



Sosplashed Limited & another v Pwani Maoni Limited & 3 others (Environment & Land Case 12 of 2021) [2023] KEELC 22487 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 12 OF 2021**

**AE DENA, J
DECEMBER 21, 2023**

BETWEEN

SOSPLASHED LIMITED 1ST PLAINTIFF

**JOHN LOCHART MURE (ON BEHALF OF SOUTH COAST RESIDENTS
ASSOCIATION) 2ND PLAINTIFF**

AND

PWANI MAONI LIMITED 1ST DEFENDANT

EUROBUILD DIANI CONTRACTORS LIMITED 2ND DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
DEFENDANT**

COUNTY GOVERNMENT OF KWALE 4TH DEFENDANT

JUDGMENT

1. The controversy giving rise to this suit is the right to privacy which has been narrowed down to the extent to which developments/construction can be carried out in an alleged zonal area. I must mention that this suit was initially commenced against 4 defendants. The Plaintiff subsequently withdrew the case against the 3rd and 4th defendants. There was later an application to rejoin the two parties to the suit for purposes of the Counterclaim which application was dismissed by this court. The suit therefore proceeded against the 1st and 2nd defendants and the Counterclaim.
2. A brief background of the matter will at this juncture suffice for the dispute to be put into perspective. It is the plaintiffs case that the 1st Defendant is the current registered owner of parcel No Kwale/Diani Beach/800 and 801 (hereinafter referred to as the suit properties) having acquired the same from Ravji Karsan and Kalpana Ravji Karsan Hirani. The 1st Plaintiff on the other hand is the registered owner of parcel Kwale/Diani Beach Block/799 which borders the 1st Defendants suit properties.



3 Apparently, the suit properties are located in Diani along Diani Beach Road a gazetted zoning area whose user of the land is low density. It is averred that 1st Defendant and his contractor the 2nd defendant sometime in the year 2019 commenced development of the 1st defendants suit properties which do not comply with the National Management & Environment Act, the Physical Planning Act and attendant rules and regulations. That requisite approvals were not obtained prior to commencement of the constructions/developments.

4 It is pleaded at paragraph 12 of the plaint that the constructions are fraudulent and illegal and these are particularized. The Plaintiffs aver that the defendants' actions have caused them to suffer loss and injury as particularized under paragraph 13 of the Plaint. That despite several complaints raised the Defendants failed/arrogantly neglected to comply with the orders and directives of the relevant regulatory bodies precipitating this suit. The plaintiff seeks that the buildings be declared illegal including demolition. The specific orders are discussed elsewhere in this judgement.

Defence

5 The Defendants defence is filed before court on 8/7/2021. They state that the impugned apartment goes up to 3 storeys. The particulars of fraud and illegality are denied. It is averred that the 1st Defendant purchased the property with an ongoing project and whose previous owners had complied with the necessary requirements and approvals.

6 The Defendants deny allegations of encroachment on the Plaintiffs' parcel and that they were colluding with the 2nd Plaintiff, South Coast Residents Association (SCRA) in frustrating individuals and residents that are not its members. It is lastly stated that the Plaintiffs do not deserve any injunctive remedies and damages. The Defendants pray for dismissal of the suit with costs.

Defendants Counterclaim

7 The 1st Defendant has also raised a counterclaim for recovery of Kshs 261,237,288.46/- being the value of the project. It is averred that the 1st Plaintiff is carrying out similar developments on its plot of land and the same are meant to frustrate the 1st Defendant's projects. That the Plaintiff interest in the developments is suspect. The Defendants plead their particulars of loss under paragraph 21 of the counterclaim and pray that;

- a. The counterclaim be allowed as prayed
- b. Costs of the counterclaim and interest be provided for
- c. Any other relief the court deems fit to grant.

Reply to Defence and Defence to Counterclaim

8 The Plaintiffs deny the contents of the counterclaim and state that it is misconceived as the plaintiffs have a legally sound interest that ought to be protected by the law. That the counterclaim offends various provisions of the law and should be struck out in limine.

9 The court is urged to allow the Plaintiffs suit as prayed and for the counterclaim to be dismissed with costs.

Site Visit

10 Following an application by Mr. Birir initial counsel for the Defendants and there being no objection from counsel for the Plaintiffs, the court on 7/02/22 directed a site visit be conducted. The same was



conducted on 18/02/22 on plots 799, 800 and 801 herein, in the presence of the Kwale ELC Deputy Registrar. The report dated 22/02/22 forms part of these proceedings and was shared with all the parties.

Evidence

- 11 PW1 Nicolette Vanderplas the 1st Plaintiff adopting her witness statement dated 17/12/2020 testified that the 1st Defendant owned the two neighbouring plots on the east side of her plot. That in June 2019 she bought the land to build her retirement home because of the low residential population. That she was not able to build as per her initial plans and had to extend on the back side because there was a very big development next door. That she also had to extend to the plot on the front because there was a high flat that could see her front. She testified that she sought to know her neighbours and found they were Mr. Ravji Karsan and Kalpina. That she subsequently discovered through the Kwale county and NEMA that they had not constructed the structures on their plot as per their original plan,
- 12 It is the plaintiffs evidence that the variations to her original plan cost her almost Ksh.15 Million. The lack of compliance cost her breach of privacy. The 1st defendants have a clear view of her property and she cannot make further alterations since the buildings are very high.
- 13 The Plaintiffs state that her claim should be allowed since the 1st defendant failed in constructing according to the approved plans they had been issued with.
- 14 PW1 produced as her evidence in proof, the documents listed in the list of documents dated 17/12/2020 [Exh 1-11] and 12/7/2021 [Exh 12-17] as evidence to this court. These were also contained in the Plaintiffs Consolidated & Paginated List of Documents dated 16th November 2021.
- 15 On cross examination by Mr. Birir the PW1 testified she noticed the 1st defendant construction around November – December, 2020. She conceded she had no proof of the Kshs. 15 million alluded in her claim. She wanted the building stopped for noncompliance with the law on residential area and for infringing on her privacy.
- 16 PW2 John Lochart is a former chairman of the South Coast Residents Association (SCRA). Adopting his witness statement dated 3/11/2021, he pointed that the SCRA is a voluntary association open in membership and serves residents of the south coast from Tiwi to Msambweni. That their main complaint was that the constructions are illegal as per their pleadings. The witness relied on the documents produced by the Plaintiff. On cross-examination the witness indicated there was no scheme to frustrate the 1st Defendant. That SCRA does not get involved in private issues and that he had no personal interest in the developments.
17. PW3 Ali Abdalla Budzuma is the Kwale County Physical Planner with 10 years work experience. Adopting his statement dated 9/7/2021 he outlined his duties as preparation of local and county physical development plans, advise on county planning matters, signing decisions and communicating decisions for development applications and policy advise. That he approved Rev. application on Kwale/Diani Beach plot /800 and 801. That on 8th November 2019 they received application for development to develop two types of development namely Two blocks of apartments with a ground floor plans, 2 floor and pent house and 4 blocks of cottages ground floor plus 1 floor.
- 18 He added that in March 2020 they received application for alteration and which they approved with a set of conditions among them change of the user to accommodate the new density. He indicated that sometime in October 2021 (sic 2020) upon random inspections it was observed that some of the developments undertaken were not as per the approval which prompted issue of improvement orders which were not complied with. The details are given elsewhere in this judgement.



- 20 PW3 also stated that the developments for this specific area were under the zoning plan approved in 2013. That in terms of general land use the developments complied since it was cottages and apartments. On the setbacks the 50% development requirement of total number area was complied with.
- 21 On cross-examination by Mr. Birir the witness confirmed that Form PPA 2 is issued on approval by Physical Planning Department, Public Health and Structural Engineering. That the building plans were all approved by the physical planners office. He stated the plans complied with the procedures. He indicated the zoning plan for Diani was gazetted in March 2013. He conceded the gazette doesn't show the requirements but the requirements are in the plan. He confirmed everything presented to his office was approved. He indicated that application of the Diani Zoning plan is very challenging because the plan came when there were existing leases and since 2013 things have changed and they couldn't give a blanket NO. That the developers complied with the general use. What needed to be affirmed was the details of the building height and this was the essence for them requiring for change of use which would be an opportunity to alter the existing lease conditions. He reiterated the 1st Defendant went ahead to construct outside the approval.
- 22 On re-examination by Mr. Khamis Counsel for the 2nd Plaintiff, PW3 stated that the 1st Defendants did not comply with regulations and guidelines of County Government. That the 9th condition states breach shall terminate the permission. On further re-examination by Ms Saeta for the 1st Plaintiff the witness stated that they are guided by the Physical Planning Act Cap 286 which has since been repealed but was then applicable.
- 23 PW4 Godfrey Wafula County Director of Environment and gazetted Environment Inspector adopting his witness statement dated 9/7/2021. On cross-examination by Mr Birir he testified that he was aware of the application by Mr. Ravji and admitted that they gave him a license. The license dated 7/01/2020 to construct 2 blocks. That on 26/6/2020 they issued another license and on inspection it was found that there were more structures upon which they gave compliance notice. That the requirements before approval were an EIA report by a registered expert, building plans, ownership documents, including public participation and submission form duly filed. That the license comes with conditions that the developer must comply with the physical planning requirements. That approval was for 5 blocks consisting 4 storey building (see breakdown in the license).
- 24 According to the witness, complaint received by the Plaintiff was in writing and was about high-rise building that was going to obscure her view and that there was no NEMA license. That the license was to cover for the entire development and not 5 cottages as alleged which he later clarified in re-examination covered only two blocks. PW4 confirmed the license is still valid because there is a procedure for cancelation of license.
- 25 On re-examination by Khamis the witness testified that NEMA does not approve building plans as the same is the responsibility of the physical planning. That there were only two blocks the subject of the issued license. There were extra buildings and that's why they issued the improvement order of 28/10/ 2020.
- 26 PW4 Ravji Kasan Hirani adopting his witness statement dated 12/7/2021 testified that he sold parcels Diani Beach 800 and 801 to the 1st Defendant. He stated that he had never applied for Development of the said plots and never gave the 1st Defendant permission to obtain the building permissions or approvals in his name. The witness stated that he became aware that the 1st Defendant obtained the approvals in his name around August/September 2020. He gave them Notice from his lawyer to explain why they were using his name but could not confirm if there was a response. He produced



