



**Bamaftah v County Government of Kilifi (Environment & Land Case 26 of 2021) [2023] KEELC 15865 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15865 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 26 OF 2021**

**M SILA, J  
MARCH 1, 2023**

**BETWEEN**

**FARID FARAJ AWADH BAMAFTAH ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF KILIFI ..... DEFENDANT**

*(Plaintiff undertaking development of a wall without first obtaining development approval from the defendant; defendant issuing a 7 day enforcement notice to the plaintiff; defendant demolishing the wall shortly after lapse of the 7 days; plaintiff filing suit and seeking damages on basis that the notice was illegal; Physical Planning and Land Use Act providing for a 90 day enforcement notice and 14 days to appeal the notice; no 90 day notice given, nor 14 days allowed to lapse to enable plaintiff lodge an appeal; no opportunity therefore given to the plaintiff to appeal the notice or justify the development; the notice of 7 days was an illegal notice; whether the plaintiff is entitled to damages; defendant arguing that since the development was not approved then the plaintiff is not entitled to damages; conflicting authorities on what damages a developer deserves where he has developed without development approval; court of opinion that so long as the notice is illegal, then the developer is entitled to damages unless the development is a risk; no justification in this case as the wall was innocent and not interfering with anybody; plaintiff entitled to an award of damages for the value of the demolished wall and general damages for trespass together with costs and interest.)*

**JUDGMENT**

**A. Introduction And Pleadings**

1. This suit was commenced through a plaint which was filed on 10 February 2021. In that plaint, the plaintiff inter alia sought orders to stop the defendant from demolishing the boundary wall in the plaintiff's land parcel Subdivision No 4730 (Original No 527/2) Section III Mainland North, Mtwapa, CR No 38340 (the suit property). Together with the plaint, the plaintiff filed an application under



certificate of urgency seeking interim orders of injunction to stop the demolition of the wall. The application was brought before me ex parte on 11 February 2021 and I granted the interim orders. The wall was however demolished before the application could be heard inter partes. Given the change in circumstances, the plaintiff amended the plaint with the amended plaint being filed on 18 May 2021.

2. In the amended plaint, the plaintiff avers to be the registered owner of the suit land which he describes as a prime beach property having purchased it in the year 2008 for a valuable consideration of Kshs 11,000,000/-. The Plaintiff pleaded that at the time of purchase the plot had a boundary wall around it with an entrance gate. Sometime in 2019 the suit property was invaded by hooligans and they demolished the wall a fact that the plaintiff pleads the defendant was aware of. This incident was reported at Mtwapa Police Station and the plaintiff has provided the OB number. As a result, some people were arrested and charged with malicious damage to property. The plaintiff avers that in February 2021, he was ready to put back the wall that was in existence, and return the property to the position that it was prior to the demolition, and he secured police protection to offer security. He undertook the task to completion and put back the wall. The plaintiff contends that despite being well aware that the suit property had a boundary wall in place, the defendant without any justifiable reason issued an Enforcement Notice dated 3 February 2021 to the plaintiff, threatening to demolish the new wall. It is the position of the plaintiff that the notice was illegal and unlawful for failing to appreciate that the plaintiff was replacing an existing wall that had been in existence for over 10 years and he was not erecting a fresh boundary wall. He contends that the notice was malicious only intended to subject the property to unlawful and illegal invasion by squatters and hooligans.
3. The plaintiff pleads further that on obtaining the stay orders on 11 February 2021, he served the defendant on 12 February 2021 and the same was received at 2.32pm. He also proceeded to affix the same at the gate of the suit property. He avers that he met officers of the defendant whom he duly served with a copy of the order. He pleads that despite this, at around 4.30pm of 12 February 2021, the defendant through its officers and agents, proceeded to demolish the wall and he contends that this was sheer impunity and contemptuous of the court proceedings. The plaintiff avers that he engaged the services of Wyco Valuers who prepared a valuation report on 10 May 2021 setting the value of the demolished wall at Kshs. 4,000,000/=.
4. In the amended plaint, the plaintiff seeks the following orders (slightly paraphrased for brevity): -
  1. A declaration that he is the absolute and indefeasible owner of the suit property.
  2. A Permanent injunction restraining the defendant whether by itself, its servants, agents, an/ or employees or any one acting on their authority from further trespassing, demolishing, invading, destroying, pulling down, bringing down, flattening, razing and or in any way interfering with the plaintiff's property or the remaining boundary wall, and/or any structure erected therein.
  3. An order directing the defendant to compensate the plaintiff Kshs. 4,000,000/- being the value of the damaged perimeter wall and or the costs of its replacement.
  4. General damages for trespass and unlawful encroachment onto the suit property.
  5. Costs of the suit and interests on (3) above at the court rates from the date of demolition (12<sup>th</sup> February, 2021) till payment in full.
  6. Any other relief that the Honourable Court may deem fit.
5. The defendant filed a statement of Defence which more or less denied all the allegations of the plaintiff. She pleaded that she is mandated to undertake routine inspections of buildings and other structures



