



Korean United Church of Kenya & 3 others v Song (Environment and Land Case Civil Suit 900 of 2012) [2023] KEELC 20873 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 900 OF 2012**

**MD MWANGI, J
OCTOBER 17, 2023**

BETWEEN

**THE KOREAN UNITED CHURCH OF KENYA 1ST PLAINTIFF
REV. JONATHAN KANG 2ND PLAINTIFF
SANG HO KIM 3RD PLAINTIFF
GEE YEON KIM 4TH PLAINTIFF**

AND

SEUNG HO SONG DEFENDANT

JUDGMENT

Background

1. Vide the Complaint dated November 27, 2012, the Plaintiffs instituted this suit. The suit was later consolidated with ELC. No. 536 of 2012, CMCC No. 3662 of 2012 and CMCC No. 3136 of 2012 vide the Ruling delivered on the February 21, 2014. The court directed that the instant suit be the lead file.
2. From the pleadings, the Plaintiffs' prayers are:
 - a. A permanent injunction to restrain the Defendant to restrain the Defendant and/or his agents and or servants and or employees and or representatives from trespassing and or entering into and or clearing any materials on and or constructing and or building any structures on and or demolishing and or constructing illegal gates through the permanent common boundary fence/wall between Land Reference Number 2/698 Oloitokitok Road Nairobi and Land Reference Number 2/ 697 Oloitokitok Road Nairobi and or moving the said boundary by whatever measurement into the 1st Plaintiffs plot and or evicting in any manner whatsoever



interfering with the Plaintiffs' Title, ownership and occupation of Land Reference Number 2/698 Oloitokitok Road Nairobi.

- b. A mandatory injunction to compel the Defendant and or his agents and or servants and or employees and or representatives to forthwith remove the illegal gate he has constructed along the permanent common boundary fence between Land Reference Number 2/698 Oloitokitok Road Nairobi and Land Reference Number 2/697 and or restore and or return the fence as it stood before the illegal gate was put up.
 - c. A permanent injunction to restrain the Defendant from disposing off waste oil and other wastes to or interfering with the Sewage System on the Plaintiffs' parcel of land LR No. 2/698.
 - d. A permanent injunction to restrain the Defendant from trespassing or constructing any Sewage line on the Plaintiffs' parcel of land LR No. 2/698
 - e. Special damages in the sum of Kshs. 4,200,000/=
 - f. Costs and interest of this suit at court rates.
 - g. Any other or further relief which this honourable court deems fit and just to grant.
3. The Plaintiffs' case is that the 1st Plaintiff is the owner of Land Reference Number 2/698 Nairobi registered in the name of the 2nd Plaintiff in trust for the 1st Plaintiff. While the Defendant is the registered owner of the neighbouring plot Land Reference Number 2/697. The plots were originally Land Reference Number 2/ 250 jointly purchased by the 2nd Plaintiff and the Defendant.
 4. That after the survey and subdivision, the 1st Plaintiff and the Defendant contributed to and put up a permanent wall forming the boundary of the two plots under the supervision of the Defendant. The 1st Plaintiff then obtained a development plan for his plot and thereafter constructed a church hall among other amenities.
 5. The Plaintiffs aver that the Defendant also developed his portion of the land and constructed buildings from which he operates a garage and a restaurant despite the approved user for the plot being for residential purposes.
 6. They allege that the Defendant without the consent of the Plaintiff, unlawfully interfered with the perimeter fence forming the boundary for the two plots, demolishing a portion of the fence and trespassed into the 1st Plaintiff's plot. The Defendant further put up a gate which is being locked and opened from his side and therefore exposing the Plaintiffs to a serious security risk. As well as the obvious trespass by the Defendant and his agents.
 7. That sometime in November, 2012 the Defendant threatened to evict the Plaintiffs from a portion measuring 1.5 meters into the Plaintiffs' Land Reference Number 2/ 268 and demanded that the 2nd Plaintiff removes all materials, metallic electric box, water pipes and water meters. That even before the lapse of the 7 days' notice issued, the Defendant forcefully entered the Plaintiff's compound with goons and commenced construction of the structures on the Plaintiffs' portion. The Plaintiffs therefore seek injunctions against the Defendant's actions.
 8. The Plaintiff further states that there are no pending proceedings between the Plaintiffs and the Defendant save for HCC ELC 536 of 2012, Milimani CMCC Number 3136 of 2012, Milimani CMCC No. 3662 of 2012 and CMCC No. 4888 of 2012 whose causes of action are different.