the sale agreement (page 35) and Affidavit (page 53), Letter 11/12/2020 (page 51-52) of the plaintiff bundle of document.

- 27 Upon cross examination he stated he had not given authority for the building plans but confirmed he signed the letter of intent dated 19/11/19 and was aware of its contents. He denied ever making any application relating the approval letter dated 8/11/2019 from the County Government of Kwale. He denied the improvement order dated 28/10/2020 and denied receiving the letter dated 20/7/2021 addressed to him and his wife c/o Pwani Maoni.
- 28 On re-examination the witness clarified that the improvement order, the license and approvals from NEMA did not bear his signature intimating receipt. That he had sold the properties while they were vacant.
- 29 With the above the plaintiff's case was closed.

Defence Evidence

- 30 DW1 Eric Omollo Director of Euro Build Diani Constructors confirmed he was the one who sought for building approvals for Pwani Maoni in the name of Ravji Kisan Hirani and Kalpana Ravji Harsan Hirani. That there was approval for 6 blocks comprising two block apartments and 4 cottages. That after measuring the area at the point of construction they found there was room for one more block. That they did amendments and instructed the architect to add one block and extend more floors. In total there were 7 blocks. He stated the physical planner visited site and never complained.
- 31 On cross examination by Mr. Khamis DW1 confirmed preparing the documents for both the county and NEMA approval. That the date of the plan only gave the month and year as October and 2019 respectively with no specific date but in the name of Ravji Karsan and Kalpana Ravji C/O Pwani Maoni, the Clients. That the 1st application was approved by the county on 8/11/2019 and the Notification for approval addressed to Ravji and Kalpana P.O.BOX 40845. He denied knowledge of this postal address. He conceded the date 8/11/2019 is the same date as that of his application. He pointed the application to NEMA was done by MASTER D –SIGNS LTD. The witness testified that at the time of seeking the approvals, they were in the process of transferring the land and used Ravji and Kalpana C/O Pwani Maoni. They did not seek Ravji's permission to use his name.
- 32 He stated that they got the approval for the alteration as per the notification dated 20/7/2020 in the name of Ravji and Kalpana. That the application for amended approval refers to seven floors and more if needed. He denied that they had for A, C and D constructed ground plus 3 floors and penthouse and clarified that they had done ground 1st, 2nd and 3rd with no penthouse.
- 33 That on the amended plan cottage approval was for ground floor, 1st floor, second level and roof terrace and which was complied with. He testified that NEMA approved all the alterations (see NEMA EIA dated 26/06/2020 in the plaintiff's further list). The witness confirmed he had complied with the court order to stop construction.
- 34 On cross-examination by Ms Saeta DW1 indicated that he was not aware of the Diani zoning plan. That for 1st approval a population of about 20 people was projected and upon the alteration 46. The parking could accommodate 20 cars.
- 35 DW2 Adrianus Maria adopted his statement dated 31/10/ and produced as his exhibits the documents listed in the list of documents dated 18/6/2021 and 26/10/2021 as DEXB 1- 18 respectively including affidavit of 26/5/2022 and the CR12 therein. The witness gave a narration of the history between the Plaintiff and the 1st Defendant and stated that the 1st Defendant bought the property from Ravji and Kalpana from loan proceeds. The witness also referred to a letter of intent for the approvals to be in



- the joint names of Kalpana and Pwani Maoni. That the company through Ravji applied and obtained approvals in the defendants further list of documents items 1 and including NEMA approvals. That on the date of the court site visit NEMA and Physical planner observation did not were not supported by the photos taken then. That the cottages in photos 'B' were 5 where 2 have ground 1st and 2nd floors. The other 3 have ground 1st and 2nd and 3rd floors – photos 'B'. The approvals and plans were stamped by the relevant officers/departments and NEMA also issued approval for two residential blocks with ground 1st and 2nd floors and pent house which are the apartment blocks.
- 36 The witness pointed that from the photos, flat A had not exceeded the approval. About the incomplete apartment building he believed that that the company was not building outside the approved plans. That he was being unfairly pushed to develop a unique structure. To date his investment had stopped and was deteriorating yet the company has all the government approvals. He stated that he and the Plaintiff started construction almost at the same time and there was only a chain-link separating them. That it is the 1st Plaintiff who removed the chain/link and replaced it with a wall without consulting him as a neighbour.
- 37 The witness testified that no windows on the 1st Plaintiffs building have been blocked by his building which came later. That his view of shimba hills has also been blocked by the 1st plaintiff buildings. He asked the court to direct for renewal of the building approvals as the ones issued are expired. He also prayed that the caution be removed from his parcel.
- 38 On cross examination by Ms Saeta DW2 testified that he sought consent from Ravji and Kalpana to seek approvals in their names as evidenced by the letter of intent. He acknowledged the letter of 28/10/2020 from NEMA and they stopped construction in compliance with order No. 2 therein.
- 39 On cross –examination by Mr. Khamis DW2 testified that they applied for the approvals together with Ravji and Pwani Maoni through the architect. He agreed the copies of the application were not filed in court. He explained how the buildings were placed on site and that currently Apt Block A is 4 floors ground plus 3 (this is the building at back of picture j). Apt B was currently just the ground floor (picture H). About the cottages (see maps drawing No. PML -02/2020 (WD -05) and drawings No. PML/10/2019 (WD 105). He pointed the boundary set backs are printed on the maps. See drawing No. PML –REV 01/2/2020 (WD 04) also see photo B whose approvals he stated were for ground floor and 2nd and roof terrace. That this was just one building on the map but applied to all the 5 cottages.
- 40 On re-examination the witness clarified that the stamping of the building /plans by the County is an indication of the approvals (8/11/2019 and 20/7/2020).
- 41 DW3 Martin Nyongesa Simiyu a Quantity Surveyor and project manager testified that in his opinion the buildings on site were built as per the approved plans and are not squeezed. He stated that he had arrived at the figure for the delayed damages of Kshs. 261,237,288 by applying weekly income to be Kshs. 250,000, Completion time was 2 years by 2023. That damages for delay means the loss the client will suffer if the project is not finished on the projected time, including the income which would have been earned. Compensation was for the perceived income the same are added and divided by the duration.
- 42 On cross-examination by Mr khamis DW3 testified that a BQ must contain generally a section of preliminaries, breakdown of construction elements of the project and the summary page. That the BQ need not be accompanied by drawings and doesn't require specifications. He testified that what was before court was a summary of a BQ and not the comprehensive BQ. That in coming up with the BQ he had done the breakdown on each component using the drawings and specifications.



- 43 On cross-examination by Ms Saeta he stated that he had looked at the architectural plans, visited the project and checked the setback distances. That he was not 100% conversant with the zone and the density for the area as he was not 100% involved in the project. That he had been to the top of (picture B) and had a good air view of the Plaintiffs compound. That assuming she was swimming he could see her. That a normal use of staircase would not cause noise pollution.
- 44 With the above the defence case was marked as closed.

Plaintiffs Submissions

- 45 The Plaintiffs raised six issues summarized here below:

Whether The Plaintiffs Have Locus To Institute This Suit And Whether This Court Has Jurisdiction To Determine The Same.

- 46 In response to the objection raised by the 1st Defendant it is submitted that as a body corporate, SCRA cannot personally appear in court except by its officers who inherently derive mandate from body's constitution. A written authority would only be required if the body corporate intends to authorize a person other than its designated officers. That the error, mistake or failure to file the verifying affidavit or letter of authority was an oversight by the Plaintiffs' counsel and which not fatal to the suit. Reliance is placed on Microsoft Mobile Oy V Musimba Investments Limited [2021] eKLR and Yaya Towers Limited V Trade Bank Limited (In Liquidation); Livestock Research V Leah Okoko & Joseph Owuor Gogo eKLR. It is urged that the Plaintiffs have locus standi to file the suit, the suit itself is not fatally defective and the court has jurisdiction to hear it.

