira William of the 4th Defendant, produced a report dated 02/10/2017. He testified that he received instructions on 16/05/2016 from the County Secretary to visit for inspection the suit premises.

95. The Chief Fire Officer Bishop Mukwana, working under the fire department of the 4th Defendant, authored a report dated 22/07/2016 produced by DW4. It was found that the areas identified for mounting firefighting equipment were taken over by illegal kiosks. Additionally, the firefighting equipment was inadequate. He further observed that the exits and fire assembly points were congested since they were occupied by the illegal kiosks; impeding rescue efforts in the event of a fire.

96. DW4 continued that the open spaces were blocked by the structures, the columns and walls eroded by rain due to poor drainage system and the stalls failed to observe rules and regulations of fire safety. He recommended that the firefighting equipment be mounted, unplanned stalls be removed, a decongestion of entrances to ease movements and a label of the exits. Furthermore, proper servicing of portable equipment and a plan to designate fire points, emergency assembly points, escape routes and response plans was recommended.

97. In Eldoret BPRT Case Nos. 18 - 47 of 2016; Esther Mukuhi & 29 Others vs. Nyayo Market Self Help Group, the Tribunal on 05/05/2017 upheld their preliminary objecting that had the effect of striking out the landlord's tenancy termination notices.

98. On 31/05/2017, the NEMA inspected the suit premises and discovered that the stalls set up exceeded the business capacity by sixty (60), contrary to its original intent. It also observed that the entrance to the market hindered human flow into and out of the market due to congestion. His apprehension as a result was that it would imminently pose major risk in the event of an emergency.

99. It was also discovered that the walkways had been blocked leading to poor flow of air and the drainage system had compromised the structural integrity of the suit premises. Finally, the operation of a hotel at the top most floor endangered the public since it operated on open fire. For these reasons, an environmental restoration, executed by the County Environment Officer Michael Wahome, was issued.

100. On that same day, the 1st - 3rd Defendants wrote a letter to the 2nd Plaintiff asking him to remove his stalls/kiosks/bandas on the suit property since they were illegally erected and caused interference with the open spaces designed for lighting, ventilation and surfaced drainages.

101. In Eldoret BPRT Case Nos. 22 - 55 of 2017; Maina David & 34 Others vs. the Trustees of Nyayo Market Self Help Group, the landlord's letter dated 31/05/2017 demanding vacation of the premises was on 21/08/2017, was withdrawn with the landlord given liberty to serve the tenants with fresh notices in compliance with Section 4 (2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.

102. On 17/09/2017, the Justice and Peace Centre, an NGO informed the 4th Defendant that the suit premises risked collapsing due to its poor status. This stemmed from the fact that it was over set up as sixty (60) structures illegally existed on the premises creating poor drainage systems and haphazard wiring. It thus demanded the 4th Defendant to take action to avert potential loss of lives and property. In the meantime, it recognized and lauded the efforts of MICHAEL WAHOME for issuing a restoration order. It urged the 4th Defendant's Director Public Health to intervene and take action to ensure that the occupants had complied.

103. The 4th Defendant's Public Health Department on 25/09/2017 issued a statutory notice to the Chairman of the suit premises highlighting that the property had faded external walls, chipped floors, poor lighting, poor and defective drainage system, blocked pass ways and blocked escape doors in the case of emergency. For those reasons, the Chairman of the Group was ordered to, within fourteen (14) days, repair and repaint the walls and leaking roofs, the chipping floors and internal walls, remove or demolish illegal structures, repair and replace all defective drainage fittings and fitments to the satisfaction of the Health Inspector, open all pass ways, provide standard dustbin and open escape doors.

104. DW3, in his findings captured in a report dated 02/10/2017 [D. Exhibit6], established that in the event of a fire, safety and evacuation mechanisms would be diminished because of the illegal structures. He recommended a removal of them since they were constructed without approval, unblock and clean-up of the drainage channels, removal of all illegal power connections, a structural integrity analysis, installation of firefighting equipment and restoration of the damaged floors.

105. He stated that the unauthorized constructions caused poor ventilation, open cabling without conduits and use or sub-standard wires, compromised the safety of the occupants, blocked the drainage channels causing a peel off of the plaster, terrazzo floor finish and the concrete cover of the ground beams. This exposed the reinforcement bars that greatly affected the structural integrity of the building. Finally, some of the structures had been anchored onto beams and columns by drilling into the structural beams supporting the building. This posed a threat to life.

106. Thus, on 21/02/2018, the 4th Defendant through its Public Health Department issues a Statutory Notice reminder to the chair of the Group to comply with the notice.

107. An AGM of the Group took place on 12/05/2018 under the chairmanship of ALEX WANGEGI. During the meeting it was revealed that the Group faced resistance towards issuance of notices to several tenants since several disputes successfully challenged their eviction. The said tenants owed the Group a total of Kshs. 2,600,000.00 being rent arrears. Amongst the defaulters listed were the 2nd, 18th, 5th, 15th, 1st, 26th, 19th, 21st and 13th Plaintiffs respectively.

108. In Eldoret BPRT Case No. 8 of 2018; Joseph Mburu Kariuki vs. Nyayo Market Self Help Group, the Tribunal on 12/07/2018 ordered the landlord to open and allow access to the premises immediately failing which the tenant was at liberty to break in an access the premises.

109. The 1st (Chairman) 2nd and 3rd Defendants held a special emergency general meeting on 17/07/2018 where eighty-five (85) members were present. While acknowledging that the illegal structures belonged

to the Group, it was resolved inter alia, that the people with illegal structures would be evicted procedurally through obtaining court orders on the strength of the letters and/or notices from the NEMA and the Public Health office. Furthermore, it was resolved that tenants would be notified not to pay the August 2018 rent with those who had paid be refunded accordingly.

110. The Secretary of the Group informed the 4th Defendant in its letter dated 17/07/2018 that they had been unable to comply with the statutory notices and restoration orders due to resistance from the owners. That it had successfully demolished eleven (11) out of the fifty (50) illegal structures. It sought intervention to remove the remaining structures. It was further reported that a number of unknown arsonists set fire on the 1st Defendant Chairman's shop on the night of 14/07/2018.