Defence and Counterclaim

9. The Defendant filed a Statement of Defence dated December 21, 2012 which was amended on the August 21, 2013 and introduced a Counterclaim. In his Defence, the Defendant contents that the Plaintiffs do not have the capacity or permission from their members to institute this suit. That the Plaint is bad in law as it discloses no cause of action hence it ought to be struck out.
10. He avers that this suit is the latest in a string of five suits instituted by the 2nd Plaintiff to intimidate him after differences arose with regards to the ownership of the suit property herein.
11. The Defendant further admits to sending the Letter dated November 19, 2012 to the 2nd Plaintiff but denies the alleged contents stated in the Plaint as the Plaintiffs are blatantly lying to the court on the claim of eviction. He denies invading the Plaintiffs' compound.
12. In the Counterclaim, the Defendant avers that he jointly purchased al that property known as LR No. 2/250 and had it registered in their names. That the Defendant's portion in the property was 60 % while the 2nd Plaintiff's was 40 %.
13. The Defendant avers that in 2002, they agreed to demarcate the property in order for each party to identify their own portion. Although the subdivision was informally done, the 2nd Plaintiff erected a perimeter fence along the perceived boundary. Each party then started to develop their respective property with the Defendant constructing a residential house and a garage and the 2nd Plaintiff constructed a church hall.
14. Later on, when parties engaged relevant authorities for the sub-division of the property, they realised that the original owner had submitted a sub-division scheme to the Director of City Planning and Architecture with a proposal to sub-divide the plots in six subplots. The approved plan provided for surrender for space for sewer to Nairobi City County and a way leave. However, since the 2nd Plaintiff and the Defendant intended to sub-divide the property into two and not six sub-plots, the sub- division had to be amended for approval.
15. The Commissioner of Lands and the Director of Survey approved the Survey Plan with subplot A (LR. No. 2/697) for the Defendant and subplot B (LR No. 2/698) for the 2nd Plaintiff. It is then that it emerged that part of the developments undertaken by the 2nd Plaintiff fell on the way leave.
16. That since the Defendant was living on his plot with his family, he had to construct a temporary septic tank. The 3m way leave was therefore to connect storm water and sewer drainage with the City County's main sewer.
17. He asserts that when the dispute arose between himself and the 2nd Plaintiff over the construction of the sewer, he petitioned the Nairobi City County, the Nairobi Water and Sewerage Co. Ltd and the Lands Department to resolve the issue. Subsequently, the Survey Map was amended approving the Defendant's application to construct the Sewer line in 6 months.
18. The Defendant avers that he has however opted to seek the court's approval to undertake the construction in view of the numerous cases filed by the Plaintiffs. He is apprehensive that once he starts the construction, the Plaintiffs are likely to file a fresh suit or cite him for contempt of court. Further that his family is unable to discharge their waste properly.
19. He therefore prays for dismissal of the Plaintiffs' suit and entry of Judgement in his favour in the following terms;



- a. A permanent mandatory injunction directed to the Plaintiffs whether by themselves, their agents and or servants to allow the Defendant without any interference to construct and or erect storm water and sewerage drainage within the 3 metre drainage way leave as approved by the Nairobi City Council.
- b. A permanent injunction directed to the Plaintiffs whether by themselves their agents or servants restraining them from interfering with the 3-metre drainage way leave as approved by the Ministry of Lands and the Nairobi City Council and or interfering with the Defendant's parcel of land LR No. 2/697.
- c. General damages.
- d. Costs of the suit.

Reply to Amended Defence and Defence to Counterclaim

20. The Plaintiffs aver that they have the capacity to institute this suit and officials of the 1st Plaintiff herein. The 2nd Plaintiff denies having instigated this suit to intimidate the Defendant. The Plaintiff admit to filing civil suits save that the causes of action and reliefs sought therein.
21. The Plaintiffs further states that the said plot was purchased by the 1st Plaintiff and the Defendant and initially registered in the name of the 2nd Plaintiff in trust for both the 1st Plaintiff.
22. That it was the 1st Plaintiff and the agreed to demarcate the property with the assistance of a professional surveyor and that the Defendant is the one who put up a permanent perimeter fence along the boundary. That the subdivision done in 2009 was done exclusively by the Defendant who forged the signature of the 2nd Plaintiff. They accuse the Defendant of colluding with Nairobi City Council and the Ministry of lands officials, excised a portion of the 1st Plaintiff's portion without the consent of the Plaintiffs, which forgery has been reported to Kilimani Police Station which is under investigations. Further, that the approvals for the subdivisions were illegal due to the forgery.
23. As regards the garage constructed by the Defendant was never approved as Plot Number 250 had its permitted user as residential purposes and not commercial.
24. Vide the Ruling delivered on the 21st February, 2014, this suit was consolidated with ELC. No. 536 of 2012, CMCC No. 3662 of 2012 and CMCC No. 3136 of 2012. The court directed that this file be the lead file.