Whether The Defendants Lawfully Obtained Development Permissions/approvals And Eia Licenses Before Commencing And Continuing With The Development.

- 47 The court is referred to the provisions of Section 55 (1) (a – h) of the *Physical and Land Use Planning Act*, 2019 which outlines the objectives of development control. That Section 57 (1) of the said Act prohibits a person from carrying out a development without a development permission granted by the relevant county government. Further that the environment Management and Coordination Act (EMCA) prohibits a person from carrying out a development without an Environmental Impact Assessment License (EIA License) which is an offence. It is submitted that at the time the Defendants started the construction, they had not lawfully obtained all the relevant building approvals and NEMA licenses. This averment was denied vehemently by the Defendants. That the documents relied upon by the defendants as proof of approvals being letter dated 8/11/2019 08 from the County Government of Kwale together with Form P.P.A.2 (Notification of Approval) of the same date (D. Exhibit 5); Form P.P.A. 2 (Notification of Approval) dated 20 July 2020 (D. Exhibit No. 6) and the approved building plans (D. Exhibit No. 18); NEMA License dated 07/01/2020 (D. Exhibit No. 4) and NEMA License dated 16/06/2020 (D. Exhibit No. 13) it is observed that the NEMA licences are neither dated or issued in 2019 neither do they bear the 1st Defendant name and who is the project proponent and registered owner of the suit properties. It follows that the 1st Defendant commenced and carried out the project without the necessary approvals in its name.
- 48 The Plaintiffs contended that the 1st Defendant fraudulently applied for development permissions and NEMA licenses in the names of Ravji Karsan Hirani (Ravji) and Kalpana Ravji Karsan (Kalpana) without the latter's consent. Indeed, all the permissions, licenses, plans and correspondence with the relevant state authorities bear their names. In this regard, the Plaintiffs accused the Defendants of fraud, impersonation and misrepresentation in obtaining the approvals and for this reason, those said



permissions and licenses are void. That Ravji Karsan Hirani (PW-5) confirmed to the court that he never gave consent to the Defendants to seek approvals in his name.

- 49 The plaintiffs submit that the Defendants took contradicting positions. That they contended that it is actually them who sought all the approvals, and that they did so in the names of Ravji and Kalpana with their prior consent. To justify this new position, the Defendants explained that apparently they were forced to use the name of Ravji and Kalpana (who were the previous owners) because they faced delays in effecting the transfer of the suit properties to the 1st Defendant's name. That the Defendants departed from their own pleadings whereas the law is clear that parties are bound by their pleadings and any evidence that is contrary to the pleadings is to be discarded as was held by Honourable Justice AC Mrima in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR and in *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR.
- 50 It was observed that by the time parties were allegedly signing the letter of intent on 21 November 2019, the 1st Defendant had already received the first approval from the county government in the names of Ravji and Kalpana (see P.P.A. 2 dated 08 November 2019 D. Exhibit No. 5). A document dated 21 November 2019 cannot be said to have given prior consent to the 1st Defendant to seek an approval that had already been issued on 08 November 2019; That the purported Letter of Intent is not a consent. It is a "Letter of intent for purchase of plot 800 & 801" and which in conveyancing practice is an ordinary letter of intent (the equivalent of a heads of terms or a letter of offer) parties enter into during pre-contract negotiations pending execution of a formal/proper agreement for sale (that is why it starts with "...Subject to execution of a definitive and mutually acceptable agreement..."). The closest that document speaks of the issue at hand is where Ravji and Kalpana (as Sellers) make it clear that the 1st Defendant is given authority to perform work on the plots but subject to them obtaining government permissions – a condition that the 1st Defendant violates soon after. Further that as per condition 10 (d) of the agreement for sale, the said letter of intent was a pre-contract negotiation document, and upon signing of the agreement the letter of intent ceased to have any binding force.
- 51 That it is a contravention of the terms of the agreement for sale for the 1st Defendant to turn to pre-negotiation documents at the expense of a written contract. This is prohibited by the parole evidence rule which provides that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument. Where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed. Evidence of surrounding circumstances will only be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. The Court of Appeal case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR is relied upon to buttress this point. It is urged that the development permissions and licenses were procured through fraud and misrepresentation hence were null and void.

Whether Execution Of The Development, And The Development Itself, Offend The Zonal Plan, Approved Building Plans, Eia Licenses, Improvement Orders And Relevant Laws

- 52 It is submitted that a zonal plan is an instrument that emanates from the law and no public officer has power to make lawful that which the law makes unlawful. To hold otherwise would entrench and countenance a culture of corruption and abuse of power vested on an officer. The court should not stamp a seal of authority to an illegality. The irregularity herein having been admitted the only recourse available for the court is to set aside and/or nullify the approval. It is reiterated that the building plans the plaintiffs submit that the Defendants' development still failed to comply with those approved plans.



53 As regards NEMA's EIA Licenses it is submitted that licenses are issued subject to fulfillment of certain conditions which the Defendants failed to fulfil. The effect of breaching these conditions is that the license is deemed to have terminated.

Whether The Plaintiffs Have Suffered Injury And If So Whether They Are Entitled To Any Remedy

54 It is submitted on behalf of the Plaintiffs that while the quantum of special damages of Kshs 14,664,000 has been proved by the structural design estimate of additional deviation dated 10 December 2020 (produced as P. Exhibit No. 13) which was not contested by the Defendants, the quantum of damages available to the Plaintiffs is at the discretion of the court. The plaintiffs place reliance on Article 23(3) which empowers this court to issue an order for compensation. Relying on the case of M W K & another Vs Attorney General & 3 others [2017] and that the injury that the Plaintiffs have and will continue to suffer, the need to vindicate the Plaintiffs' rights, the need to deter the Defendants from committing further violations and the importance of sending a message that orders/directives of government authorities ought to be respected an award of Kshs 25,000,000 is proposed.

Whether The Defendants Are Entitled To Be Paid KSHS 261,237,288.46 As Sought In Their Counterclaim

55 It is submitted that the Defendants filed a counterclaim dated 18 June 2021 which the Plaintiffs opposed vide their Reply to Defence and Defence to Counterclaim. However, the Defendants have not proved their counterclaim to the required standard and are therefore not entitled to any payment or compensation. The court is urged to allow the Plaintiffs' case, to dismiss the Defendants' counterclaim and to grant the orders as sought in the Plaintiff.

1st Defendants Submissions

56 The 1st Defendant submissions were filed by Alinaitwe Osodo Advocates after he filed a Notice of Change of Advocates taking over the brief from Mr. Mr Birir. The following issues for determination were as discussed here below.

On Whether The Plaintiffs Have The Legal Capacity To Institute A Suit Against The Defendants

57 It is submitted that while the 1st Plaintiff claims to have filed this suit vide its' director, Nicolette Van Der Plas, in her capacity as the director, the absence of any verifying affidavit or written authority, authorizing someone to swear a verifying affidavit confirming its' instructions to the Advocates to institute and prosecute the suit and authorizing letter approving or nominating Nicolette Van Der Plas or John Lochart Mure to represent and give testimony on behalf of CSRA offends the provisions of Order 4 rule 1(2) and (3) of the Civil Procedure Rules. The case of Savala & another v Ndanyi (Environment and Land Case Civil Suit 248 of 2021) [2022] KEELC 2536 (KLR) and Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3269 (KLR) is cited to the effect the defect could only be cured any time before hearing of the suit but not at this stage of the proceedings. The court is invited to disregard the plaint and dismiss the 2nd plaintiffs claim.

Whether The Suit Buildings Were Constructed Without Obtaining The Prior Approvals From The Relevant Authority And If Approvals Were Granted, Should The Same Be Cancelled And The Said Buildings Be Demolished

58 It is submitted that the allegation that the 1st Defendant was contracting without approvals and further contrary to building plans is highly misleading and false, as the same is confirmed by the very plans on record dated October 2019 and February, 2020 which consistently bear the names and



signature of the client's Ravji Karsani Hirani and Kalpana Ravji Harsan Hiran c/o Pwani Maoni Limited. These are further confirmed by the affixed stamps and signature of the County Government and Physical planner and further, confirmed by the statements of PW3 and PW4 that approvals and building plans actually existed and were approved. Further that the 1st and 2nd Defendants produced two licenses from NEMA, dated 7/01/2020 and 26/06/2020 both granting approval for specific constructions to be made being construction of two residential blocks with block 1 (ground, first, second and a pent house) and block 2 (ground and first floor). These two blocks are what are referenced in the main plan as proposed apartment A and proposed apartment B and are as captured on the pictures taken during site visit as pictures I and H which display the proposed apartment B which is incomplete, and on the far right of picture J is proposed apartment A.