111. On 15/01/2019, the Tribunal in BPRT No. 08 of 2018 directed the Group to pay Kshs. 10,000.00 to the 25th Plaintiff deducted from the rent. The 25th Defendant was further at liberty to seek damages for unlawful closure of the premises.

112. Two days later, the Plaintiffs' Counsel wrote to the 4th Defendant informing that contrary to the letter of 17/07/2018, the Plaintiffs were lawfully in occupation of the suit premises. They cautioned the 4th Defendant against demolishing their premises and would seek court redress if need be.

113. According to the Plaintiffs, the 1st, 4th, 13th, 16th and 19th Plaintiffs as well as Godfrey Mbugua, Judy Wamboi, Mary Wambui Kinyanjui, Moses Wang'ombe, Abdikadir Yakub and Edin Jirow obtained health clearance certificates on diverse dates in 2019 from the County Public Health Officer. The 4th, 11th, 14th and 25th Plaintiffs and Peter Njoroge were then issued with demand notices on 31/03/2019 for rent arears on diverse dates between March, 2018 and February, 2019 in respect to several amounts.

114. Those above issues from the facts and the evidence are not disputed. However, several issues spruced from the facts established by rival parties, informing this Court of the following issues that now fall for determination. These shall be set forth and analyzed sequentially:

i. Whether the trial court was vested with jurisdiction to hear and determine the subject matter

115. A technical point of objection was raised in the manner of cross examination of the Plaintiffs' witness. In its submission, the 4th Defendant expounded that the suit fell under the jurisdiction of the High Court as set out in Article 163 of *the Constitution* since the Plaintiffs prayed for declaratory orders that they were tenants. It opined that based on those reliefs, the nature of the dispute had nothing to do with land use and occupation of land as set out in Article 162 (2) (b) of *the Constitution* and Section 13 (2) (d) of the *Environment and Land Court Act*.

116. Secondly, the 4th Defendant raised the issue of jurisdiction urging that that Plaintiffs ought to have challenged the restoration order, that they were dissatisfied with, at the NEMA Tribunal as set out in Section 126 (2), 129 and 130 of the Environmental Management and Coordination Act.

117. Thirdly, from its pleadings and line of examination of the Plaintiffs' witness, the 4th Defendant argued that the suit was res judicata and/or res sub judice since according to P. Exhibit .5 (c), the landlord was prohibited from demolishing the stalls; an order similarly sought in the present case.

118. Jurisdiction is everything and without it, a court must down its tools: (and I will gladly do so if I so find). This principle was restated by the Supreme Court in Constitutional Application No. 2 of 2011; In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of *the Constitution* as follows:

> " The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a

Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."

119. In its reliefs, the Plaintiffs sought declaratory orders that they were lawful tenants in the suit premises. They also prayed for orders that the intended eviction be declared illegal thus urging this court to bar the Defendants from interfering with the tenancy unless it was done within the confinements of the law. These reliefs, were according to the 4th Defendant, not within the parameters of Article 162 (2) (b) of *the Constitution* and Section 13 (2) (d) of the *Environment and Land Court Act*.

120. In expositing the meaning of "the use and occupation of, and title to land", the Court in Nairobi HCCC No.627 of 2012; Anthony Raymond Cordeiro & 2 Others vs. Adrian Noel Carvalho & 5 Others (UR) had this to say:

> " 13. To my mind, as far as this case is concerned, the crucial words in Article 162 (2) are: ".....the use and occupation of, and title to land". The meaning of these three (3) terms in my view is very clear. That, apart from the issue of environment, once a matter involves the use and occupation of land or title to land, the High Court will have no jurisdiction to deal with the same. I think once the meaning of these three (3) terms is ascertained, it will be clear the extent to which Article 162 (2) intended issues touching on land not to be dealt with by the High Court.
>
> 14. In Blacks Law Dictionary 8th Edn, 2004 the term "use" has been defined at page 1577 as: "Use ..... 1. The application or employment of something esp., long-continued possession and employment of a thing for the purpose for which it is adopted as distinguished from a possession and employment that is merely temporary or occasional... "
>
> At page 1109, the term "occupation" is defined as: "2. The possession, control or use of real property."
>
> While at page 1522, title is defined as: "1. The union of all elements (as ownership, possession and custody) constituting the legal rights to control and dispose of property, the legal link between a person who owns a property and the property itself....."
>
> 15. It should be noted that, the terms "use and occupation of" were used conjunctively and not disjunctively. In this regard, my view is that the intention in *the Constitution* is that if an issue arises touching on land in respect of its use, possession and control, then the High Court will have no jurisdiction. If the dispute touching on land is for anything else other than what I have stated, my view is that, that dispute will be outside the jurisdiction of the Land Court....."

121. Justice Gikonyo, inNaftaly Meme vs. Stanley Mwithimbu & 2 Others [2016] eKLR, while dealing with a similar issue pronounced himself as follows:

> " The major question here and which must be asked properly is whether Environment and Land Court has jurisdiction to try this suit. Mr. Kioga submitted that the Environment and Land Court will not have jurisdiction over this matter which is for damages for wrongful eviction from commercial premises of, and destruction of property belonging to the tenant...The correct position is that a shop, a dwelling house and commercial premises

affixed to, are land in law. The said submissions force me to go back to the rules of interpretation and construction of a Constitution. First, I must admit that *the Constitution* did not intend to be interpreted narrowly; in fact, it carefully prescribed a purposive interpretation of *the Constitution* which will, inter alia, develop the law and give life to its provisions. See article 259 of *the Constitution*. I will come back to this point later. Second, *the Constitution* of Kenya, 2010 is self-reinforcing; it must, therefore, be read as a whole as a living document- always speaking. On more specific platform, I wish to refer to article 259(4)(b) of *the Constitution* which clearly provides that:

> In this Constitution, unless the context otherwise requires the word ''includes'' means ''includes, but is not limited to''
>
> Article 260 of *the Constitution* uses the words; ''land'' includes... Therefore, according to article 259(4) (b) land includes but is not limited to the descriptions and prescriptions provided thereunder. Thus, in honouring the constitutional command in article 259 on development of the law, the words used in article 162(2), that is to say, use and occupation of land carry and convey a particular meaning which should be given effect when developing the law on what land entails. And, within the constitutional structure of our nation, and borrowing from a long string of judicial precedents, renowned literary works and opinions of eminent jurists, in addition to the prescriptions provided in article 260 of *the Constitution*, land includes but not limited to; everything growing on or permanently affixed to it. It also includes estate or interest in real property. There are many landmark cases on this subject which I need not multiply. But see Black's Law Dictionary, 8th Edition on meaning of land, use, occupation and development of land. The legal significance of the notion of use and occupation of land is that it also embraces the concept of development of land and so one has to think about; (1) the type of use, say, for agricultural, residential, commercial, or industrial purposes, in this category include tenancy; (2) the density of use as in the physical structures on the land; (3) the aesthetic use of land, for instance the design, planning; and (4) the placement of land as easement, security or encumbrance. In fact, our new land laws are tailored towards this broad understanding of land law and matters of lease and tenancy are matters relating to land and are provided for under Part VI of the *Land Act*. Unlawful eviction is in fact provided for under section 77 of the *Land Act*. Even the previous repealed Acts provided for buildings on, whether for residential or commercial purposes or for self-occupation by the owner or for renting or leasing out, to be land. With this rendition, I am not in agreement with Mr. Kioga's submission that land as defined in article 260 of *the Constitution* does not include a shop or commercial or residential dwelling. Accordingly, trespass to and unlawful eviction from premises, are matters relating to land for which Environment and Land Court is the competent court to grant relief of damages and compensation. On this you may look at section 13(17) of the *Environment and Land Court Act* for reliefs which Environment and Land Court may grant, and damages and compensation is one of them".

122. A purposive and holistic interpretation of the phrase "the use and occupation of, and title to land" is as, according to the above authorities which this Court wholly adopts, intended to entail an inclusivity approach. For this reason, a wide understanding of the phrase rather than a narrow approach will serve the ends of justice in determining the issues at hand.

123. In the present case, I find that Plaintiffs claim squarely falls within the jurisdictional morphisms of this Court. This is because the crux of the dispute concerns the validity of the Plaintiffs' tenancy over L.R. No. 2116/27/111. The contention is basically whether the Plaintiffs were or were not tenants of the Self-Help Group and for that reason liable or not to be evicted from its premises. What are they doing in the premises? Loosely put, they are either or not occupying and using space owned by the Defendants. For this reason, I am in disagreement with the 4th Defendant and I hold that the Court is vested with jurisdiction to determine the issue that concerns the use and occupation of, and title to the suit land by considering the issues that stem from the premises or fixtures on it.

124. A second objection by the 4th Defendant implored the Plaintiff to seek internal dispute resolution mechanism measures since their claim disputed the contents of the restoration order dated 31/05/2017.

125. This court is alive to its duty and mandate set out in Article 159 (2) (c) of *the Constitution* derived from the people. This Court is called upon to promote alternative forms of dispute resolution. In my view, all internal dispute resolution mechanisms donated in statute flow from these principles. So that a court will not hesitate to drive parties to the relevant dispute resolution mechanism as set out by that particular statute.

126. It is not disputed that a restoration order dated 31/05/2017 was served upon the 1st, 2nd and 3rd Defendants; the Trustees of the Group. This was confirmed by DW1 who in his testimony explained that they had been unable to comply with the statutory notices and restoration orders due to resistance from the tenants.

127. Section 109 (1) of the Environment and Management Coordination Act spells out that a restoration order must, in its contents, disclose the person(s) to whom it is addressed to. Section 109 (5) of the Act then goes on to statethat aperson served with an environmental restoration order shall, subject to the provisions of the Act, comply with all the terms and conditions of the order that has been served on him.

128. Section 109 (1) (g) mandates an environmental restoration order to disclose to the person servedthe right to appeal to the Tribunal against that order, except where the order issued by a court of competent jurisdiction, in which case the right of appeal shall lie with superior court in this instance. It is on the strength of this provision that the 4th Defendant argued that the dispute ought to have been placed before the NEMA Tribunal and not this court in the first instance.

129. The present dispute disclosed that the environmental restoration order dated 31/05/2017 was served and addressed to the Trustees and/or management committee of the Group and not the Plaintiffs. While the order may have had atrocious and catastrophic effects on the Plaintiffs' business, I find that the language of the Act narrows the audience to the person served with the environmental restoration order at the NEMA Tribunal. The reliefs sought by the 1st, 2nd and 3rd Defendants in their counterclaims do not in any way seek to challenge the restoration order either.

130. Lastly, the 4th Defendant objected the jurisdiction of this court by invoking the doctrines of res judicata and/or res sub judice. The Plaintiffs denied that averment since the disputes in the BPRT focused on rent while the present suit sought to injunct the Defendants from demolishing their stalls.

131. The doctrines of res judicata and res sub judice are entrenched in our jurisdiction pursuant to Section 7 and 6 of the *Civil Procedure Act* respectively. While res sub judice is in respect to matters pending in court, res judicata involves matters already decided in court. However, that being the only difference,

both doctrines invoke the same guiding principles. They serve the public interest in promoting the doctrine of litigation which must come to an end.

132. In conjunctive terms, the suit or issue(s) was or are directly and substantially in issue in the former suit, between the same parties or parties under whom they or any of them claim, litigating under the same title. Additionally, the issues must have or form the substance of the former suit and finally, the court that heard or is hearing the dispute was competent to try the issue.

133. In the present case, the 4th Defendant relies on P. Exhibit 5 (c) to find that the present issues are res sub judice or res judicata. I however disagree with it for the reasons that in the said suit, it was only the 25th Plaintiff that had filed a dispute against the landlord. Secondly, it only appears that there was only one issue for determination in the Tribunal, that is, the landlord was prohibited from demolishing the stalls. In the present case, there are several other issues for determination for this Court. Since the parties and issues are not all the same substantially, I find that based on those two (2) limbs, the said doctrines are not applicable to the facts and circumstances of this case.

134. For the above reasons, I do find and hold that the Plaintiffs properly invoked this court's jurisdiction.

ii. Whether the Plaintiffs are tenants of the Nyayo Market Self Help Group over parcel no L.R. No. 2116/27/111?