Evidence Adduced

25. Before the hearing on the January 26, 2022, counsel for the Plaintiffs informed the court that the Plaintiffs shall only pursue is compensation. On the hearing day, the Plaintiffs further withdrew the cases against all other Defendants in the other consolidated files save for the Defendant herein.
26. During the hearing, Rev. Jonathan Kang, a pastor at the Korean United Church of Kenya testified as PW1. He adopted his Witness Statement dated June 7, 2017 as his evidence in chief. He also adduced the documents listed on the Plaintiffs' List of documents dated June 7, 2017 as well as the Plaintiffs' Supplementary List of documents dated May 2, 2019 in the order in which they are listed as Plaintiffs' exhibits save for the Valuation Reports which was to be produced by the Valuers.
27. PW 1 further stated that the Defendant is one of the church members. That they bought plot jointly with Defendant known as LR No. 2/ 250. The plot was to be shared in the ration of 40:60 in favour of the Defendant. That they initially shared it casually without a Surveyor. He accused the Defendant of



forging his signature on the subdivision Plan and subdivided the Plot. However, his portion was less in the subdivision Plan, a fact confirmed by the DCI Report.

28. It was his evidence that their problems started when the Defendant started laying a claim on their Sunday School Class and claimed that they had occupied about 0.5 m on his land along the boundary. The City County of Nairobi did not enforce the enforcement notice issued to them. That the people who demolished their properties in 2012 and 2014 did not identify themselves but came through the Defendant's gate he had constructed along the perimeter fence. That the Lands office confirmed vide the Letter of April 17, 2015.
29. That the Plaintiffs therefore seek compensation for the damage caused to their property and general damages.
30. In cross-examination, PW 1 stated that the Letter dated April 24, 1978 on the Defendant's List of Documents confirms the need for a sewer in respect of LR 2/250. The Letter dated March 19, 1997 equally stated that a 3 metre Sewer line would be required. That although there is a letter dated March 21, 2013 from NLC to the Director of Surveys seeking amendment of the Survey Plan, he was not sure if the amendments were approved. The letter dated April 21, 2016 from Nairobi City County to Nairobi City Water & Sewerage Company however confirms that there was a 3 metre Sewer Line.
31. He stated that he filed a complaint for the forgery to the Police and Mr. Song, the Defendant herein, was charged in Kibera Court Criminal Case No. 4181/ 2013. He was however acquitted under Section 215 of the *Criminal Procedure Code*.
32. That he also filed a complaint in regard to the damage on the property against the Defendant who was charged with a Criminal Case No. 2880/2014 at Kibera. The Defendant was again acquitted.
33. He informed the court that the City Council of Nairobi had issued an Enforcement Notice in respect of the church's property LR No. 2/ 698. That the enforcement notice alleged illegal construction on the Sewer way leave. They however never confirmed with the City County if the notice was authentic. The demolition was done after 7 days.
34. It was PW1 's evidence that another enforcement notice was issued in 2014 in respect of LR 2/698 complaining about an illegal construction of the boundary wall and building structures on the sewer way-leave.
35. That the Enforcement Notice of August 8, 2026 on the other hand was about construction of a structure up to roofing without permission. That when they received the notice, they demolished the structure themselves.
36. He argued that although he never saw the people who demolished their building, they guessed it was Mr. Song since they had a dispute with him. That the Photo taken in 2014 was a City County of Nairobi in their compound who came under the instructions of Mr. Song.
37. PWI stated that the Plaintiff in ELC 536 of 2012 at paragraph 13 states that the 3rd Defendant's Officers destroyed their properties. Similarly, in Milimani CMCC 3136 of 2012 at paragraphs 13-14, he accused the 2nd Defendant's Officers of attempting to trespass. The 2nd Defendant in both cases is Nairobi City County Water & Sewerage Company respectively.
38. That he had instructed Muriungi advocate to subdivide the land but he could not tell if the Advocate instructed Ms. Two EMS Associates to do subdivisions.
39. He further confirmed that he had not particularised his claim of special damages against the Defendant. He confirmed to the court that he had filed more than 5 civil cases and 3 criminal cases against the