within its area of jurisdiction as well as providing approvals for constructions. She pleaded that during one of its routine inspection, she found out that the plaintiff was constructing a boundary wall without her approval as required by the *Physical Planning Act*. The defendant avers that upon this discovery, her enforcement officer sent a notice to the plaintiff requiring him to produce notice of compliance which the plaintiff failed to do. She pleads that as provided by law, she had no option other than to issue the Enforcement Notice as the plaintiff had failed to obtain the relevant approvals before the construction. She pleads that she is not at fault for issuing the Enforcement Notice. The defendant contends that the plaintiff is guilty of non-compliance with the law and does not deserve any of the orders sought.

## **B. Evidence Of The Parties**

### **(i) Plaintiff's Evidence**

6. The plaintiff testified and called one witness.
7. He mentioned that he does not reside on the suit land, which is in Mtwapa, but lives elsewhere. His evidence was more or less in line of what is pleaded in the plaint, which I have already alluded to above. It took him 6 months to complete the wall owing to disturbances by hooligans. He stated that after he had finished the wall, the Governor of Kilifi and the local Member of County Assembly (MCA) visited the plot. Nobody from the County Planning Department came to him. It is after he had completed the wall that he got the Enforcement Notice. On the stay order given on 11 February 2021, he testified that he served it at the offices of the defendant located at Mtwapa and he placed another at the wall. However, County officers came and demolished the wall with police officers from Kilifi as the police in Mtwapa declined to participate.
8. Cross-examined, he acknowledged that the property is in Mtwapa within the jurisdiction of the defendant. He did not seek approval from the defendant in erecting the wall since there had been an existing wall. He got the Enforcement Notice after he had completed the wall. The notice is dated 3 February 2021 and it gave him Seven (7) Days to demolish the wall. He stated that there was nothing in the notice asking him to take any documents to the County Offices. The notice did inform him that he could appeal. He did not file an appeal but came to court and obtained injunctive orders on 11 February 2021. The notice lapsed on 10 February 2021. He served the court order in the office of the County Administrator in Mtwapa and not the Department of Lands, Energy, Housing, Physical Planning & Urban Development where the notice emanated from. He did not ascertain whether the previous owner had approval for the wall that he had put up. He was aware that one needs approval though he did not apply for one. Re-examined, he pointed out that the Enforcement Notice informed him that he could appeal to the Liaison Committee or the Environment and Land Court and he opted to come to court. On the injunctive order, he stated that it was extracted on 15 February 2021 and was there when the wall was demolished. He was now not too sure if the demolition was on 12 February 2021 as he had earlier stated.
9. PW2 was Herbert Humphrey Ouna Mukhongo, a Valuation Assistant at Wyco Valuers. He testified that the valuation report was prepared by Wyclife Mukhongo who is now deceased. He testified that he went to the suit property together with the valuer and they found the wall demolished. He produced the valuation report. He was cross-examined on the date in the report which shows the site visit to have been 16 January 2021 and he affirmed that this was the date and that is also when he took the photographs of the site.