135. The Plaintiffs case is that they are all tenants of the 1st, 2nd and 3rd Defendants, the Trustees of the Group, who are the registered proprietors of all that parcel of land namely L.R. No. 2116/27/111. They relied on various rental agreements executed to commence on 01/07/2012 for a period of four (4) years ending in 2016. The Plaintiffs only produced rental agreements belonging to the 5th, 11th, 13th, 14th, and 21st Plaintiffs.

136. On the strength of the reliance of that alleged scanty evidence, the 1st, 2nd and 3rd Defendants jointly denied that there existed tenancy agreements with the thirty-three (33) Plaintiffs arguing firstly that they did not exist ab initio and secondly even if they did exist, which fact was denied in toto, then the agreements had expired by effluxion of time having been determined in the year 2016. They maintained that in any event, they had not collected any rent from the Plaintiffs herein.

137. The reliance of agreements in writing cannot be overstated. Looking at Section 3 (1) of the *Law of Contract Act*, no suit shall be lodged on the disposition of an interest in land unless the contract relied upon is inter alia, in writing. The 1st Plaintiff's testimony stated that the five (5) agreements were the same entered into by all the thirty-three (33) Plaintiffs whose terms applied across the board for all of them.

138. Moreover, the Counterclaim by the 1st, 2nd and 3rd Defendants is that an order issues against the Plaintiffs and/or their agents, servants and/or persons claiming title through them that all illegal structures, stalls, extensions built in the suit property Kitale Municipality L.R. No. 2116/27/111 be demolished. At paragraph 4 of the Amended 1st, 2nd and 3rd Defendants' Defence and Counterclaim the 1st, 2nd and 3rd Defendants pleaded that "the Plaintiffs are aware since 2016 that they are operating on illegal structures/stalls/ kiosks, extensions and/or additions on the suit premises - LR. No. 2116/27/111..."

139. Given the above, it is clear to me that the parties herein are in agreement that expressly no rental agreements were renewed at least from the sample rental agreements produced in evidence. If I understand the Trustees of the Group well, by expiry of time, the Plaintiffs who used to be tenants were, according to them, no longer tenants of the Group because no written contracts exist between the parties. PW1 testified that the set of tenancy agreements produced by him as P. Exhibit 2(a) - (e)

were only a sample of the agreements the Plaintiffs used to have with the 1st, 2nd and 3rd Defendants' Group and the ones produced were similar to all other Plaintiffs' agreements. This evidence was not refuted by the Defendants.

140. As regards the parties' pleadings on this issue, there were admissions to that fact. And as always should be borne by parties, they are bound by their pleadings. They cannot deny the same or adduce evidence outside of the pleadings. This cannot be overemphasized. But in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR, the Supreme Court of Kenya held:-

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

141. And in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002, Adereji, JSC expressed as follows: -

> " .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

142. Yet again, in the instant case, the express admission by the 1st, 2nd and 3rd Defendants in the 4th paragraph quoted in part above is that the Plaintiff continued to operate allegedly illegal structures on and in the suit premises. Does this conclusively find that all the Plaintiffs whose tenancy agreements were not produced, more particularly the 5th, 11th, 13th, 14th, and 21st did not have existing rental agreements? First of all, there is express admission by the Defendants in their pleadings that they (Plaintiffs) were in the suit premises using allegedly illegal structures to carry out business.

143. The Court of Appeal in Ali Abdi Mohamed vs. Kenya Shell & Company Limited (2017) eKLR referred to the following decisions regarding implied contract:

> " .... In Lamb v. Evans [1893]1 Ch 218, Bowen LJ stated: The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes u to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.
>
> Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213 made some general observations about the circumstances in which a contract might be implied. At p.224 col. 1, he said: "As the question whether or not any such contract is to be implied is one of fact, its answer must

depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given cases unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with the one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.

Further, I do not think it is enough for the party seeking the implication of a contract to obtain "It might" as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract."

144. Thus, in considering contracts by inference, a court must look at the circumstances of the case, inspired by the necessity to enforce obligations as between the parties to a dispute. In setting out the parameters, it must be demonstrated that the conduct as between the parties was consistent with the existence of a contract so that parties acted accordingly because of the existence of an erstwhile express agreement.

145. In terms of the position and relationship of the Plaintiffs with the 1st, 2nd and 3rd Defendants, I find that over and above any other corroborating evidence, and by virtue of the admission by way of pleadings by the 1st, 2nd and 3rd Defendants and by their admission that they did not renew any tenancy agreements in writing, that tenancy agreements continued to exist after 2016 since they have filed the present suit. Furthermore, by virtue of the admission by said Defendants that indeed the Plaintiffs did continue after 2016 to operate from within the stalls/structures/kiosks within the premises on LR. No. 2116/27/111, the Defendants did not furnish evidence to the contrary to negate the fact that the said Plaintiffs continue to enjoy a landlord tenancy agreement to date.

146. DW1 denied firstly the existence of any contracts because he did not personally execute the agreements. However, I find that argument weak on the basis of the fact that according to his evidence, the duties of the management company included but were not limited to managing the building, collection of rent, issuing receipts on payment of rent and issuing annual reports. The fact that he was not in the committee during the execution of the contracts did not unbind the Trustees from the obligations encapsulated thereon since they remained the registered proprietors of the suit land.

147. Secondly, DW1 admitted that there were more stalls running, added from the initial intention of its construction. DW1 referred to those stalls as illegal structures which he acknowledged existed up to thirty-seven (37) of them. He added that since 2016, they had not collected rent from the illegal structures alone. It therefore means that previous to the 2016 act of stopping from collecting rent from the stalls, the Self-Help Group used to collect rent from the stalls. On what basis where they doing that other than a tenancy between the Group and the stall occupants? None other can be. Thus, based on this admission, I find that DW1 could not then renege that no contractual relationship existed.

148. The Plaintiffs produced copies of receipts in support of payment of rent from inter alia, the 33rd, 22nd, 13th Plaintiffs respectively for 2018. They also produced licences issued by the 4th Defendant to, among others, the 29th Plaintiff for operating the businesses the year 2018. They also produced health clearance certificates for diverse dates, from the County Public Health Officer for the year 2019, to operate in the suit premises granted to the 1st, 4th, 13th, 16th and 19th Plaintiffs among others. Finally, the

Plaintiffs produced demand notices dated 31/03/2019. The demands were for rent arrears on diverse dates between March, 2018 and February, 2019 in respect to several amounts against the 4th, 11th, 14th and 25th Plaintiffs.