- Defendant. In addition, he instructed his advocate on record to write the letter dated May 10, 2016 seeking to have the Defendant deported although he has family and properties in Kenya.
40. In re-examination, PW1 confirmed that the demolitions happened twice, in 2012 and in 2014. That the photos of the city county vehicles in their compound was taken by a church member whom he does not know. That Mr. Muriungi and Ms. Two EMS Associates are not known to him as it is the Defendant who instructed and paid them. It was his evidence that Mr. Song was acquitted in the criminal cases for lack of evidence to link him to the forgery.
 41. He further averred that the Director of Surveys confirmed that the way leave was irregularly introduced.
 42. The second Plaintiffs' Witness (PW2) was Mr. James Kimani Horeria, a Valuer. He confirmed preparing the Reports dated May 18, 2016. He then produced them as exhibits.
 43. In cross-examination by the Defendant's Counsel, the 1st report indicates that he inspected the damage on June 25, 2012. The Report is dated 18th May, 2016. This is a revised version of the Report. At the time of inspection, he did not have information and he could not tell what he revised.
 44. He stated that he was told by the Management as indicated at page 61. He confirmed that he did not have the breakdown and he could not breakdown the global figure but he gave a sum of Kshs. 76 Million. At page 60, he states that the damage to the wall was done by a bulldozer or tractor knocking and collapsing the walls.
 45. He further testified that in his 2nd Report, he indicated that inspection was on June 5, 2014 it is a revised report. He could not remember what he was revising. He did not have an itemised value of the items damaged as well.
 46. In re-examination, he stated that once in a while Valuers revise their Reports. That he is not obligated to provide itemised breakdown of items valued. The Plaintiffs' Counsel then closed the Plaintiffs' case.
 47. The Defendant, Sueng Ho Song, testified virtually as DW1 in support of his case. He adopted his Witness Statement dated February 28, 2017 as his evidence in-chief. He further produced the Documents listed on the Defendant's List of Documents dated February 28, 2017 as DE 1-34 save for documents listed as No.31 and 33 being photographs of demolition by Nairobi City County dated May 19, 2014 which were marked for identification.
 48. The witness further produced documents on the Defendant's further list of documents dated May 7, 2019 marked as DE 35- 50 save for the Report and Valuation on damages listed as document No. which was marked for identification. It was his evidence that although the 2nd Plaintiff has sought damages from him to compensate him for the alleged damages, he did not damage any property by Mr. Khan. That the demolition was done by Nairobi City County which had served an Enforcement Notice at Page 27 of the Defendant's List of Documents. He further confirmed that he was charged with a criminal case and acquitted. He produced the Charge sheet at page 21 of the defendant's further list of documents.
 49. Upon cross-examination by the Plaintiffs' counsel, DW 1 confirmed that they acquired the land in the year 2002 jointly. He stated that it is the 2nd Plaintiff who build the wall separating the portions before the subdivision which was done in 2009. That he had no problem with the size.
 50. DW 1 confirmed that he had seen the Directorate of Criminal Investigations Forensic Document Examiner's Report Adduced as PE 6. He also confirmed instructing Two EMS Associates through his Letter dated January 11, 2008. He paid them a sum Kshs. 150,000/-, whose receipt was acknowledged



as shown at page 38. However, Muriungi & Co. Advocates was instructed by the Mr. Khan, the 2nd Plaintiff. He denied knowledge of the document on page 32 of the Plaintiffs' documents.