- 59 It is submitted NEMA approval dated 26/06/ 2020 provided for five blocks; with four blocks consisting of ground, first, second and third floor only and further specified one other block shall have three stories of ground, first, and second floors only along with the relevant septic tank, soak pit system for waste disposal. These five blocks approved are what are reflected in the plan as proposed cottage A, B, C, D & E and in the pictures captured during site visit as pictures marked as A and B respectively. These two licenses by NEMA are not in dispute and are confirmed to have been issued for the developments conducted on the properties Kwale/Diani Beach Block/800 and 801.
- 60 Additionally two approvals (form P.P.A. 2) from the Physical Planner – Kwale County dated 8/11/2019 and 20/7/2020 produced by the defendants though conditional were a clear confirmation that the 1st Defendant through Ravji Karsani and Kalpana Harsan, applied and got prior approvals before the commencement of the construction of the buildings on the properties Kwale/Diani Beach Block/800 and 801. It was noted that the approvals from the Physical planner are not detailed as those of NEMA, the details of the physical planner are what are on the main plan as they append their approval signature and stamp thereon.
- 61 Counsel for the 1st defendant submits that the testimony of Mr. Ravji Karsan is not a reliable one as he has sworn an affidavit on 5th March, 2021 stating that he did not authorize neither was his approval sought to apply for approval for the suit constructions, yet he admits to having knowledge of the letter of intent of 19th November, 2019 where his consent and approval was sought to seek approvals on behalf of the 1st Defendant.
- 62 Further that there is not a doubt that prior to the commencement of the construction of the properties Kwale/Diani Beach Block/800 and 801, the 1st Defendant sought and obtained approvals for undertaking the said developments. That this has not been denied by the approving authorities.
- 63 On the issue of the 1st Defendant building contrary to the approved plans, it is submitted it was clear from the findings of the site visit no development had proceeded since the court's stay order of March, 2021.
- 64 It is urged that parties agreed during site visit that the apartment B in contention, was found to be and still was incomplete, and further, from the pictures taken of the site, one could clearly see the representation by Mr. Ali Budzuma that the two corner cottages marked as picture A, had a ground floor, first floor, second floor and an incomplete third floor. The 1st defendant submit that from the images taken on the ground, no cottages has surpassed the approval captured above.
- 65 On noise pollution and alteration of the building plan it is submitted that the 1st Plaintiff is trying to obligate the Court to dictate to an investor the type of building they are to develop and the same is discriminatory and breach of the right to own property and quite enjoyment of the same.



66 That the 1st Defendant has not refused to make the informed changes but it is its' contention that it has not been given reasonable time to do so; especially considering that it had even stopped construction so as to abide by the recommendations of NEMA.

Are The Plaintiffs Entitled To General And Special Damages For Breach Of Their Right To Privacy, Right To Property, Right To Clean And Healthy Environment And Depreciation Of The Said Plaintiffs' Property

67 Relying on the evidence of DW3 it is submitted that it is next to impossible for the developments to create a nuance in terms of noise pollution. That it is common knowledge that where a road or proper buildings are erected, the value of the area shall automatically raise.

68 That for the 1st Defendant to be condemned to compensate the 1st Plaintiff any special or general damages would be unjust and unfair as the 1st Defendant took the Plaintiff spent the alleged monies on its' own volition.

Whether The 1st Defendant Is Entitled To The Counter Claim Of Kshs. 261,237,288.46/- As Quantified In The Bill Of Quantities?

69 The court is referred to the testimony by DW3, the Quantity Surveyor, it was confirmed that the buildings on the ground and what was drafted in the plans were actually matching up in terms of spacing and materials used. That the 1st Defendant is building as per the approved plans and is being urged to make changes to the same plans, which insinuates that what already exists is not so much contrary to the law.

70 That the 1st Defendant who is the affected party ought to be allowed to make the relevant suggested amendments and proceed with its' construction based on the amendments proposed. The 1st defendant maintains that what is on the ground to date is what was on the approved building plans as confirmed by DW3 and not disputed by PW3 and PW4. What PW3 and PW4 claim is that some improvements need to be made to one of the buildings, apartment B, which as has been seen, is not even complete yet, it is in fact at the ground floor level still as can be seen from pictures I and H.

71 The court is invited to order compensation in terms of the assessed costs for the project in the Bill of Quantities produced by DW3 in the tune of Kshs. 261,237,288.46/-, should it be found that it had obtained approvals prior to instituting the suit and that it was building as per the approved plans.

Who Should Bear The Cost Of These Proceedings

72 The 1st defendants seek that the Plaintiffs should bear the costs incurred to defend this suit which would otherwise not have been necessary.

2Nd Defendant's Submissions

73 The 2nd defendant in its submissions filed before court on 12/6/2023 by the firm of Birir Advocates. It is submitted the plaintiffs failed to make a case against the 2nd Defendant who was simply doing his work as contracted by the 1st defendant. The 2nd Defendant refers the court to the evidence presented before it and stated that from the same it can be gathered that the 1st plaintiff had a personal vendetta against the 1st defendant and unfortunately the same spill over to the 2nd defendant. That from the evidence of PW2 it is further evident that the zoning plan in Diani expired in 2018 and has not been updated. The court is urged to dismiss the suit against the 2nd Defendant with costs.



Issues For Determination.

- 74 Having considered the pleadings, evidence and submissions of the parties the following issues commend determination.
- a. Whether the Plaintiffs have locus to institute the present proceedings against the defendants,
 - b. Whether the buildings and structures on the land parcels No. Kwale/Diani Beach Block/800 and Kwale/Diani Beach Block/801 were constructed without obtaining prior approvals?
 - c. If the answer to (b) above is in the affirmative what would be the consequence,
 - d. If the approvals were obtained to what extent did the developments comply to the approvals and zonal plan for the area,
 - e. Whether the Plaintiff is entitled to the Prayers sought.
 - f. Whether the counterclaim is merited
 - g. Who should bear the costs of the suit and counterclaim.

Whether The Plaintiffs Have Locus To Institute The Present Proceedings Against The Defendants

- 75 The 1st Defendant contends that the Plaintiff has no locus standi to file the present suit against the defendants on the grounds that, The 2nd Plaintiff did not file a verifying affidavit or a letter authorizing the 1st Plaintiff to plead on his behalf, there is no board resolution by any of the Plaintiffs authorizing their advocates to institute this suit, that there is nothing to prove that John Lochart Mure is a Chairperson of the 2nd Plaintiff and finally and that there is nothing showing that John has authority to represent the 2nd Plaintiff.
- 76 The filing of pleadings is regulated under the provisions of order 4 Rule 1 of the Civil Procedure Rules as follows; -
- (1)
 - (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.
 - (3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.
 - (4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.
 - (5) The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counterclaims.
 - (6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2)(3), (4) and (5) of this rule.
- 77 I have noted the Plaintiffs submissions distinguishing locus standi and failure to file a verifying affidavit alongside a Plaint as required by the provisions of order 4 above. But what is locus standi? Locus standi signifies the right of an individual to be heard in court proceedings. To have locus to sue in a court of law, a party must have a sufficient interest in the matter in issue See *Law Society of Kenya v Commissioner of Lands & Others* [2001] eKLR . The Plaintiffs interest has been clearly stated. Firstly



the 1st plaintiff whose suit property borders that of the defendants alleges that her quiet enjoyment has been infringed upon by the illegal construction undertaken by the defendants. There is no contestation that the 1st Plaintiff and the 1st defendant are neighbours and the dispute is about the developments undertaken on the latter's land. To me this raises sufficient interest. As for the second Plaintiff is now trite that under the 2010 constitution dispensation there is no bar to locus standi in environmental related issues. The 2nd Plaintiff has also demonstrated to court that they have been involved in public interest engagements for the residents of Diani and Msambweni.

78 The above in my view has no nexus with the absence of verifying affidavit to accompany a plaint and a letter of authority. The courts concern should be to inquire what would be the import or implication of such failure. The Defendants concern is with the 2nd Plaintiff compliance and not the 1st Plaintiff. This is visible in the 1st defendants submissions where the court is invited to disregard and dismiss the claim of the 2nd plaintiff for failure by Mr. Mure to swear a verifying affidavit on behalf of the SCRA including written authority to litigate/plead on its behalf. The Plaintiff admit to the absence of these documents and attribute the same to the oversight or mistake of its counsel. That such mistake is not fatal to the suit. Further that this mistake should not be visited upon the litigant and the need for the court to administer substantive justice.

79 I will now address the question whether the failure above is fatal to the suit. This court was referred to the case of Microsoft Mobile Oy V Musimba Investments Limited [2021] eKLR where Justice Mativo (as he then was) stated that the omission to file a verifying affidavit is curable by filing it.