149. The Plaintiffs produced orders from the BPRT concerning diverse issues evincing that a tenancy relationship existed with the 1st, 2nd and 3rd Defendants on the one (1) part and the 25th and 29th Plaintiffs, at the very least, as evidenced by P. Exhibit 5(a) and P. Exhibit 5(c), for the period between 2017 and 2018.

150. Based on the above, I arrive at the unwavering conclusion that from the evidence, the 1st, 4th, 5th, 11th, 13th, 14th, 16th, 19th, 22nd 21st, 25th, 29th and 33rd Plaintiffs (hereinafter the Plaintiffs) were tenants of the Defendants and continue to remain so to date. Furthermore, as captured in the Minutes of the meeting held on 12/05/2018, DW1 admitted as that tenants had been paying rent in 2018. These were the people the Counterclaim referred to as occupying illegal structures/ kiosks.

iii. Whether the excess stalls, over and above the initial approved plans, were constructed with authorization and by whom?

151. It is not denied from the facts of the case the 1st, 2nd and 3rd Defendants employed the services of a registered Architect DW2 to prepare architectural plans/drawings in October, 2004. Those plans approved for construction, a three (3) storey 204 stall building. There were also provisions made for voids (empty spaces) reserved for ventilation and lighting.

152. In 2012 an additional number stalls were constructed distinctively made from mabati materials, pursuant to several rental agreements entered in that year as approved by the management committee of the Group. The stalls were erected along the empty spaces and on the walkways. Total stalls currently are 250.

153. It was confirmed by all parties that the additional number of stalls they existed in the premises. According to DW2, DW3 and DW4 and in relying on their produced reports, the structures were allegedly illegally erected therein and had multifaceted hazardous contingent effects on the population within the premises.

154. It is also apparent, from the evidence, that the initial architectural plans were not subjected to the amendment process before putting up the additional structures in them hence the Defendants reference to them as 'illegal'. What is manifestly clear, however, is the fact that the Plaintiffs came into the suit premises between 2012 and 2016, by the invitation and permission of the 1st, 2nd and 3rd Defendants' Group. The management committee did not feature the 1st, 2nd and 3rd Defendants as officials therein at the time. However, under the terms of agreement, the Plaintiffs were directed to erect the construction of mabati stalls by the management. For this reason, the denied that the structures were illegal.

155. According to the rental agreements adduced in evidence, the cost of construction of the stalls, was met by the occupants in exchange for not paying rent for six (6) months. In other words, the six (6) month grace period was a payback plan geared towards recovery costs by the tenants as agreed since, in the understanding and finding of the Court, the Management did not want to incur the direct cost of putting up the structures for the occupants. This is because the structures would ultimately remain the ownership of the Group, and this was the ultimate mind of the Group as evidenced by the Minutes of the meeting held on 17/07/2018, whose copy was produced as P. Exhibit 8.

156. This also was the admission by 1st, 2nd and 3rd Defendants pursuant to its letter 31/05/2017 where it was declared that all the illegal structures belonged to the Group. DW1 testified that several cases

perpetually challenged their eviction processes. They could not thus purport to distance themselves from their ownership when they testified that they were unplanned since they were not captured in the approved plans for the suit premises. Additionally, no amendment to the approved plans took place.

157. I agree with the Plaintiffs that the buck stopped with the 1st, 2nd and 3rd Defendants who approved and permitted the construction of the mabati structures. It was incumbent upon them to seek the necessary approvals for constructions and they cannot not distance themselves from their existence. In any event, this Court took note of the fact that DW1 was not a candid witness when he took the witness box.

158. DW1 testified that thirty-seven (37) stalls were illegally erected. Some of them were demolished. He confirmed that he was present in the meeting held on 12/05/2018 whose chair was Alex Wangengi. DW1 admitted as captured in the minutes that tenants had been paying rent in 2018.

159. DW1 affirmed the contents in the letter dated 17/07/2018 as true. He also confirmed that the minutes of the meeting that he chaired on 17/07/2018 captured the true facts. In particular, that the constructed stalls belonged to the Group. It was also agreed that the tenants would operate without paying rent for six (6) to twelve (12) months.

160. The 1st, 2nd and 3rd Defendants' evidence is one in the nature of approbating and reprobating. However, what remains true from the evidence of both sides is that the Plaintiffs only set up the constructions with the approval of the management committee. In my view, it was irrelevant as to whether the 1st, 2nd and 3rd Defendants were running the day to day decisions of the Group or not since they continued to remain the registered proprietor of the suit premises of a Group which had a management committee running its business, including directing on who would or not operate businesses in the suit premises and in what manner he/she did so, and collecting rents from such persons. I am not persuaded and I am not prepared to hold that the decisions to construct the extra stalls were done clandestinely or surreptitiously. The Defendants were all aware of the move and endorsed impliedly and by acquiescence the decisions and steps.

161. Concluding thus, I find that the extra stalls, in occupation by the Plaintiffs, were set up under the behest of the 1st, 2nd and 3rd Defendants and on their behalf and to their benefit but without the necessary approvals from the necessary institutions. They are the property of the 1st, 2nd and 3rd Defendants who continue to derive benefit from their use by the Plaintiffs. For these reason, I find that the occupation by the Plaintiffs to the extent that the extra stalls were constructed under the authority of the 1st, 2nd and 3rd Defendants is legal, and the occupants thereof lawful tenants of the said Defendants.

iv. Whether the reports produced by the Defendants were authored by means of collusion or a corrupt scheme?

162. A number of individuals were called in by the Defendants as witnesses to support their case that the stalls (which I have found above to have been legally constructed) posed a danger to use and occupation of the suit premises. The most prominent conclusion that was drawn from the various reports furnished by the Defendants were that the constructed structures were unplanned causing potential hazard effects on the suit premises.

163. According to the evidence adduced, DW2 was, in May 2016, called by the Group to establish simple plan boundaries that would have the effect of creating sectional titling of the property. In his report dated 06/05/2016, the open yards that had been designed for lighting, ventilation and surface draining had been filled up with uncoordinated constructions. This had the effect of endangering the support structure of the building, causing flooding and other health hazards.