51. It was his evidence that the 2nd Plaintiff advised him to pay Stamp Duty for subdivision of LR No. 2/ 697 which he did. He adduced the Cheque in favour of the Commissioner of Domestic Taxes at page 36 of his list of documents. He agreed to paying every cost as he needed his land.
52. DW 1 also referred to the Letter dated March 19, 1997 showing the conditions for subdivision of LR No. 2/250. The amendment on approved subdivision on page 6 of the Defendant's Further List Documents not indicate the way leave. He was however not sure if the approved subdivision was actually approved by the City Council of Nairobi.
53. It was his evidence that he Petitioned the City County of Nairobi, the Nairobi Water & Sewerage Company and the Land Departments to resolve the issue. He averred that he got an approval for construction of his house before he constructed a home on his plot. He was using the old sewer line but after the subdivision the old sewer line was blocked. The county approved a septic tank. That is why he approached the city county of Nairobi.
54. He had a right to complain the City County. The letter of January 15, 2013 is by one R.K. Muema for Town Clerk initiating the process of creating a wayleave. He adduced a further complaint to Nairobi City County vide the Letter dated February 5, 2013 against a permanent blockage of sewer and storm water drainage.
55. In re-examination, he stated that the Letter of March 19, 1997 was from the Director of City Planning which provided under condition No. (viii) required a 3 Metre wayleave to be provided and surrendered to Nairobi City County. In the Letter of January 15, 2013 from the Director of City County Planning reiterating the earlier letter of March 19, 1997. NLC also reiterated the requirement of the 3 metre Wayleave through its letter dated April 21, 2016.
56. It was his evidence that he did not author the Enforcement Notice nor induce/ influence the issuance of the enforcement neither did he participate in the demolitions. That he only complained about blockage of his Sewer line by the Plaintiffs. He restated the numerous cases filed against him both civil and criminal.

Court's Directions

57. At close of the hearing, the court directed parties to file their respective written submissions. Both parties complied.

Submissions by the Plaintiff

58. In their submissions, the Plaintiff aver that out of the 4 consolidated suits, the 1st Defendant only filed an Amended Defence and Counter-claim dated August 21, 2013 in this lead file, ELCC No. 900 of 2012. They affirm that the other three (3) suits ELCC No. 536 of 2012, CMCC No. 3662 of 2012 and CMCC 3136 of 2012 are undefended and therefore admitted. The Plaintiffs base their argument on the provisions of Order 2 Rule 11 of the *Civil Procedure Rules*. They also make reference to the case of *Keshavji Jivraj Shab -vs- Kuldip Singh and Another* [2021] eKLR where the Court stated that:

“...having failed to file a defence and have the allegations in the Plaintiff's Claim.”

59. The Plaintiffs submit that the main dispute between the protagonists was whether the sub-division of the suit property was properly done and whether there was a provision of a three metres sewer wayleave



as a condition for the subdivision of the suit property. Ancillary to the main dispute was the issue whether any party suffered damages as a result of the actions of the other.

60. The Plaintiffs at paragraph 8 of their submissions assert that pending the determination of this suit, the 1st Defendant sold his Land LR No. 2/697 to a Company known as New Fortune Company Ltd in the year 2020. The Plaintiffs submit that the 1st Defendant's action defeated their prayer for reliefs of nullification of the illegal subdivision and a permanent injunction to restrain the Defendants from introducing a non-existent illegal Sewer Wayleave unto the 2nd Plaintiff's Land LR No. 2/698. This is what forced the Plaintiffs to withdraw their claims against the other Defendants other than the 1st Defendant.
61. The Plaintiffs set forth to demonstrate that the subdivision of the suit property was fraudulently done by the 1st Defendant who subsequently purported to introduce the non-existent three metre Sewer Wayleave on the 2nd Plaintiff's property causing him damages.
62. The Plaintiff's case is that the process of sub-division of the suit property was commenced by the 2nd Plaintiff through the letter of July 15, 2007. The 2nd Plaintiff however travelled out of the Country for Ministerial work. The Plaintiffs allege that when the 1st Defendant felt that the subdivision was taking too long, he appointed Messrs Two EMS Associates, (Planners) and Messrs Muriungi & Co. Advocates (Lawyers) to facilitate the subdivision process. The Plaintiffs assert that all the payments to these firms were made by the 1st Defendant though the posited as acting for and on behalf of the 2nd Plaintiff since the land was then registered in his name.
63. The Plaintiffs allege that the two firms submitted a subdivision plan with the 2nd Plaintiff's forged signature. The Plaintiffs affirm that the impugned subdivision plan was examined by a forensic document examiner on October 23, 2013 who issued a report confirming that the 2nd Plaintiff's signature on the subdivision plan was forged. This caused the 1st Defendant to be charged with the offence of forgery and uttering of false documents in Kibera Criminal Case No. 4181 of 2013. The 1st Defendant was however acquitted on the basis of lack of evidence to suggest that he had committed the offence.
64. The Plaintiffs argue that though the prosecution failed to prove the offence of forgery against the 1st Defendant beyond reasonable doubt, there was no dispute that the signature on the subdivision plan was forged therefore, rendering the subsequent subdivision fraudulent, illegal, null and void. They relied on the decision in *Mary Njeri Mugo -vs- Jane Wakiui Gatimu & Another* [2019] eKLR over the illegality and irregularity in an agreement. The Court expressed the view that if an agreement between parties was irregular and tainted with illegality, their registration as joint proprietors could not be a clean title capable of being protected in a court of law. The title arising from such illegality cannot be said to enjoy any legal sanctity in the eyes of the law.
65. The Plaintiffs submit further that the impugned fraudulent subdivision did not provide for a three metres Sewer Wayleave. They insisted that no evidence was submitted to support the claim of the existence of the Wayleave.
66. The Plaintiffs allege that it was the 1st Defendant who Petitioned the Nairobi City County Government to illegally and forcefully introduce and forcefully introduce the Wayleave on the 2nd Plaintiff's property. The 1st Defendant complained to the Director of City Planning vide a letter dated December 18, 2012 about the alleged blockage of Sewer connection to his plots five (5) years after the sub-division.