## ii. Defendant's Evidence

10. The defendant called one witness, Edgar Onyisi, who works with the defendant as a Development Control Assistant. He testified that he was not the author of the Enforcement Notice dated 3 February, 2021 which was signed by his boss, one Paul Wambua, the Development Control Officer. He explained that the notice was issued because the plaintiff was constructing the boundary wall without any approval from the County Development Control Unit. He stated that he went to the site and requested for approvals but none were provided. It is then the Enforcement Notice was served. He stated that upon service of the notice, works were to stop, after which the plaintiff was expected to attend their offices, meet the enforcement team with some documentation. He affirmed that the notice issued was of 7 days and stated that once such notice lapses, the County Government carries out a demolition. In this instance, the notice took effect on 10 February 2021 and they moved in to demolish. He was present during the demolition together with security officers from the County Government and another Development Control Assistant. They proceeded to demolish the wall. He testified that even where there had been a previous wall, one still needs to submit documents to approve reinstatement of the wall. He explained that this is important, so as to verify that it is the owner undertaking the development, and also for revenue collection. On the court order, his evidence was that they had not been served with any. He stated that the notice was issued from their office in Kilifi and they have no Development Control Office in Mtwapa. He denied that there was any court order placed at the gate of the premises. He testified that if the plaintiff had complied with the Enforcement Notice, they would have processed the approval. He added that if one is aggrieved by the notice he can proceed to the Liaison Committee and this was captured in the notice.
11. Cross-examined, he affirmed that the suit property belongs to the plaintiff though he claimed that he was told by Mr. Wambua that its ownership has a dispute which was pending in court. He was undertaking his field work, while alone, when he saw the construction in dispute. He requested for copies of the title, search, clearance certificate and the approval. He could not recall the date when this happened. About three days later, the Enforcement Notice was issued. He delivered it himself and handed it to the foreman. The notice was pursuant to the *Physical Planning Act, 2019* and he affirmed that it needed to comply with Section 57 of the said statute. He acknowledged that if it does not comply with that Section then the notice would be irregular. The notice was issued under Section 57 of the *Act*. This was a 7 day notice and the plaintiff was to undertake the tasks written in the notice within that time or else the wall would be demolished. He was not aware that the Act requires a 90 days' notice. He nevertheless confirmed that no 90 days' notice was issued and the notice did not first give the developer the option to demolish the wall. He denied that the defendant was keen to demolish the wall. At that time the wall was 98% done. He was aware that Section 72 of the Act provides for appeal and affirmed that one has 14 days to appeal to the Liaison Committee. He acknowledged that what was given was a 7 days' notice which was contrary to what is provided in the law. The notice expired on 10 February, a Wednesday, and the demolition took place on 12 February, which was a Friday. The demolition machine (popularly known as a Caterpillar) was not of the County Government. He stated that it was hired. He did not know who hired the Caterpillar and who paid for it. He did not know who instructed the Caterpillar man. He mentioned that instructions came from the head office. He affirmed that the County has a documentation system. He did not however see any documents related to this demolition. He elaborated that the Caterpillar came on a loader. The loader driver was sent to him by Mr. Wambua. He was not aware that a court order had been issued and was not aware that anyone had been served with such order. He mentioned that everything was handled by his boss, Mr. Wambua, and he was only instructed to proceed to the site with the Caterpillar man and demolish the wall. The instruction was verbal. He was not aware that anybody within the County Government had an interest in the land. He did not know that the premises had suffered a demolition in the year 2019



by squatters though he acknowledged that the area has a squatter problem. He was shown the order of injunction which was received by their County Attorney on 12 February 2021. I observed that it was received at 2.23pm on that day.

12. Questioned by the court, he stated that he does not know if the cost of demolition was passed to the plaintiff. He averred that the demolition was at 1 pm and took 35 minutes. He had never seen a wall in the premises before. The wall developed was not going to interfere with anyone.