164. DW3 Senior Superintendent Architect Thuranira William of the 4th Defendant testified that he visited the suit premises together with DW2 and two others on 28/09/2017 to assess and satisfy the credibility of the premises. The instructions were issued by the 4th Defendant's secretary on 16/05/2016. Conversely, DW4 testified that on 21/07/2016, the 4th Defendant conducted a fire safety audit of the suit premises by DW4, DW3 and the Chief Fire Officer Bishop Mukwana that authored the report dated 22/07/2016.

165. The report of 22/07/2016 observed that the areas originally isolated for mounting firefighting equipment were taken over by illegal kiosks. Additionally, the firefighting equipment was inadequate. He further observed that the exits and fire assembly points were congested since they were occupied by the illegal kiosks. This had the effect of curtailing rescue efforts in the event of a fire.

166. The report continued that the open spaces were blocked by the structures, the columns and walls eroded by rain due to poor drainage system and the stalls failed to observe rules and regulations of fire safety.

167. It was recommended that the firefighting equipment be mounted, unplanned stalls be removed, a decongestion of entrances to ease movements and a label of the exits. Furthermore, proper servicing of portable equipment and a plan to designate fire points, emergency assembly points, escape routes and response plans was recommended.

168. On 31/05/2017, the NEMA officials inspected the suit premises and discovered that the stalls set up exceeded the business capacity by sixty (60), contrary to its original intent. It also observed that the entrance to the market hindered human flow into and out of the market due to congestion; imminently pose major risk in the event of an emergency.

169. It was also discovered that the walkways had been blocked leading to poor flow of air and the drainage system had compromised the structural integrity of the suit premises. Finally, the operation of a hotel at the top most floor endangered the public since it operated on open fire. For these reasons, an environmental restoration order was issued and executed by the County Environment Officer Michael Wahome.

170. In their letter of 17/09/2017, the Justice and Peace Centre, an NGO informed the 4th Defendant that the suit premises risked collapsing due to its poor status. This stemmed from the fact that it was over set up as sixty (60) structures illegally existed on the premises creating poor drainage systems and haphazard wiring. It thus demanded the 4th Defendant to take action to avert potential loss of lives and property. In the meantime, it recognized and lauded the efforts of MICHAEL WAHOME for issuing a restoration order. It urged the 4th Defendant's Director of Public Health to intervene and take action to ensure that the occupants had complied.

171. The 4th Defendant's Public Health Department on 25/09/2017 issued a statutory notice to the Chairman of the suit premises highlighting that the property had faded external walls, chipped floors, poor lighting, poor and defective drainage system, blocked pass ways and blocked escape doors in the case of emergency. For these reasons, the Chairman of the Group was ordered to within fourteen (14) days, repair and repaint the walls and leaking roofs, the chipping floors and internal walls, remove or demolish illegal structures, repair and replace all defective drainage fittings and fitments to the satisfaction of the Health Inspector, open all pass ways, provide standard dustbin and open escape doors.

172. DW3 in his findings captured in a report dated 02/10/2017, established that in the event of a fire, safety and evacuation mechanisms would be curtailed because of illegal structures set up therein. It was

thus their recommendation to remove the structures since they were constructed without approval, unblock and clean the drainage channels, remove all illegal power connections, conduct a structural integrity analysis, installation of firefighting equipment and restoration of the damages floors.

173. He stated that there were unauthorized constructions in existence that caused poor ventilation, compromised the safety of the occupants, blocked the drainage channels causing a peel off of the plaster, terrazzo floor finish and the concrete cover of the ground beams. This exposed the reinforcement bars that greatly affected the structural integrity of the building.

174. DW3 continued that the alleged illegal structures haphazardly connected to the power. In some other instances, open cabling was noted without conduits and use of sub-standard wires. He also took note of the fact that the illegal structures had eaten up the space designed for firefighting equipment. Finally, some of the structures had been anchored to beams and columns by drilling into the structural beams supporting the building. This posed a threat to life.

175. Thus on 21/02/2018, the 4th Defendant through its Public Health Department issued a Statutory Notice reminder to the chair of the Group to comply with the notice.

176. Thereafter on 17/07/2018, the Secretary of the Self Help Group informed the 4th Defendant in its letter that they had been unable to comply with the statutory notices and restoration orders due to resistance from the owners. It thus sought intervention to remove the remaining structures.

177. It cannot be gainsaid that the said reports were authored and released to the 1st, 2nd and 3rd Defendants between the period 2016 and 2017. It is not in dispute the reports were made contemporaneously with the conscious but vain efforts by the Self-Help Group to terminate the tenancies of the Plaintiffs or a number of them as evidenced by P. Exhibits 5(a), 5(b), 5(c) and 11 which were references to the BPRT. This Court has been left to make a prudential decision on the contest herein regarding the safety or otherwise of the suit premises based on the presence of the alleged illegal stalls and their occupants. The first question the Court poses loudly is: was it a coincidence that the several suits filed by the Plaintiffs the BPRT took place from 2016 onwards?

178. It is also interesting to note that save for DW2, the reports produced were pursuant to mandate donated to the authorities to yearly inspect suit premises. Although they disclosed that they were discharging their mandate, I note that previous reports since construction of the additional stalls were not AT ALL furnished in evidence to demonstrate that this mandate was or was not discharged every year. If it was discharged every year, what were the contents of the Reports they made from 2012 to 2016 when the ones unfavourable to the prevailing situation were made? Could it be that the reports, if any approved the situation as it was but now it was realized by the officials, after requests by the 1st, 2nd and 3rd Defendants' Group that the premises were no longer safe?

179. Again, if indeed the reports were anything to go by, why were they not authored between 2012 and 2015 in the exercise of their mandate as indicated in court? The structures had been in existence four (4) years before those reports were authored after all. Does it mean that before 2015, there were no hazardous effects that randomly and surprisingly emerged only in 2016?

180. Additionally, the Defendants, when furnishing their evidence, informed the Court that they had never inspected the premises prior to the dates indicated. Is it possible that the building could have never been inspected by the authorities ever since it was erected up to 2016? Whether the witnesses were referring to themselves individually or their offices generally therein, I still find that the absence of previous reports initiates a level of doubt as to the rationale of authoring reports in the wake of requests or complaints to by the Group.