67. The Plaintiffs point out that the Director of City Planning promptly responded to the 1st Defendant's letter with one addressed to the Commissioner of Lands reiterating the assertions by the 1st Defendant thereby misleading the Commissioner of Lands.
68. The Plaintiffs further allege that the 1st Defendant caused the stoppage of the 1st Plaintiff's approved development plans for the reason that the 1st Plaintiff had not disclosed the existence of the Sewer Wayleave.
69. On the other hand, the National Land Commission relying on representation from the Director of City Planning directed the Director of Surveys to amend the Survey Plan to provide for the three (3) metre Way Leave for Storm Water and Sewer drainage on the Plaintiff's land. The Plaintiffs assert that the introduction of the three metre Way Leave into the Survey Plan was through the actions of the 1st Defendant facilitated by the Director of City Planning, one Rose Muema.
70. After the introduction of the Way Leave, the Plaintiffs allege that the County Government of Nairobi issued enforcement Letters and eventually demolished all the constructions undertaken by the Plaintiffs, despite having obtained approvals. They blame the 1st Defendant for hatching the plan to introduce the illegal Way Leave.
71. The Plaintiffs submit that the Director of Criminal Investigations conducted investigations concerning the amendment and introduction of the three (3) metres Way Leave onto the Plaintiff's property and conclusively confirmed that the procedure of its inclusion on the Amended Plan was unprocedural.
72. The Plaintiffs submit that they suffered damages as a consequence of the 1st Defendant's actions. They submit that their construction developments which had been approved by the County Government of Nairobi were demolished twice; first on June 25, 2012 and secondly on June 5, 2014. Consequently, the Plaintiffs alleged that they suffered losses estimated at Kshs 7,600,000.00 and Kshs 5,150,000.00 respectively as assessed by a qualified Land Economist. They insist that the damage was caused on the Plaintiff's Property on representation and assumption that there was a three (3) metres Way Leave on the Plaintiff's Property propagated by the 1st Defendant.
73. The Plaintiffs allege that the 1st Defendant had in his statement of defence admitted to be the one who had instigated, prompted and misled 'Nairobi City County' to unprocedurally introduce a fraudulent illegal and non-existent three (3) metres Way Leave on the Plaintiff's property.
74. In conclusion, the Plaintiffs pray that their suits be allowed as prayed for being undefended and an award of special damages of Kshs 12,750,000.00 and general damages and costs in all the suits.

Submissions by the Defendant

75. The Defendant submits that the Plaintiff have in their submissions deliberately misrepresented to the Court that the Defendant did not file defences in respect of the three Consolidated Suits. The Defendant avers that it was only in CMCC 3662 of 2012 where the Defendant was not served with Summons to Enter Appearance that they did not file a Statement of Defence. The Defendant asserts that the parties on August 3, 2013 recorded a Consent as a Consequence whereof, the Defendant filed an Amended Statement of Defence which pleaded the existence of the three (3) other suits, and a Defence thereof.
76. The Defendant identifies four (4) issues for determination and proceeds to submit on all the 4 issues.
77. The 1st issue as framed by the Defendant is whether in view of the Sale and Transfer of the Defendant's parcel of Land LR No. 2/697 to a 3rd Party, the Orders of injunction may issue. The Defendant submits



- that he sold the parcel to a 3rd Party back in the year 2020. Despite the Plaintiffs being aware of the sale and transfer, they elected not to join the 3rd party, the owner of the suit property in this suit.
78. The Defendant submits that since he is no longer the proprietor of the parcel of land, orders of injunction cannot issue against him. The prayers for injunction have been overtaken by events. The Defendant has made reference to a number of decided cases to support his argument that Courts do not act in vain.
 79. The 2nd issue identified by the Defendant is whether the Defendant trespassed into the Plaintiff's parcel of land LR No. 21698 and caused damages thereof. The Defendant submits that the 2nd Plaintiff in his testimony before the Court testified that the demolition of his properties was carried out by the Nairobi City County and Not by the Defendant. In the circumstances, the Defendant asserts that he cannot be held liable for the decisions and actions taken by the Nairobi City County.
 80. It is the Defendant's case that in as much as he made a complaint to the authorities, he had no control over its outcome.
 81. On the third issue whether the Plaintiffs had proved their claim for special damages, the Defendant pointed out that it is only in ELCC No. 536 of 2012 that the Plaintiffs had specifically pleaded the particulars of special damages; being the value of the damaged building, the cost of damage to Piano, Amplifier, Air Conditioner, LCD Projector, and Electronic Piano, a Generator and 6 sets of Tables and Chairs all amounting to Kshs 4,260,000.00.
 82. The Defendant reiterates that he is not liable for any alleged damage. Notwithstanding that, the Defendant is not liable, he submits that the Plaintiffs did not produce any documents to support the cost of the items claimed, further, no valuation report was produced to support the claim for Kshs 4,260,000.00. The reports produced by PW 2 cannot be relied on because as the Defendant affirms in his submissions, they were not originals but are, revised assessment reports. The witness did not explain the whereabouts of the original reports and the basis and reason for the revision of the reports he was relying on, amongst the other reasons elaborated in the submissions.
 83. The Defendant reiterates that special damages must be specifically pleaded and proved. The Defendant avers that the Plaintiffs have in their submissions sought special damages amounting to Kshs 12,750,000.00. The same were not specifically pleaded. Parties are bound by their pleadings.
 84. The Defendant finally submits that the Plaintiffs have failed to prove their cases on a balance of probabilities against him and urges the Court to dismiss the Plaintiffs' suit with costs.

Issues for Determination

85. In framing the issues for determination in this matter, I take cognizance of the Plaintiffs' submissions at paragraph 8 to 10, thereof. The Plaintiffs submit that the Sale by the Defendant of his parcel of Land LR 2/697 to a third party Ms New Forhome Company Ltd in 2020, defeated their claim for the relief of nullification of the illegal subdivision and a permanent injunction to restrain the Defendants from introducing a non-existent illegal Sewer Way Leave on the 2nd Plaintiff's land. I need not therefore make a determination on those reliefs. What essentially remains for the Court to determine is on the other reliefs sought by the Plaintiffs being special and general damages. The issues then for determination are:
 - a. Whether the Plaintiffs have proved liability for the alleged damage to their properties against the Defendant.
 - b. Whether the Plaintiffs have proved the special damages claimed.



- c. Whether the Plaintiffs are entitled to General Damages.
- d. Whether the Defendant has proved his Counter-claim against the Plaintiffs.
- e. What orders shall be made regarding the costs of the suit.

Analysis and Determination:

a. Whether the Plaintiffs have Proved Liability Against the Defendant?