### C. Submissions Of Counsel

13. In his submissions, Mr. Khalid Salim, learned counsel for the Plaintiff, submitted on three issues as follows :-
  - a. Whether the plaintiff was the registered owner of the suit property;
  - b. Whether the defendant properly complied with the provisions of Section 57 of the *Physical and Land Use Planning Act*, when issuing the enforcement notice dated 3 February, 2021;
  - c. Whether the Plaintiff is entitled to orders sought.
14. On the first issue counsel submitted that the defendant did not tender any evidence to controvert the plaintiff's ownership of the property. He thus urged the court to hold that the plaintiff is the registered owner of the suit property. On the second issue, counsel pointed out that the enforcement notice was issued on 3 February 2021 and the demolition was conducted on 12 February 2021. Counsel submitted that the enforcement notice was issued pursuant to Section 57 of the *Physical and Land Use Planning Act, 2019*. He specifically referred to Section 57 (3) and 57 (4) and submitted that the law requires a 90 day notice and that it is only after the 90 days have lapsed that the County Government can move to restore the land at the cost of the offender. Counsel also pointed at Section 72 (3) of the *Act*, which gives a person aggrieved by the enforcement notice 14 days to appeal to the County Physical and Land Use Planning Liaison Committee. He submitted that the plaintiff was not given this 14 days' notice. To buttress his submissions on this issue, counsel relied on the case of *Republic vs The County Government of Kwale Ex-parte Leisure Lodges Ltd* (2018) eKLR. On the third issue counsel submitted that since no valid notice was issued, the applicant was denied the right to hearing and the right to fair administrative action as required by Section 4 (3) (a) of the *Fair Administrative Action Act, 2015*. He submitted that the defendant is liable to compensate the plaintiff for the wall at Kshs. 4,000,000/= and also asked for general damages of Kshs. 1,000,000/=.
15. Mr. Kiti, learned counsel for the defendant, was of opinion that the following three issues are for determination: -
  - a. Whether the enforcement notice dated February 3, 2021 is defective illegal and unlawful;
  - b. Whether the plaintiff made out a case for breach of any right pursuant the provisions of article 40 of the *Constitution*;
  - c. Whether the Plaintiff is entitled to the rights sought.
16. On the first issue, counsel submitted that the defendant is empowered by Section 57 of the *Physical and Land Use Planning Act, 2019* to revoke a development permission if the applicant contravenes the Act or conditions imposed on the Development permission or for any justifiable reasons authorized by the law. Counsel submitted that the plaintiff was given seven (7) days notice which he failed to comply with. He submitted that the notice was in compliance with Section 72 (1) and (2) of the Act and the plaintiff was obligated to comply, and if aggrieved, proceed to invoke Section 72 (3) and appeal to the Liaison Committee. He submitted that this procedure was not followed and the plaintiff has



thus not gone through the process of challenging the legality of the enforcement notice. He relied on the case, *Ephantus Mwangi and 12 others vs The Director of City Planning Department (City Council of Nairobi) & another* (2012) eKLR. On the second issue, counsel submitted that the defendant does not challenge the plaintiff's right to property but submitted that he held his interest subject to the laws of the land and County Planning laws. On the third issue, counsel submitted that no good reason was given as to why the plaintiff failed to pursue the avenues for appeal given in the Act. He also raised query about the date of 16 January 2021 given in the valuation report. He added that PW-2 was lacking in the relevant qualifications to enable him explain the quantification of Kshs. 4,000,000/=. He submitted that the plaintiff was not deserving of compensation and referred to the case of *Jamii Telecommunication Limited vs County Government of Uasin Gishu*, Eldoret ELC Petition No. 6 of 2018, (2020) eKLR. He also referred me to the case of *Anthony Njoroge & 2 others vs County Government of Nairobi & another* (2020) eKLR, to argue that the plaintiff does not deserve an award in general damages for the development was not approved.

#### **D. Analysis And Disposition**

17. It is not disputed that the plaintiff is the registered proprietor of the suit land. In his evidence, the defendant's witness attempted to bring in an issue that the proprietorship of the suit land was contested but absolutely no evidence was presented to demonstrate that his ownership of the land is disputed. For purposes of this litigation, I have no material that contests the ownership of the suit land, and I will take it that the registered proprietor is the plaintiff. Another assumption I will make is that the order that was issued by this court on 11 February 2021, stopping the demolition, was served after the demolition had taken place. Given the above, it is my view that there are only two issues for determination, being:-
- i. Whether the enforcement notice was illegal.
  - ii. Whether the plaintiff is entitled to damages despite not having the development approved.

#### **Whether the enforcement notice was illegal**

18. It is not contested that the plaintiff undertook construction of a wall to replace one that had been pulled down. According to the plaintiff, he did not need development permission for this, since he was replacing an old wall, but according to the defendant, this still needed approval. As a result, the defendant issued an enforcement notice demanding that the wall be pulled down. This enforcement notice is dated 3 February 2021. It did mention that the plaintiff was allegedly developing a boundary wall without the requisite approvals from the County Government of Kilifi planning authority pursuant to Section 57 of the *Physical and Land Use Planning Act*. Section 57 of the said Act provides as follows:-

57. Development permission
- (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.

19. What was issued to the plaintiff was a 7 day notice and the notice required the plaintiff to do the following:-

- i. Stop all the construction on site.
- ii. Submit to the undersigned (County Development Control Officer) within the specified time frame (7 days) copies of ownership documents, survey plan and approvals (if any).

20. The plaintiff was warned that failure to adhere to the stipulated time frame, the County authorities 'shall move to the suit and take all appropriate legal measures including making arrest or causing demolition to such wall without further notification.' The notice was of Seven (7) Days and it mentioned that it will take effect on 10 February 2021. Within the notice, the plaintiff was informed that if aggrieved, he may appeal to the Liaison Committee or the Land and Environment Court (sic) as the case may be under Part VI of the Act before the said date of 10 February 2021. At this juncture, it is instructive to set out the provisions of Section 72 of the Act, which provides as follows :-

72. Enforcement notice

- (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.
- (3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.
- (4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.
- (5) A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice 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.
21. It has been urged by the plaintiff that this notice is illegal, first because pursuant to Section 57, one is required to be given a 90 days notice, and secondly, that under Section 72, the time for appeal to the Liaison Committee is 14 days. For the defendant, it was asserted that the notice was legal.
22. Section 57 and Section 72 need to be read together. Section 57 addresses itself to a situation where the County is of opinion that one is developing without the requisite development permission. Section 57 (3) thereof is explicit, that the notice to the developer should allow him to restore the land within 90 days. It goes without saying, that the only legal notice for restoration of a challenged development cannot be less than 90 days. Any notice that does not give the developer 90 days cannot be considered to be a notice in conformity with Section 57 (3) of the Act, and would be an illegal notice. In essence, the County Government is not to move in and restore the land before lapse of the 90 days. Section 72 is titled enforcement notice. This enforcement notice is the notice issued pursuant to Section 57, and as we have seen above, it cannot be a notice that is of less than 90 days. Under Section 72 (3) a person is at liberty to appeal the notice within 14 days to the Liaison Committee. Now, the 90 days and the 14 days should not be confused. The 90 days is the period for which one needs to be given to restore the land and the County Executive is not permitted by law to take an enforcement measure before lapse of 90 days. The 14 days is the period within which one is at liberty to appeal the enforcement notice to the Liaison Committee. It will thus be useful for the enforcement notice issued to also advise the developer that he can appeal that notice within 14 days to the Liaison Committee. Again, a notice that informs the developer that his right to appeal is one that is of less than 14 days would be an illegal notice for failure to conform to the period set out in Section 72 (3) of the Act.
23. In our case, the notice was only of 7 days. It was not even good enough to cover the period for lodging an appeal to the Liaison Committee. I am of opinion that the plaintiff was perfectly in order to come to court to challenge the legality the notice.
24. In his submissions, Mr. Kiti, argued that the plaintiff ought to have appealed to the Liaison Committee to challenge the notice. The short answer to that is that the plaintiff couldn't file an appeal to the Liaison Committee because the defendant demolished the structure even before expiry of the 14 days period that one has to lodge an appeal. If the notice was proper, the plaintiff would have had up to 17 February 2021 to lodge his appeal. The defendant cannot complain that the plaintiff failed to lodge an appeal to the Liaison Committee yet it already demolished the premises before the time for lodging an



appeal lapsed. The Plaintiff was unfairly locked out from exercising his right of appeal to the committee by the Defendant the moment his wall was demolished. The subject was already moot as the demolition took place on 12 February 2021. Mr. Kiti's reliance on the decision in the case of *Mwangi Ruguru & 12 Others vs The Director of City Planning Department* therefore does not help him. In that case, the developer filed a Judicial Review motion to challenge an enforcement notice, and a preliminary objection was raised, that the developer ought to appeal to the Liaison Committee, which objection was upheld. But as I have mentioned, in this case, the plaintiff could not have appealed to the Liaison Committee as the development was already destroyed before lapse of the time that he was entitled to lodge an appeal.