80 Justice Maraga in the case of Korica (U) Limited & Another V Kenya Ports Authority [2008] eKLR stated thus had this to state; -

striking out of a verifying affidavit does not automatically render the plaint incompetent. As stated by the Court of Appeal in Joseph Sigilai –Vs- Gotak Sanik Ltd & 4 others Civil Appeal No. 98 of 2003 in such an eventuality the court has a discretion of either striking out the plaint or giving the Plaintiff time to file a proper verifying affidavit. Exercising my discretion in this matter I grant the Plaintiff's plea for time to file and serve a proper verifying affidavit

81 The 1st Defendant indeed acknowledges in its submissions that such failure is not fatal except that the same should be filed before the hearing is completed. The plaintiff attached to the submissions a verifying affidavit together with SCRA letter of authority and pleads with the court to salvage the suit by granting leave albeit out of time and deem the same as duly filed. The above court decisions both point to the fact that the failure is not fatal and does not render the Plaint defective and I'm indeed persuaded and agree with the position of the learned judges. To me this is what emboldens me as my focus and should therefore be the justification upon which this court should turn its face away from technicalities and choose substantial justice. I do not think the rationale for verifying affidavits was to be used as a technical knockout against litigants but was for protection.

82 I will buttress the above by invoking the courts inherent jurisdiction. In Samuel MN Mweru & Another Versus National Land Commission & 2 Others [2020] eKLR the court stated thus; -

‘Courts derive their power from *the constitution* and the statutes that regulate them. Historically, the high court, in addition to the powers it enjoyed in terms of statute has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of inherent jurisdiction. Citing I H Jacob Current Legal Problems, Freedman CJM adopted the following definition of ‘inherent jurisdiction



‘The reserve of fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them....’

83 The upshot of the foregoing is that I decline the 1st defendant’s invitation to strike out the Plaintiffs pleadings.

Whether The Buildings And Structures On The Land Parcels No. Kwale/diani Beach Block/800 And Kwale/diani Beach Block/801 Were Constructed Without Obtaining Prior Approvals? If The Answer Is In The Affirmative What Would Be The Consequences?

84 I will address the two issues concurrently for ease of following the arguments. The Plaintiffs case is that she is the owner of parcel Kwale/Diani Beach Block/799 which borders parcel Kwale/Diani Beach Block/800 and 801. It is clear from the proceedings that it is not dispute that the 1st Plaintiff and the 1st Defendant parcels neighbour each other. PW1 produced certificate of lease dated 18/06/19 for Kwale/Diani Beach Block/799 and a corresponding certified copy of Green in proof of ownership by the 1st Plaintiff. She also produced green card for Kwale/Diani Beach Block/800 and 801 showing the 1st defendant as the registered proprietor commencing 14/9/20. It is also not in dispute that the properties are situate in Diani. That due to certain breaches of the law on the part of the defendants she has suffered loss. The breaches and losses have already been outlined.

85 Firstly the Plaintiffs claim is that no prior approvals were obtained before commencement of the developments. It is imperative therefore to establish what kind of approvals were required and their conditions as to when such approval is to be obtained.

86 I will start with when the construction of the developments begun. It is the Plaintiffs case that the developments commenced sometime in the year 2019. PW1 clarified in re-examination that Pwani Maoni started building around November/December, 2019. PW3 the Kwale County Physical Planner stated in his witness statement which he adopted as his evidence in chief, that they approved a development application in respect of kwale/diani 800 & 801 on 8th november 2019. this is also reiterated in his oral testimony and further supported by the letter dated 8/11/2019 from the county government of kwale signed by Chair Vundu Mwanza communicating approval to develop. This means it is possible as well that construction may have started around the same month of November 2019. DW2 upon being asked by Ms Saeta counsel for the Plaintiff about the Project Sign Board, he stated the same was erected around 2019 when they started construction. DW2 Adrianus Maria Verhoef states in his oral testimony that he and the plaintiff both started their construction almost at the same time. PW1 for the plaintiff informed the court in cross-examination that she bought her land in June 2019 but started construction in November 2019.

87 From the foregoing highlights picked from the proceedings the exact date of commencement of construction appears not to be known. However, it is clear and it is my finding that that the constructions had commenced by the month of November 2019.

88 The next question is what approvals were required, by whom, from whom and at what point in time. Based on the proceedings herein two approvals emerge, under the National Environmental Management Coordination Act (EMCA) as to EIA License issued by NEMA and the Land Use & Physical Planning Act 2019 as to development permissions and attendant building plans which are also approved alongside by the relevant County Government (Kwale). I will proceed first address the development permissions and the plans as they go in tandem and cannot be isolated.



89 The development permission is a requirement of the Physical Planning Act Chapter 286 of the Laws of Kenya (now repealed) and which provisions have been retained by the *Physical and Land Use Planning Act* 2019 (herein the Act). The Act commenced on 5/8/2019 to make provision for the planning, use, regulation and development of land and for connected purposes. Key among these is development control whose objectives are stipulated under section 55 as follows;

55.

- (1) The objectives of development control are —
 - (a) to ensure orderly physical and land use development;
 - (b) to ensure optimal land use;
 - (c) to ensure the proper execution and implementation of approved physical and land use development plans;
 - (d) to protect and conserve the environment;
 - (e) to promote public safety and health;
 - (f) to promote public participation in physical and land use development decision-making;
 - (g) to ensure orderly and planned building development, planning, design, construction, operation and maintenance; and
 - (h) to promote the safeguarding of national security.

90 The Power to undertake development control is donated under section 56 of the Act. Section 56 read together with sections 57 makes it mandatory to obtain a development permission before one can carry out a development. It also stipulates the consequence for noncompliance thereof. Section 57 of the Act provides as follows; -

57.

- (1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
- (2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both. (3) A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.
- (4) Where a person who is required to do so fails to comply with the provisions of subsection (3), the relevant county executive committee member may undertake to restore the land as required and shall recover the cost of the restoration from the person required to undertake the restoration.



- (5) A county executive committee member may revoke development permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.
- (6) A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause.

- 91 The question that arises is whether the development permission was obtained before the construction commenced in November 2019. It is now trite that he who alleges must prove. Ali Budzuma who gave evidence in support of the Plaintiffs informed the court that on 8th November 2019 they received an application for development to develop two types of developments. PW3 in his witness statement dated 9/7/21 and evidence also states that they approved a development application on 8/11/2019 from the developer. On the other hand, the 2nd defendant stated in his further witness statement dated 26/10/21 that on 10/11/2019 he was instructed by the 1st defendant to seek approvals before commencement of the project. However, he realized these approvals had already been issued to Ravji and Kalpan under care of Pwani Maoni. The defendants produced a letter dated 8/11/2019 and Notification of approval (Form PPA2) dated 8/11/2019 from the County Government of Kwale Physical Planner and County Engineer addressed to Ravji Karsan Hiran & Kalpana Ravji Karsan (herein Ravji and Kalpana) Both indicate Approval of application for development.
- 92 Based on the foregoing and this court having determined that the impugned developments commenced around November 2019. It therefore follows there existed and was obtained development approval or permission for the impugned developments herein. But having stated this there are still some huddles to surmount as raised by the Plaintiffs.
- 93 The Plaintiffs contend that the approvals were not lawfully obtained as they were obtained in the names of Ravji and Kalpana who were the registered owners of the suit property without their consent. This is termed to be impersonation and fraudulent. The Plaintiffs wants this court to find the approval void.
- 94 Certainly, the above approval by the County Government of Kwale bears the names Ravji Karsan Hiran & Kalpana Ravji Karsan. DW2 confirmed in his evidence in chief that he is the one who sought for building approvals for Pwani Maoni and the same came in the name of Ravji Karsan Hirani and Kalpana Ravji Harsan Hirani. He conceded upon cross examination that 'we used Ravji and Kalpana C/O Pwani Maoni. I did not seek Ravji's permission to use his name.' PW4 Ravji Karsan Hiran testified and reiterated that he did not grant such consent. In any case the defendants did not present a copy of the said consent before this court. But what is the defendant's response to this?
- 95 The defendants aver at paragraph 6 of the amended defence dated 18/6/21 that they purchased the property which had an ongoing project and which the previous owner had complied with necessary requirements for constructing the said houses. As such they proceeded with the project since they had a green light by relevant authorities. The burden lay on the defendants to prove the existence of the ongoing projects and its attendant approvals. The first port of call in this regard would be the sale agreement in respect of Kwale/Diani Beach Block/800 & 801 dated 13/12/2019 between the 1st defendant and Ravji Karsan Hiran & Kalpana Ravji Karsan (see item 12 of the Plaintiffs consolidated bundle). Clause 11.13 does not define the suit property to contain any developments as ordinarily would have been the case were there any developments. This is further confirmed at clause 5 which states that the property is sold with vacant possession. On cross examination by Ms. Saeta DW1 Eric Omollo stated that when they started construction there was a wall and not buildings. The witness further indicated 'I confirm that there were already ongoing projects, there was construction of gates and the walls and I didn't need approvals. These were the ongoing projects I referred to'. Let me state



that gates and walls cannot be equated to cottages and the impugned developments in the present suit. I have no evidence before court to show the parcels were bought together with ongoing projects and which projects had already been approved. It is my finding in respect of this point that the property was bought in vacant possession and there were no ongoing projects under whose licences or approvals the defendants would ride on.