181. DW2, in his letter dated 06/05/2016 referenced the same as follows: "Additional constructions at Nyayo Market Building Complex." He then stated that his purpose of the visit was to complete as built, a drawing for assignment of titles. After making the necessary observations, he strongly recommended the 1st Defendant to remove all unplanned extensions in the open spaces in order to preserve the security of the structure and for health and safety requirements to be met.

182. If DW2's mandate was to asses for assignment of titles, it is my view that it was not within his mandate to recommend a removal of the extension to 'preserve the security of the structure and for health and safety requirements'. Not only was it outside his scope of work, it was ultra vires his instructions.

183. DW3 and DW4 during their testimonies revealed that they both attended to inspection of the premises upon receipt of instructions from the County Secretary together. That document was mysteriously never produced in evidence. However, strikingly contrasted was the date the exercise took place. Did the exercise occur on 28/09/2017 as testified by DW3 or on 21/07/2016 as testified by DW4?

184. In their evidence and reports, it was recommended that a structural analysis report be adduced to establish the dilapidation of the suit premises. According to DW2 and DW3, a structural engineer was best placed with instructions to conduct such since it was only within his scope of duty. The instructions were admitted as not having taken place since none of the Defendants indicated that they had fulfilled their mandate together with a structural engineer. The structural engineer, best qualified to conduct a structural analysis of the building, was the best person placed to make any conclusions regarding the structure of the suit premises. Absence of such expert report therefore leaves no justification by the other experts (in other fields) in making such conclusions which in my view are misleading on the structure of the building since they are not skilled in the art as to drawing such references. It is pure guesswork from them.

185. Turning to the restoration order, the Defendants in their evidence opined that the Plaintiffs were in essence in denial of the restoration order because they were dissatisfied with its contents. Firstly, I have already stated that the said notice was served upon the 1st, 2nd and 3rd Defendants and not the Plaintiffs. It is not clear whether such notification was shared to the Plaintiffs though.

186. In their view, while it was indeed furnished to the Defendants, it was never complied with. All the while, the Plaintiffs were of the view that the process of the law in line with statute be adhered to without circumventing it. In fact, the sentiments of the Plaintiffs had all along intended to comply with the law and would in my view, yield to such procedure only. They have indeed been vocal and dissatisfied with the Defendants' conduct towards terminating their leases because they were a travesty of justice and abhorrent to the dictates of procedural fairness.

187. Section 108 (2)(c) of the Environment Management and Coordination Act provides that an environmental restoration order shall award compensation to be paid by the person on whom it is served to other persons whose environment or livelihood has been harmed by the action which is the subject of the order. A cursory perusal of the restoration order did not indeed award compensation. I find that based on that requirement alone, couched in mandatory terms, the said restoration order did not meet the threshold set out in statute as to ensure that it is enforced.

188. It is obvious that the demolition of the structures will cause financial implications to the Plaintiff who were not served with the restoration orders but will bear the ultimate effects of their non-existence, particularly from a business point of view. If the Plaintiffs are left with no compensatory mechanisms as set out in Section 108 (2)(c) of the Act, then I find that the restoration order failed to meet the bare minimum threshold and to give effect to it by accepting the proposition that the Plaintiffs be evicted

from the premises on account of it would amount to this Court being used to inflict an injustice to innocent persons.

189. In addition to my findings above, it is my view that the reports and orders, so authored in cross proximity as to time, were spirited to defeat the Plaintiffs' acquired rights to the use of part of the suit premises where their business kiosks/structures stood. I am satisfied to hold and I hereby do that in view of the above, the damning reports were authored in bad faith.

v. Whether if the Plaintiffs lose their stalls by virtue of demolition and removal of the structures they occupy are entitled to compensation, by who

190. I have deeply agonized about the reliefs sought by both the Plaintiffs and the Defendants over this matter, which appears to me to be an indirect way of one group of business people being pitted against another for ulterior motives other than the fact of the safety of the premises wherein they carry out their businesses and one has resorted to use existing regulatory and other agencies through the management of the owner to "kick out" of the premises in a discriminatory manner the other group they so choose. Ultimately, the Plaintiffs want to remain in occupation and use of the structures/kiosks they erected and occupy in the suit premises while the Defendants want to demolish the same and thereby making the Plaintiffs to lack any business 'premises' in the suit premises. On the one hand, the Plaintiffs have prayed for a declaration that they are tenants therein and permanent injunction against the Defendants. On the other hand, the Defendants other than the 4th have prayed for demolition of the structures. None of the parties sought the relief of compensation should the structures cease to exist in any event.

191. As noted from the analysis above (in this entire judgment), the Plaintiffs are in occupation and use of the premises, specifically, the structures/stalls/kiosks alleged by the Defendants to have been illegal. I have found that they have also been using the same for business. The Defendants on their part claim that the stalls were illegally constructed, which this Court has disagreed with. Although they argued that the stalls posed a danger to the structural integrity of the building, which I have found not to have been substantiated by a qualified professional's report and assessment, it is clear to me that the stalls were conducted in full view and with clear permission of the 1st, 2nd and 3rd Defendants. I have also found that indeed the said Defendants and the 4th benefitted from the presence of the Plaintiffs in the suit premises through, on the one hand, constructions of the stalls/kiosks which I have found belong to the first set of the Defendants and by way of rent payments, and on the other hand, payments of trade licences and other licences respectively.

192. The 1st, 2nd and 3rd Defendants invited the Plaintiffs into their premises and by their conduct and express promises made them to believe that they would legitimately carry out businesses in the said premises without any hindrance or let as long as they abided by the terms and conditions of the tenancies thereby created, and the Defendants did not adduce any evidence, save for their own admission and therefore not the Plaintiffs' will they stopped collecting rents from the 'illegal' kiosks from 2016, that the Plaintiffs breached the terms of the tenancy relationships. But again, on the issue as to whether the Plaintiffs were in arrears of rent from 2016 when the collections was allegedly stopped, the Plaintiffs adduced evidence showing that on 31/03/2019 the 1st, 2nd and 3rd Defendants' Group issued demand notices, evidenced by P. Exhibit 13 (a) - (f), to some of the Plaintiffs, namely, the 4th, 11th, 14th and 25th for rent arears on diverse dates between March, 2018 and February, 2019. This clearly shows that the Defendants continued to collect rents from the Plaintiffs on diverse dates beyond the 2016 year because, for instance, if the rents had not been paid by the four Plaintiffs listed herein prior to March, 2018, the demand notices would have indicated as much.