25. In any event, by law, the defendant ought not to have moved to restore the premises within the 90 days that I have already demonstrated above. There is a reason why the law has given these periods of time. The County Government may think that a development is illegal, but the developer may very well demonstrate that the development is legal, or may take steps to regularize the development, and obviate the need for any enforcement measures being undertaken. When proper notice is not issued, then in essence, the developer is being condemned unheard. Even in our case, it could be that after hearing from the developer, and taking into account his explanation that he was only replacing a wall that previously existed, the defendant would have had no issue with the development. But what happened is that the defendant rushed in and pulled down the development without giving the plaintiff an opportunity of presenting his case. It can only be contended that opportunity to be heard was given if the notices were legal, that is, if they provided for the correct time frames for enforcement and for lodging an appeal to the Liaison Committee. I have already demonstrated that they did not, and I have no hesitation to conclude that, not only were the notices illegal, but the act of the defendant moving in and demolishing the plaintiff's development was also illegal. Even where a county government has powers to issue notices, seeking to force persons who may be carrying out development without permission to stop such developments and restore the land to its original condition, such notices must obey the statutory timelines.

### **Whether the plaintiff is entitled to damages despite not having the development approved**

26. Mr. Kiti referred me to the case of *Jamii Telecommunication Limited vs County Government of Uasin Gishu* and *Anthony Njoroge & 2 Others vs County Government of Nairobi & Another* to argue that the plaintiff is not entitled to general damages. I have read the cases. In the case of *Jamii Telecommunications* the petitioner, a telecommunications company, filed suit against the County Government of Eldoret claiming that the latter had destroyed its telecommunications network despite issuing approval for the same. The respondent's position was that the development was being done contrary to what was approved. The court noted that there had not been compliance with the notice period, but was of opinion that the development was not in line with what was approved. In view of that, the court declined to award damages for the loss but only awarded Kshs. 1,000,000/= for infringement of the petitioner's right to property. In the case of *Anthony Njoroge & 2 Others vs County Government of Nairobi*, the petitioner had undertaken a development of a borehole, surrounded by a wall and other water equipment. This development was demolished by the County Government of Nairobi without due notice being issued and the petitioner sought damages for the value of what was demolished, general and punitive damages. The court was of opinion that the petitioner did not present to the court any evidence to demonstrate that the demolished developments were approved, and bearing that in mind, was of the view that no more than the value of the damaged property is what the 2<sup>nd</sup> petitioner deserved. I am of course not bound by the above decisions, which are actually contradictory in opinion. Whereas in the *Jamii Telecommunications* case the court declined to award any damages for the value of the development, since in its view, the development was unauthorized, in