- 96 DW2 Adrinus Maria who gave evidence on behalf of the 1st defendant additionally stated that some of the approvals were in the joint names of Ravji and the 1st defendant since at the time of seeking the approvals the property had not been transferred to the 1st defendant following delays due to the Covid 19 pandemic. He then stated he was advised to get into an understanding with the vendors to get the approvals as the title was being awaited. Accordingly, a letter of intent was signed in this regard. The said letter was produced in evidence (see item No. 12 of the 1st & 2nd defendants further list of documents). Mr. Osodo submits that PW4 accepted to being aware of the said letter of intent which letter confirms that Mr. Ravjis consent was sought. Indeed, I note that during cross examination Mr. Ravji confirmed that he signed the letter of intent dated 19/11/2019 after he agreed with its contents. He acknowledged that at paragraph 3 of the letter of intent there is reference to leases, maps, reports, plans but which he wasn't aware of. Let me state that to me it does not matter that Mr. Ravji admits to signing the letter and agreeing with its contents. It is the content of the same that is material to this dispute.
- 97 The court spent time on the letter of intent above. it is referenced letter of intent for purchase of plot no. 800 & 801. the description of the buyers and sellers is given and features ravji karsan hiran & kalpana ravji Karsan as sellers and the 1st defendant as buyer. I find it necessary to capture the content of paragraph 3 verbatim. It states;-
- 3 Subject Property the property which is the subject of this offer...is identified as Kwale/Diani Beach/800 & Kwale/Diani Beach/800 and 801. Together with the property Buyer is also purchasing all sellers rights, title and interest in both plots mentioned above improvements, leases, maps, reports, plans, and other such material that is having to do with the Subject property including all other land use entitlements, governmental permits and allocations, including official approval with all beacons coordinates and other such governmental and agency approvals as may exist concerning the property. the lease obligations must be paid up including to and including the year of transfer. Buyer is authorized by seller, with governmental permission from November 19th 2019 to perform work on plots 800 & 801. (emphasis is mine)
- 98 I note that the above letter of intent does not identify specifically the maps that are in place as it relates to construction. The only issue that is clear is that the buyer could undertake work on the suit property's from 19/11/2019. I have difficulty connecting the words 'with governmental permission' to mean authority to use Ravjis name. To me the closest it comes to is a condition precedent to the effect that governmental approval must be sought for the 1st Defendant to perform any works. The parties were obligated to clearly translate their intentions into the letter of intent for that is the only forum the court can draw from. The court also agrees with the Plaintiffs observation that the approvals of November 2019 predated the letter of intent and therefore the latter cannot be said to have given prior consent to the 1st Defendant to seek an approval that had already been issued on 08 November 2019.
- 99 Based on the above this court is not persuaded that the letter of intent demonstrates that consent to use Ravjis name was sought neither does it give such consent. It cannot also qualify for a consent for purposes of the Act.
- 100 Based on the above I will not be drawn into the discussion about the meaning and use of 'C/O Pwani Maoni'. It cannot salvage the situation.



101 But having stated the foregoing with regard to the absence of consent the most important question to me is what are the legal implications for failure to present such consent in view of the Plaintiff's submission that the approvals should be voided for want of such consent. The Plaintiff anchors their position on the provisions of Section 57 of the Act which state thus:-

57

(4) Where an applicant is not the registered owner of the land for which development permission is being sought, that applicant shall obtain the written consent of the registered owner of that land and the applicant shall provide that written consent to the respective county executive committee member at the time of applying for development permission.

(5) The development permission granted by a county executive committee member shall be subject to compliance with the provisions of any other written law.

102 The Act does not prescribe the consequences for failure to produce the owner's consent. Indeed the Act envisages that an application be made by an agent, architect and a developer other than the owner of the property. The consent would then in my view allow for such application by proxy. I also think the requirement for the owners consent was also to protect registered owners of the land. But assuming I'm wrong on this, in the present case it is not in dispute that the land was sold to the 1st defendant and which at the point of the initial 2019 approvals a letter of intent had been signed in respect of the sale. I note that the provisions of section 57(4) is couched in mandatory or obligatory terms. But would the absence of the consent invalidate the entire approval? In my view the answer is in the negative. I think it is voidable at the instance of the authorizing office. Why do I say so? Firstly, it is because the said section 57 is silent on the consequences to be deployed in the absence of such consent unlike for the development permission where Section 72 of the Act (Part IV) is dedicated to enforcement provisions and outlines the sanctions to be meted where there is failure to obtain development permission. In view of the finding that the development permissions were obtained and the absence of a sanction under section 57 I will not dwell much on the absence of consent but focus on the substance of the development permission and the attendant approvals.

103 I will now interrogate the NEMA approvals. It is pleaded that the 1st and 2nd Defendants started putting up the developments sometime in the year 2019 having not obtained the requisite Environment Impact Assessment licence from the National Environment Management Authority. This is stated to be not only fraudulent but also a criminal offence. The Plaintiff relies on the provisions of Section 58 (1) of the Environment Management Coordination Act (EMCA) which provides as follows:-

58. Application for an Environmental Impact Assessment Licence

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

.....

104 The above provisions clearly require that the license is obtained before implementation of the project, in this case construction. The Plaintiff produced as part of her bundle the NEMA Licence No.



0064416 dated 17/01/20. On the other hand the defendants rely on the licence dated 17/01/20 and another dated 16/06/20. It is apparent that both the licences were obtained after commencement of the project this court having determined that construction started around November 2019. But is this fatal to the approvals? In my view it is not. Section 58 (9) provides further that;-

- (8) The Director-General shall respond to the applications for environmental impact assessment license within three months.
- (9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.
- (10) A person who knowingly submits a report which contains information that is false or misleading commits an offence and is liable on conviction, to a term of imprisonment of not more than three years, or to a fine of not more than five million shillings, or to both such fine and imprisonment and in addition, his licence shall be revoked.

105 While I note that section 58(9) is to be read together with 58(8), to me it offers a useful guideline on the approach to be taken by a court where there is no prior licence. This is that the developer is given the option to commence the development even before they receive the Licence. Even assuming the names are said to be the falsehood section 58(10) above clearly makes this an offence which would be subject to criminal proceedings where if the applicant is found guilty there would be an additional sanction to revoke the licence. This would be a different process altogether.

106 In addition, the Plaintiff submits that both licences do not bear the names of the 1st defendant who is the project proponent and which means the project was commenced without the necessary approval in its name. From the licences it is true that both licences are in the name of Ravji Karsan Hiran & Kalpana Ravji Karsan. I will however respectfully disagree with Counsel and take a different approach to this issue of names. My view is that this is not fatal to the licence. NEMA in its letter dated 10/12/20 Ref. NEMA/KWL/CDE/Vol.1/63 noted there had been change of ownership and directs that an application is made to transfer the licence from the current developer. My perusal of the correspondence exchanged between NEMA and the Plaintiff does not reveal that the Plaintiff objected to this approach.

107 The upshot of my foregoing discussions is that I decline to find that the approval by NEMA and the County are illegal/void for the reasons cited.

If The Approvals Were Obtained To What Extent Did The Developments Comply.

108 Having perused the pleadings, the evidence led and the submissions I think the substantive issue should be what was approved by the Physical Planner and the extent to which the impugned developments complied thereof. Further would be to also consider compliance vis a vis the zonal plan for the area. Indeed their import to the Plaintiffs retirement home to the extent that they are said to have among others caused PW1 to loose her privacy and grave financial implications.

109 It is the Plaintiffs case that the suit properties are located in Diani Beach Road and the gazetted zoning Plan stipulates the user as Low Density Residential. The plan forms part of the Plaintiffs bundle of exhibits. That the requirements for a low density are that the minimum plot size should be 0.4 Ha; the developments should keep boundary setbacks of 12 meters on the front and 3 and 5 meters respectively on the side and rear end; maximum plot coverage not to exceed 25% and maximum floors are ground and 1st floor and developments comprise of villas, bungalows and maisonettes.



- 110 According to Plaintiff the above specifications have been breached since the 1st Defendant is constructing high rise apartments of 4 storeys consisting of 72 bedrooms on less than 0.4 Ha and without maintaining the requisite boundary setbacks. It was PW1 evidence in chief that she had change her original plan by extending on the back side because there was a very big development next to hers. That she also had to extend on the front because there was a high flat that could see her front and obstructed her view. She had to close windows on the western side and remove some air openings. In addition, there would also be noise from the residents occupying the developments once completed.
- 111 PW3 Mr Budzuma the Kwale County Physical Planner confirmed in his evidence in chief that the developments for this specific area were under the zoning plan approved in 2013. It was his evidence that the zoning plan designated the area as low impact hospitality zone which required minimum land ought to be 2 acres', distance where development from the property boundary 12 meters from the front boundary, 3 metres side boundary and 3 meters from the rear. Total area to be covered by a building wasn't to be more than 50% of the total land area. Maximum floors are ground plus 2 and general nature of the developments were villas, lodges hotels and cottages
- 112 PW3 stated further that in March 2020 they received application for alteration and which they approved with conditions. In comparison to his adopted witness statement these were Two cottages ground plus 1 floor (Cottages B and E on the master plan); Three block cottages ground plus 2 floors (A,C and D) and Two blocks of apartments to be constructed ground floor plus 3 floors (apartment Blocks A and B). It was his testimony that around October, 2020 random inspections were done when it was observed that the developments undertaken were not as per the approvals that were issued. That Cottages B and E had been constructed to include ground floor plus 2 floors yet approval was for ground and I floor. That the proposed cottages block A, C, D had been constructed to include ground plus 3 floors and the penthouse yet the approval was for ground plus two floors. Apartment block B was still at ground floor level of construction.
- 113 The above was highly contested by the defendants. DW1 Mr. Owuor indicated in cross examination that the application for amended approval refers to seven floors and more if needed. The witness denied that they had for cottages A, C and D constructed ground plus 3 floors and penthouse and clarified that they had done ground 1st, 2nd and 3rd floors with no penthouse. DW2 Adrianus Maria insisted that on the amended plan cottage approval was for ground floor, 1st floor second level and roof terrace and which was complied with. The defendants took the position that all they applied for was approved. I note that PW3 confirmed in cross examination that everything presented to his office was approved.
- 114 It is submitted on behalf of the Plaintiff that Apartment A and Cottage A in the Photo marked 'B' are high-rise buildings exceeding the prescription of the zonal Plan. That from these buildings the defendants and all their tenants are able to see clearly all of the 1st plaintiffs' compound and swimming pool. Further that her bedroom is adjacent to the staircase of Cottage A which cottage did not keep the required set back meaning that the occupants could see into her bedroom.
- 115 As earlier stated a site visit was conducted and this court drew a lot of insight from the report and the photographs presented which in my view gave the correct position on the status of the developments on the ground and which photos were also relied upon extensively in the parties submissions.
- 116 I will at this point clarify the pictures and what they depict to avoid confusion. The pictures were marked purely for identification and ease of reference. Apartment Block A is depicted in the picture labelled 'E' by the court. It is also the one in picture B where it overlooks the swimming pool. Its location is best described by DW3 where on cross examination by Ms. Saeta he states 'As you get into the compound there is a swimming pool and a building adjacent to it and neighbours the plaintiff



use (see photo B).’ Adjacent to it is the incomplete apartment B. My understanding is that it is also the unit referred to as Cottage A as referred to by the Plaintiff in her submissions where the court is referred to (see photos marked B (right)). Also see the plaintiff submissions at paragraph 4.8.4 where apartment A is described to be in photo E(left) and rightly so because it overlooks the Plaintiffs house as seen in the picture marked H (note the H is surrounded with 6 letter i. It is also referred by Mr. Osodo as picture I). But it is also the same unit in the picture marked E. The picture with a plain H depicts the apartment B. Adrianus Maria also rightly states in his oral evidence that ‘ the other 3 have ground 1st and 2nd and 3rd floors – photos ‘B’. Mr. Budzuma states in his witness statement that the application for revision sought for construction of ‘proposed Apartment Blocks A and B- ground floor plus 3 floors and which he confirms was approved on 17/8/2020 and reiterates in cross examination that everything that was presented was approved. He also states in his witness statement that following the joint inspection carried out on 26/10/2020 ‘proposed apartment Block A had been constructed ground plus 3 floors in accordance with the approved plan (see paragraph 8 (c). This is also restated in his oral testimony.

- 117 I reviewed the drawings to ascertain what was approved vis a vis the above. The above unit is contained in Drawing No. PML-REV 01/2/20(WD-01) and shows it is a proposed alteration of the initial approval of November 2019. My review of this drawing showed it was approved on 17/7/20 by the Kwale County Physical Planner. It has Ground floor plan; First and Second Floor plans; third floor plan and roof floor plan. The roof only bears water tanks. It is approved subject to compliance with attached conditions. These are the conditions contained in the letter dated 17/7/20 signed by Mr. Budzuma. There is also Drawing No. PML-REV 01/2/20(WD-02) which shows there is ground floor, first floor, second floor, 3rd floor levels together with Roof terrace which terrace only shows water tanks. From picture E taken at the site (also see picture ‘H’ the one surrounded with 6 I’s) as well as picture B, I observed the building complied with the specifications as approved and there is nothing or any addition on top of the terrace. It is therefore my finding that it complied with the approvals as granted by the County Government of Kwale. But what about compliance with the zoning plan.
- 118 PW3 stated in his witness statement which he adopted as part of his evidence in chief that ‘the maximum number of floors for development made on this zone should be 3 (ground plus 2 floors). The plaintiffs contention that the approval given above was outside the zonal plan requirements is not misplaced. Let me first state that it is rather surprising that PW3 conceded on cross examination that he issued approvals for everything that was presented before him. From my review of Mr. Budzuma’s testimony his focus was mainly on whether the developments were done as per the approved plans and he cared less about the Zoning plan. For me for the purpose of the zoning plan the court finds that the unit did not comply with the Zoning Plan of the area.
- 119 I will not dwell much on Apartment B and which I have already clarified is not picture B. It was observed by Mr. Birir during the site visit that it is incomplete which was confirmed by the observation of the court. Mr. Osodo for the 1st defendant rightly submitted that pictures I and H display the proposed apartment B which is incomplete. My review of these pictures including pictures H and E taken during the site visit also reveal that the same is incomplete and is at ground level. I will latter in this judgement address the proposal to have the same to be done away with to enable attaining the required 50% coverage.
- 120 I now come to the cottages and these are described in the Plaintiff submissions at 4.11.1 and 4.11.2. I will start with those described in the latter. According to the plaintiff Cottage A, C and D were constructed to include ground plus 3 floors and a Penthouse yet on the plans they were approved as ground plus 2 floors only - the court is referred to Drawing No. PML-REV 01/2/20(WD4). It is stated there was an additional 1 floor and penthouse which were not approved. In terms of their identification



the court is referred to (photos marked B (right), C (right), E (left) and J (left)). My review of photo B (right) is the same unit described as apartment A above and which I have already found was built according to the approval granted except that it does not comply with the zoning requirements.

- 121 But there is the real cottage A and which I note during the hearing this court marked it to be under Drawing PM-REV 01/2/20(WD-04). This drawing shows it was approved on 17/7/20 subject to the attached conditions. The drawing has ground floor level, first floor level, second floor level and roof terrace level. The Roof terrace as given on the said drawing shows an open Terrace Plan which therefore cannot make a 3rd floor as developed by the defendant (See picture J far left) It is therefore clear to me that this 3rd floor is additional and is outside the approved plan. In addition this makes it contrary to the Zonal plan whose specifications are ground plus 2 and therefore anything beyond this is not in compliance with the zonal plan.
- 122 Picture A is a cottage and shows the unit as developed with ground and two floors. The Plaintiff at paragraph 4.11.1 of the submissions states it was constructed to include ground plus 2 floors despite having been approved ground plus 1 floor only. To me it is one of the corner cottages and which DW2 Adrianus Maria refers to as one of the 5 cottages where two cottages have ground floor, 1st and 2nd floors and which I note is in line with what picture A depicts. The court and Mr. Budzuma observed that the corner cottages have an additional floor. But what was approved by the Physical Planner for the corner cottages? The approval for this unit is contained Drawing No. PML-REV 01/2/20(WD-03). My review of this drawing shows an approval of Ground floor plan, first floor plan and roof floor plan. The roof floor has nothing except 'high level storage water tanks'. Certainly, I agree that there is a deviation from the approved plans/drawings.
- 123 I think I have said enough about the extent to which the approvals were complied with by the developer herein . I have also shown the departure in comparison to the requirements of the zoning plan for Diani. This takes me to the remedies craved by the Plaintiff.

Whether The Plaintiff Is Entitled To The Prayers Sought.

- 124 The Plaintiff seek the following orders; -
- a. A declaration that the buildings, premises and structures comprising the development erected on Kwale/Diani Beach Block/800 and Kwale/Diani Beach Block/801 are illegal in so far as they were constructed without obtaining prior and lawful planning approvals and EIA license and in so far as the said development remain inconsistent with the approved building plans, the zonal plan and the conditions set out in the EIA license for the development,
 - b. A permanent injunction restraining the 1st and 2nd Defendants by themselves, their agents, servants and or any other person acting on their instructions from constructing buildings, structures and/or developments on the parcels of land known as Kwale/Diani Beach Block/800 and Kwale/Diani Beach Block/801 unless the same is strictly in compliance with the zoning plan for the area, approved building plans and the conditions set out in the EIA license.
 - c. An order directing the Defendants to within 14 days of this order, demolish the buildings, structures, fittings, fixtures, developments and/or the parts thereof that are inconsistent with the approved zoning plan for Diani, the approved building plans and the conditions set out in the EIA license for development.
 - d. An order directing the 3rd and 4th Defendants to forthwith cancel the approved building plans and the EIA license for the Development and the Plaintiffs be at liberty to effect the demolition



exercise at the Defendants' sole costs in the event of default in compliance with orders (b) and (c) above; and

- e. An order directing the Defendants to jointly and severally to pay to the 1st Plaintiff special damages amounting to Kshs. 14,664,000/-
 - f. An order against the Defendants jointly and severally for general damages for breach of the Plaintiffs' right to privacy, right to property, right to clean and healthy environment and depreciation of Plaintiffs' property.
 - g. Interest on any sums awarded above at Court rate from date of filing the suit until payment in full.
 - h. Costs of the suit; and,
 - i. Any relief that this Honourable Court may deem fit and just to grant.
- 125 Prayer (a) in the Plaint has two limbs. On the first limb this court has already made a finding elsewhere in this judgement that there existed and was obtained development approval and or permission for the impugned developments herein. Consequently, the court declines to make a declaration that the buildings, premises and structures comprising the development erected on Kwale/Diani Beach Block/800 and Kwale/Diani Beach Block/801 are illegal in so far as they were constructed without obtaining prior and lawful planning approvals and EIA license.
- 126 The second limb relates to compliance with the approved building plans, the zonal plan and the conditions set out in the EIA license for the development. I have already given an analysis on these aspects in the foregoing discussions. The big question is what is the fate of the non-compliant units? The Plaintiff wants the buildings demolished but it is my considered view a blanket demolishing order would not be objective, correct and fair approach. I will demonstrate why shortly.
- 127 The Apartment A as described in my analysis and from the Plaintiffs evidence is the one that bears the lion's share of the Plaintiffs woes and directly affects the Plaintiff. From the plaintiff's testimony and the site visit report and the picture seen, it is the one that borders the Plaintiffs house and has the offending staircase and it is the apartment from which the defendants and the occupants thereof can see into PW1 compound and the bedroom. DW3 Mr. Simiyu upon cross examination by Ms. Saeta stated 'I have been to the top of (picture B) and I had good Arial view of the plaintiff's compound. Assuming she is swimming I can see her' . I however noted the witness was evasive to answer the question on infringement of privacy. The Court observed during the site visit that the defendant can have an aerial view of the 1st defendants house. Clearly there is no privacy.
- 128 The Plaintiff craves an order directing the Defendants to within 14 days demolish the buildings, structures, fittings, fixtures, developments and/or the parts thereof that are inconsistent with the approved zoning plan for Diani, the approved building plans and the conditions set out in the EIA license for development. I think this is the appropriate point to comment on the remedies available in law and to comment on the improvement orders.
- 129 Section 72 of the Act is on enforcement and stipulates the actions to be taken as follows;-
- 72.
- (1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—



- (a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or
 - (b) any condition of a development permission granted under this Act has not been complied with.
- (2) An enforcement notice shall—
- (a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;
 - (b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and
 - (c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

130 Kwale County issued a letter dated 10/11/20 signed by Mr. Budzuma which informs the developer that following a site visit prompted by the 2nd plaintiff the ongoing developments are inconsistent with the plans approved by the County Government on 17/8/2020 and 20/8/2020. The developer is required to within 14 days align the development to be consistent with the approved plans and conditions set therein and failure to which legal action was to be taken upon the developer and the developments. From the proceedings it is clear that this was not complied with by the defendants but at the same time the legal action threatened was never taken. PW3 states in his evidence in chief that there were no charges stated in the order and that after 14 days they had leeway to go to court or demolish the buildings but before they could enforce this suit was filed. For me there was simply no good will on the part of the County to enforce. On the part of NEMA the orders were issued for demolishing however they did not follow through and infact the second order they issued requiring the licence to be transferred without reference to the earlier order to me sent mixed signals.

132 I note that Section 72(2)(C) in addition to demolition allows room for alteration. Guided by this provision my approach is to look at what will serve justice. The DW2 stated that they were not given enough time to comply and this is cemented by PW3 who stated above that before they could do anything this suit was filed. DW3 pleaded during cross examination thus All the 1st defendant wants is to progress the development and if there is a mistake I admit that not everyone knows everything’..... given the chance the 1st defendant would have regularized.’ Let me state that nothing is cast on stone and I think that is why the drafters allowed for the option for alterations. Guided by this it is my view that an alteration should suffice. Unfortunately, the Physical planners order in my view is not specific as to the alterations to be made. There is also a request for change of user which I do not see will help much to alleviate the Plaintiffs concerns. As I noted earlier the Physical Planner focused more on compliance to the development plans and forgetting about the zoning requirements. On the zoning plan PW3 indicated that the application of the Diani Zoning plan is very challenging because the plan came when there were existing leases and since 2013 things have changed and they couldn’t give a blank NO. Granted there could be challenges but if there has been challenges all the more reason the County Government should put in measures towards mitigating this challenge. They too have caused the mess herein. The 2nd Plaintiff would also be more useful in this regard.



- 133 Having stated the above it is my view that the Apartment in Picture B should be altered to comply with the zoning plan for the area as to height being Ground plus two floors. In any case it is not a villa neither is it a cottage. The court has noted the evidence and submissions with regards to the setback requirements but the problem I have is that there was no evidence placed before me of the actual measurements taken on the ground by either the Plaintiff or even during the site visit.
- 134 As to Apartment B and which is incomplete as agreed by all the parties and depicted in picture H and E it is this courts opinion that it should not be progressed any further to enable the 50% land use coverage permitted under the zoning plan. DW3 conceded during cross examination that the project covers 50-70%.
- 135 As to the prayer (d), I note that the suit against the 3rd and 4th defendants was withdrawn pursuant to a notice of withdrawal dated 12th July and filed on 13/07/2021. The orders cannot therefore issue in the circumstances.
- 136 The 1st Plaintiff further craves an order directing the Defendants to jointly and severally pay to them special damages amounting to Kshs. 14,664,000/-. PW1 evidence was that she had to make adjustment to her original plan, she had to remove some windows and reduce the sizes especially those overlooking the staircase on picture B and E. In this regard let me state that my only problem is that the original plan of PW1 retirement home was never presented for the court to appreciate the changes she had to make. The Structural Design estimate of additional deviation dated 10th December 2020 which was produced as part of PW1 exhibits does not attach the same yet it is a very critical document for purposes of comparison or juxtaposition. Secondly it is now trite that Special damages must be specifically pleaded, particularised and proved see Kenya Women Microfinance Ltd Vs. Martha Wangari Civil Appeal 14 of 2020 (2021) eKLR. The 1st Plaintiff did not present to the court any documentation to show the actual expenses were incurred which PW1 conceded to in cross examination. Consequently, this order cannot issue having not been proved.
- 137 The court has been invited to grant an order for General damages for breach of the Plaintiffs' right to privacy, right to property, right to clean and healthy environment and depreciation of Plaintiffs' property. General damages are payable at the discretion of the court. Firstly as to depreciation of the property the court had no benefit of an expert or scientific report and evidence in this regard. Neither did the defendant present any such evidence to prove that the 1st defendants property will appreciate in value upon full execution of the 1st defendants project. I therefore find no basis upon which a decision to grant general damages can be made on this aspect. Given the circumstances of the case I think that the orders that shall be made shortly as against the 1st defendant shall suffice for purposes of compensating the 1st Plaintiff. It is also punishment enough for the 1st Defendant.

Whether The Counterclaim Is Merited

- 138 The 1st Defendant raised a counterclaim in its pleadings. Based on the analysis and discussions hereinabove the counterclaim against the plaintiff cannot be sustained. I'm aware there was an attempt to reintroduce the 3rd and 4th defendants which application was dismissed by this court.
- 139 The upshot of the foregoing is to find that the Plaintiffs has proved the case against the 1st Defendant on a balance of probabilities except for what has been declined by this court. As to the second Defendant he was a mere agent for the 1st Defendant and I find no reason to attribute liability to it.
- 140 This court for the reasons explained therefore enters judgement for the Plaintiffs against the 1st Defendant in the following terms; -



- i. The Apartment A being the unit as depicted in Picture B in these proceedings shall be altered so as to comply with the zoning plan requirements for the area as to height being Ground plus two floors within 120 days of this judgement.
- ii. Apartment B being the incomplete unit depicted in Picture H and E shall not be progressed and shall within 120 days of this judgement be demolished by the 1st defendant to enable compliance with the zonal plan requirement on development area coverage of 50% as against the total acreage of parcel No. Kwale Kwale/Diani Beach/800 and 801.
- iii. Cottage A being the unit in picture J far left shall be altered by demolishing the 3rd floor as developed by the 1st Defendant within 120 days of the date of this judgement.
- iv. In the event that the 1st Defendant fails to cause the above orders to be implemented within 120 days, the orders shall be undertaken by the 1st Plaintiff under the supervision of the County Government of Kwale and NEMA at the expense of the 1st Defendant.
- v. The Cottage unit in picture A shall be altered by maintaining the approved plan of Ground floor plan, first floor plan and the roof floor plan which shall only hold the 'high level storage water tanks'.
- vi. The rest of the cottages shall retain the specifications as approved in (v) above and shall proceed strictly as per the said approved plans and subject to mitigation as to waste disposal and management as required under EMCA.
- vii. The Counterclaim is hereby dismissed with no orders as to costs.
- viii. The 1st Defendant shall bear the costs of the main suit.

DATED AND DELIVERED VIA EMAIL WITH CONSENT OF THE PARTIES THIS 21ST DAY OF DECEMBER 2023.

ADDRAYA E. DENA

JUDGE.