86. From the testimony of the PW 1 who was the 2nd Plaintiff in the matter, the demolition of their properties was carried out by the Nairobi City County. I am sure he meant the Nairobi City County Government which is the legal entity created under article 176 of the Constitution of Kenya, 2010. The Nairobi City County Government is one of the 47 County governments in the Republic of Kenya established under the provisions of article 176 of the Constitution.
87. Article 183 of the Constitution stipulates the functions of the County Government exercised through the County Executive Committee to include managing and coordinating the functions of the County Administration and its departments and any other functions conferred by the Constitution or national legislation. I need to emphasize that under Section 6 of the County Governments Act, the County Government is a body Corporate with perpetual Succession and shall have all the powers necessary to perform its functions.
88. The Plaintiffs allege that though the actual demolition of their property was by the Nairobi City County Government, it did the same under the direction of the Defendant, hence the claim against him.
89. In his submissions, the Defendant asserted that in as much as he made a complaint and or petitioned the County Government, he had no control over its outcome. In other words, the Defendant was not in a position to dictate the kind of action to be taken to address his complaint and or petition.
90. This Court agrees with the submissions of the Defendant in that respect. The County Government is a Constitutional entity with, as section 6 of the County Governments Act provides, all the powers necessary for the discharge of its functions. It has at its disposal the machinery and personnel, including professionals, to enable it consider complaints and petitions from the residents of Nairobi city County and exercise its independent mind as to the kind of appropriate legal action to address the complaint. I find it inconceivable, in any event, mere speculation that the County Government of Nairobi acted under the control and direction of the Defendant. No evidence was adduced whatsoever to prove the allegation and or demonstrate how the Defendant controlled the County Government of Nairobi to act at his whims. My finding therefore is that the Plaintiffs have not proved liability against the Defendant. They, for their own reasons opted to withdraw the case against the County Government of Nairobi who were directly responsible for the actions complained of.

b. Whether the Plaintiffs have Proved Damages Against the Defendant?

91. Having found that the Plaintiffs have not proved liability for the alleged damages against the Defendant, their claim for damages of whatever nature automatically fails. Nonetheless, as good practice demands, I need to pronounce myself on the claim for damages – general and special damages.
92. It is trite law that Special Damages must not only be pleaded but specifically proved. There is a plethora of authorities on this issue.



93. In the case of *Hahn –vs- Singh* (1985) KLR 716, the Court of Appeal held that: -
- “special damages must not only be specifically claimed (pleaded) but must also be strictly provedfor they are not the direct natural or probable consequence of the act complained of and many not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
94. In the case of *Total (Kenya) Limited formally Caltex Oil (Kenya) Ltd – vs- Janevans Ltd* (2015) eKLR the court insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide proforma invoices sent to the party by a third party. This court agreed with the above cited decisions in the case of *Arthur K. Apungu –vs- Justnice Limited* (ELCC 103 of 2009).
95. The Plaintiffs pleaded Kshs 4,260,000.00 as special damages. In their submissions, they seek more than they pleaded: -Kshs 12,750,000.00. They, in the words of the Supreme Court in the case of *Raila Odinga & Another –vs- IEBC & 2 others* (2017) eKLR, are seeking to travel beyond their pleadings. That is not allowable. As stated in the above cited case, parties are bound by their pleadings. The Court stated that:
- “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.”
96. Coming back to the pleaded special damages, the Plaintiffs relied on a valuation report which as the Defendant points out in his submissions was titled, “revised assessment report”. The witness who produced the report could not explain the reason or the basis neither the justification for the revision of the report. The report was not only wanting in details but also on professionalism. The witness could not explain how for example he arrived at the value of any of the items claimed. As an example, the Piano, as its age was not stated neither its make nor year of manufacture. That applied to all the items under the heading of special damages. I find that the Plaintiffs did not prove the special damages as by law required.
97. On the claim for general damages for trespass, the Plaintiffs did not prove trespass against the Defendant. Once again, the Plaintiffs through their witness affirmed that it was the County Government of Nairobi that carried out the demolition. At no time was it proved that the Defendant even once trespassed into the Plaintiff’s parcel of land after the subdivision. The claim for general damages against the Defendant therefore fails.

(c) Whether the Defendant Proved His Counter-claim Against the Plaintiffs?

98. In his testimony as well as his submissions, the Defendant was quiet about his counter-claim against the Plaintiffs. Having advanced the argument that the Plaintiffs’ claim for a permanent injunction was overtaken by events, the Defendant clearly understood that his own claim against the Plaintiffs suffered the same fate. That being the case and for the same reasons against the Plaintiffs’ claim for a permanent injunction, the Defendant’s claim too fails. It is hereby dismissed.



99. Having arrived at the above conclusion, the appropriate order on costs as that each party bears its own cost.
100. Accordingly, the Plaintiffs' claim against the Defendant is hereby dismissed. The Defendant's counter-claim against the Plaintiffs is hereby dismissed. Each party shall bear its own costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF OCTOBER, 2023

M. D. MWANGI

JUDGE

In the virtual presence of:

Ms Muluvi holding brief for Mr. Mutua for the Defendant.

Ms Msando holding brief for Mr. Makokha for the Plaintiffs.

Yvette: Court Assistant