- the Anthony Njoroge case, the court thought that in such instance what the developer is entitled to is no more than the value of the property destroyed and was not entitled to other heads of damages.
27. I will reiterate that there is good reason as to why the law requires proper notice to be issued. This is so as to give a chance to the developer to be heard before drastic action can be taken against him. If the developer has not been given a right to be heard, through issuance of a proper notice, then I do not see the place of the County Government asserting that the development is illegal. The legality or not of the development, can only be explored within the time frames given in proper notices and by the institutions named therein, which are, the Liaison Committees or the Courts. Again, it could happen that a development does not actually have development approval, but when the developer is heard, the County Government may waive the need for approval, or grant approval, despite the late application. This is so especially for what one can consider innocent developments that cause no harm to anybody such as a boundary wall around a compound or minor renovations to already existing property.
28. I would hesitate to make orders that encourage impunity and encourage authorities not to abide by statutory notices. It should be understood that demolishing property is drastic, very drastic. Developments are by their nature expensive ventures for which persons have made immense sacrifice. Demolition will not only cause actual loss of investment but may shatter a person and bring him down to the depths of hopeless and depression. One may not be able to recover from such loss. Demolition is thus a remedy that should be used very sparingly and as a last resort, probably only where, despite the developer being given ample opportunity to regularize the development, he has failed to do so, and/or where the development in issue is a threat to the environment or infringes on the rights of others. Simply rushing to demolish a property without first hearing the developer is insensitive and extreme. On my part, where proper notice is not issued, I would not hesitate to make an award for the value of the loss. I will also not hesitate to make an award in general damages for trespass. I say so because when the authorities move in to demolish a property before the lapse of proper notice, then they are making an illegal entry to property, and an illegal entry to property amounts to trespass. The law does not give them permission to enter property before lapse of a 90 days notice, thus entry before lapse of this period is trespass, and the developer is thus entitled to damages to trespass. I would also venture to state that such illegal acts also entitle a court to award punitive damages, for we would not wish to have authorities abusing their power in direct violation of law, and at the expense of the rights and investments of citizens.
29. In our case, the plaintiff was never given adequate opportunity to explain his development and demonstrate why it should remain. Maybe if the defendant had first heard the plaintiff they would not have moved to demolish the wall. The defendant issued an illegal notice and cannot be allowed to get away with it. I am persuaded to make an award for the value of the development and also an award for general damages for trespass. I would even have granted exemplary damages if the plaintiff had pleaded the same.
30. On the value of the demolished development, the plaintiff quantified the damaged wall at Kshs. 4,000,000/=. The defendant did not call any evidence to challenge this valuation as she did not make any valuation of its own nor present a contrary valuation report. The only issue that is worthy of mention is that in his submissions, Mr. Kiti submitted that the witness was not skilled in valuation. It is true that the witness who produced the report in court is not skilled in valuation, but he is not the one who valued the premises. The premises was valued by a registered valuer, only that he is now deceased. PW-2 was merely producing the report because he worked with the deceased valuer and he also accompanied him to the site. I am aware that the date in the report indicates 16 January 2021 as the date of the site visit but it is obvious to me that this is a mistake and it is probable that the site was visited on 16 February 2021 and not 16 January 2021 as debris was still on site. I do not see why the



plaintiff should be prejudiced merely because of a wrong date being given in the report. In any event, it is common ground that the premises was demolished on 12 February 2021. I do not hesitate to award the plaintiff Kshs. 4,000,000/= for the damaged wall.

31. The plaintiff has sought general damages for trespass and Mr. Khalid has asked for Kshs. 1,000,000/=. I have already explained that when the defendant moved into the premises outside the time period provided by law, then they were trespassers and they are thus guilty of the tort of trespass and are liable to pay damages. Mr. Kiti did not make any submission on what would be reasonable as general damages for trespass. On my part, considering the nature of the development, which was really just a wall which did not interfere with anybody, a fact that the defendant's witness admitted, I will award the plaintiff the Kshs. 1,000,000/= sought as general damages for trespass. I am emboldened in making this award by the rather dubious manner in which the exercise was conducted. Putting aside the fact that the notices were improper, it would appear that the defendant was acting at the behest of other persons who chose to remain behind the scenes and good faith was not demonstrated. No documentation was provided as to the request for demolition. There is no record as to who hired the machinery or whether the defendant paid for it. The plaintiff has not been surcharged so that we can know that the defendant is the one who actually undertook the demolition in good faith. I think in those circumstances, general damages in the sum of Kshs. 1,000,000/= is actually a slap on the wrist and I do make this award.
32. The other prayers in the plaint are for a declaration that the plaintiff is the rightful owner of the suit land, a permanent injunction to restrain the defendants from pulling down the wall or remains of it, and costs. On the prayer for a declaration as to ownership, I already mentioned that I do not have any ownership dispute. On the permanent injunction, the wall has already been pulled down and I have made an award on damages for it. I do not wish to pronounce myself on any future developments. On interest, the award of Kshs. 4,000,000/=: which is the value of the demolished development, to attract interest at court rates from the date of demolition, which is 12 February 2021, until payment in full. For the sum of Kshs. 1,000,000/=: awarded as general damages for trespass, this sum to attract interest at court rates from the date of this judgment till payment in full. The plaintiff is also awarded the costs of this suit to also attract interest from the date of this judgment.

Judgment accordingly.

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