193. I have noted that the Defendants' pleadings and reliefs prayed for (see the Amended Defence and Counterclaim dated 30/09/2019) are to the effect that said structures which the Defendants alleged to

be illegal to be demolished, and that at paragraph 16 of the 4th Defendant's Defence dated 29/08/2018 that the structures were built on drainage lines, fire assembly points, entrance, exits and walkways, among others. I have indicated in my earlier judgment that I am not convinced that the reports the Defendants relied on to support the above allegations and reliefs appear to me to have been made at the instigation of the 1st, 2nd and 3rd Defendants in a bid to indirectly evict the Plaintiffs from their businesses since the terminations of their tenancies have proved to be futile.

194. But granted that for reasons of failure by the Defendants to avail the evidence of a Structural Engineer to inform the Court whether or not the integrity of the building on the suit premises is or is not compromised there is a possibility that for the reason of the extra constructions of the stalls/kiosks the integrity of the building is compromised, it means that the removal of the stalls/kiosks from the building will not reverse the danger that has already been brought about by it. If that is the narrative to be gotten from the evidence of DW1, DW2, DW3 and DW4 then it would mean that the entire building will have to be condemned by the relevant authorities and be declared unfit for use by even the owners, is to say, even the 1st, 2nd and 3rd Defendants and ALL their members. It therefore also would mean that even the sectional property titles that were to be generated through the inspection of the premises by DW2 would be of no avail. In those circumstances, there would be no need to compensate any of the Plaintiffs for reason of the demolitions that would result from the structures/stalls and there would be no need to demolish only the said structures but the entire building.

195. If on the other hand, it is the evidence of the Defendants that they want this Court to believe that the presence and use of the structures/stalls erected by the Plaintiffs and their businesses are the only ones that would pose a danger to the building and the use and occupation of the premises, it goes without saying that the evidence of DW2, DW3 and DW4 together with all the reports that were relied on by the Defendants in a bid to convince the Court that the structures alleged to have been illegally erected and used by the Plaintiffs was nothing but a choreograph of concerted misused professional information designed to indirectly cause an eviction of persons who were invited by the Defendants into the premises, have given them a benefit in the past but whose 'use' is now unprofitable to them and they therefore want to use the Court process to achieve their desired results.

196. The law on promissory estoppel is settled. I will not belabor its origin, meaning and role in both the law of contract and equity. However, suffice it to say that the elements of doctrine of promissory estoppel were succinctly explained recently by the learned judge J. Ngugi, as he then was, in Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR where he stated as follows:-

> " 32. From a scan of our decisional law, one must show the following five elements in order to establish estoppel by representation or promissory estoppel:
>
> a. Representation: There must be a representation by the representor in words or by acts or conduct;
>
> b. Reasonableness: The person relying must satisfy the Court that it was reasonable for them to rely on the representation;
>
> c. Reliance: the victim must demonstrate that he was induced by the representation and in such reliance acted on it;
>
> d. Detriment: the victim must show that in acting in reliance of the representation he suffered some detriment or changed his position; and

e. Unconscionability: the victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

33. Where each of these elements is demonstrated, a party will be permitted to raise an estoppel to prevent the opposite side from going back on their word and establishing by evidence any averment which is substantially at variance with his former representation."

197. The totality of the Plaintiff's evidence and that of the first defence witness (DW1) is that the 1st, 2nd and 3rd Defendants, by their conduct of inviting the Plaintiffs into the suit premises, permitting them to construct the structures they did erect which are now is issue, taking or owning the said structures, collecting rents from the Plaintiffs at diverse times and in diverse years, and permitting the Plaintiffs to so believe that they had and they indeed acquired legitimate tenancies placed themselves within the confines of the five elements or promissory estoppel explained in the authority of Carol Construction (supra). They cannot be permitted to resile from that position. If they do, then will be in breach of contract as between themselves and the Plaintiffs and have no choice but to compensate them not only for the expenses they incurred in erecting and improving the structures/stalls/kiosks but for general damages for breach of contracts and loss of business and cutting short their legitimate expectation of peacefully and gainfully carrying out business in the premises.

198. However, for the reason that the Plaintiffs did pray for compensation, I will not venture into that line. Therefore, I will not award any compensation. In any event, I have found the evidence adduced by the Defendants is insufficient to prove their case on a balance of probabilities as to grant the reliefs sought by the Defendants in their counterclaim and the same fails.

vi. Who bears costs of the suit

199. It is trite law that costs follow the event unless directed otherwise for good reason, by the Judge. Section 27 (1) of the *Civil Procedure Act*, which remains applicable in this court, gives the court discretion to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.

200. In the present suit, I find that the Plaintiffs succeeded in the suit having proved their case on a balance of probabilities. The claim will thus be entered in thief favor. Contra, I find that the 1st, 2nd and 3rd Defendants have not established the Counterclaim to the required standards.

Orders and Disposition

201. The upshot is that I enter judgment for the Plaintiffs against the Defendants as follows:

a. A declaration be and is hereby made that the Plaintiffs herein are lawful tenants of the 1st, 2nd and 3rd Defendants in the business premises standing on parcel No. L.R. No. 2116/27/111.

b. A declaration that the intended/threatened eviction of the Plaintiffs from their business premises standing on parcel No. L.R. No. 2116/27/111 and the threatened demolition of the business premises is illegal.

c. A permanent injunction be and is hereby issued against the Defendants from interfering with the Plaintiffs' business premises standing on parcel no. L.R. No. 2116/27/111 save for terming them in the manner provided by the law.

d. The Counterclaim dated and filed on 30/09/2019 lacks merit and is hereby dismissed with costs to the Plaintiffs.

e. The Plaintiffs shall have the costs of the suit.

f. Interest on (d) and (e) above shall run from the date of judgment until payment in full at court rates.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 14TH DAY OF JUNE, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE