



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 642 OF 2011

JOSEPH NGATA KAMAU.....PLAINTIFF

VERSUS

BERNARD MAINA WACHIRA.....1ST DEFENDANT

RACHEAL NJERI KIBE.....2ND DEFENDANT

COUNTY GOVERNMENT OF NAIROBI.....3RD DEFENDANT

JUDGMENT

Introduction:

The Plaintiff, the 1st Defendant and the 2nd Defendant are neighbours. They own and occupy four (4) maisonettes situated on all that parcel of land known as L.R No. 209/8737/1 (hereinafter referred to as the “suit property”). The Plaintiff owns maisonette 3; the 1st Defendant owns maisonettes 1 and 2 while the 2nd Defendant owns maisonette 4. The four maisonettes are on the same compound. The suit property is owned by Upper Hill Properties Limited (hereinafter referred to as “the head lessor”). The Plaintiff and the 1st and 2nd Defendants are the directors and shareholders of the head lessor. The Plaintiff and the 1st and 2nd Defendants own their respective maisonettes on separate leases from the head lessor for the unexpired term of 99 years with effect from 1st March, 1976 (less the last 10 days thereof). The dispute before the court concerns the use and enjoyment of the common areas on the suit property.

The Plaintiff acquired maisonette 3 in 1994. The Plaintiff purchased the said maisonette from Jayendra Devani and Bharti Jayendra Devanito whom the head lessor had leased the same. The leasehold interest in the said maisonette was transferred to the Plaintiff on 22nd December, 1994. The lease in respect of maisonette 3 conferred upon the Plaintiff among others, the following rights:

- 1. The right to exclusive use and enjoyment of the curtilage of the maisonette or the garden area adjacent thereto.*
- 2. The right to share equally the residential accommodation for servants at the servants’ quarters located on the suit property in common with the head lessor and all other lessees or occupiers for the time being of the other maisonettes.*
- 3. The right in common with the headlessor and the owner and occupiers of all other maisonettes and all others having the like right to use for the purpose only of access and ingress from maisonette 3 all such part of the suit property as affords access thereto excluding the other maisonettes and also those parts of the suit property which have been designated by the head lessor as being for exclusive use of other maisonettes.*
- 4. The right to use in common with the owners and occupiers of all other maisonettes and their visitors the main drives, paths and other areas forming part of the suit property subject to such reasonable rules and regulations for the common enjoyment thereof as the headlessor may from time to time prescribe but excluding the gardens adjacent to the other maisonettes which have been designated by the headlessor as being for the exclusive use of such other maisonettes.*
- 5. The benefit of any covenants entered into by the owners of the other maisonettes with the headlessor for the benefit of the suit property.*

Maisonettes 1 and 2 were initially leased to Rameshachandra Pandya and Apurva Rameshchandra Pandya, and Ushakumari Yajnik respectively under separate leases by the head lessor for the unexpired terms of 99 years with effect from 1st March, 1976 (less the last 10 days thereof). The leases that Rameshachandra Pandya and Apurva Rameshchandra Pandya, and Ushakumari Yajnik had with the head lessor in respect of the two maisonettes had the same terms as the lease in respect of maisonette 3 that was transferred to the plaintiff by Jayendra Devani and Bharti Jayendra Devani the excepts of which I have set out above.

The 1st Defendant purchased the leasehold interests in maisonettes 1 and 2 from Rameshchandra Pandya and Apurva Rameshchandra Pandya, and Ushakumari Yajnik respectively on or about 3rd March, 2006. The instruments of transfer of leases dated 3rd March, 2006 in respect of the two maisonettes that were executed by Rameshchandra Pandya and Apurva Rameshchandra Pandya and, Ushakumari Yajnik in favour of the 1st Defendant provided among others as follows:

“The Vendors HEREBY TRANSFERS all their right title and interest in the said maisonette TOGETHER WITH:-

(a) The right to use (in common with the lessor and all other lessees or occupiers for the time being of other maisonettes in the said estate and/or the said property having like rights to the said grounds) the car parking, roads and pathways adjoining and/or surrounding the said maisonette and/or otherwise situate in the said property.

(b)

TO HOLD the same unto the purchaser for the residue of the said term of ninety nine (99) years from the First day of March one Thousand Nine Hundred and Seventy – Eight less the last 10 days, subject to the payment of rent and also to all the covenants terms and conditions contained in the said lease and the said title.”

The said transfers provided further as follows:

“The lessor (head lessor) hereby consents to this transfer of the maisonette to the purchaser, subject to the terms and conditions constrained in and referred to in the said lease, and said title AND the lessor (head lessor) hereby confirms that she shall be bound and adhere to all the covenants and agreements on her part to be done and performed as contained in the said lease and the said title.”

The lease in respect of maisonette 4 owned by the 2nd Defendant was not produced in evidence. Without any evidence to the contrary, I will assume that it was on the same terms as the leases in respect of maisonettes 1, 2 and 3 referred to above as the same was also issued by the headlessor.

The Pleadings:

The Plaintiff's case:

In his amended plaint dated 13th August, 2013, the Plaintiff averred that in breach of the terms and conditions regarding the use of common areas contained in the leases that were issued in respect of maisonettes 1, 2 and 4 by the headlessor to the 1st and 2nd Defendants, the 1st and 2nd defendants had illegally blocked for their exclusive use the common areas of the suit property thereby denying the plaintiff the right to use and enjoy the said areas. The Plaintiff averred that the 1st and 2nd Defendants had blocked for their exclusive use, the open grounds on all sides of the four maisonettes, the front of the maisonettes, the garden adjacent to maisonette 1 and the servant quarters situated next to maisonette 4. The Plaintiff averred that the 1st Defendant had erected a perimeter wall alienating the common area next to maisonette 1 and constructed a bungalow on the said common area that he uses for his personal benefit for various business activities. The Plaintiff averred that the said bungalow had blocked the common parking area for the owners of the other maisonettes as well as their visitors and customers. The plaintiff averred that the said bungalow had also interfered with the general serenity and the greenery provided by the garden in the common area. The Plaintiff averred that the 1st Defendant alienated the said common area without the consent of the owners of the other maisonettes and the mandatory licenses from the 3rd Defendant. The Plaintiff averred further that around the month of September, 2012, the 2nd Defendant also fenced off the common area adjacent to maisonette 4 which is next to the common servant quarters thereby blocking the Plaintiff from accessing the area. The Plaintiff averred that the said blockage was illegal and unjustifiable.

The Plaintiff averred that he reported the 1st and 2nd Defendants' activities mentioned above to the 3rd Defendant for appropriate action but the 3rd Defendant failed to take any action. The Plaintiff averred that as a result of the Defendants' acts and omissions, he had suffered and continued to suffer loss and damage. The plaintiff sought several reliefs against the Defendants in the amended plaint.

The 1st Defendant's defence:

The 1st Defendant filed his statement of defence on 8th April, 2016 in which he denied all the averments contained in the amended plaint. The 1st Defendant denied that he had blocked, obstructed or denied the plaintiff access to the common areas on the suit property. The 1st Defendant denied also that he had constructed a bungalow on the common area next to maisonette 1 and that he was using the same for business. The 1st Defendant denied that he had breached the terms of the lease under which maisonettes 1 and 2 were let to him by the head lessor. The Plaintiff's alleged loss and damage were also denied.

The 2nd Defendant's defence:

In her statement of defence dated 13th April, 2016 and filed on 14th April, 2016, the 2nd Defendant denied the Plaintiff's claim in its entirety. The 2nd Defendant denied blocking or denying the plaintiff access to the common areas on the suit property. The 2nd Defendant also denied having erected an illegal fence adjacent to maisonette 4 or having placed a blockage to prevent the Plaintiff from accessing common areas on the suit property next to the said maisonette or servant quarters. The 2nd Defendant denied also that the Plaintiff had suffered any damage or loss.

The 3rd Defendant's defence:

The 3rd Defendant filed its statement of defence on 29th August, 2013. The 3rd Defendant denied the entire claim by the Plaintiff and contended that the claim was misconceived.

The evidence given by the parties:

The suit was heard over several days and was concluded on 27th January, 2017 with a site visit by the court. The Plaintiff and the 1st and 2nd Defendants gave evidence and closed their respective cases without calling additional witnesses. The 3rd Defendant closed its case without calling evidence.

The Plaintiff's evidence:

The Plaintiff told the court that he was staying in maisonette 3 on the suit property. He produced a certified copy of the lease dated 22nd May, 1989 in respect of maisonette 3 as P. Exh. 1. He stated that he had lived on the suit property since 1989 and that the 1st and 2nd Defendants were his neighbours. He stated that he owned maisonette 3 while the 1st Defendant owned maisonettes 1 and 2. He stated that there were a total of four maisonettes on the suit property and that the 2nd Defendant owned maisonette 4. He stated that he brought this suit against the 1st Defendant because the 1st Defendant had grabbed the parking area serving the suit property in June, 2011. He stated that the 1st Defendant left him with no parking with the result that his business collapsed. He stated that the carpark was part of the common area. He stated that he had sued the 2nd Defendant because she had also grabbed the carpark at the back of the suit property. He stated that while the 1st Defendant took the front parking, the 2nd Defendant had taken the parking at the rear.

The plaintiff stated that the 1st Defendant had grabbed the front parking by putting up a wall around the parking area thereby blocking access to the same. He stated that the 2nd Defendant had also done the same with the parking at the back of the suit property. He stated that the 2nd Defendant fenced the parking at the back of the suit property with barbed wires and installed a gate thereby blocking access to the same. The plaintiff stated that he was a travel consultant and that he used to bring into the country tourists from the U.S.A. He stated that the said tourists were unable to come to his premises on the suit property anymore because of lack of parking. He stated that he was operating a business on his maisonette 3 under the name International Guest House. He produced in evidence as P. Exh. 2 a copy of the certificate of registration of the said business dated 12th July, 2005.

The Plaintiff stated that he had been running the business since 1989. He stated that the 2nd Defendant had rented her maisonette 4 to a Non-Governmental Organization known CRECO. He stated that the 1st Defendant on his part was also running businesses on the suit property. He stated that the 1st Defendant had put up a building on the parking area which he was using as an M-Pesa Shop and for other activities. He stated that when the 1st and 2nd Defendants took over and blocked access to the parking as aforesaid, he attempted to get help from the 3rd Defendant who failed to be of assistance to him. He produced in evidence as P. Exh. 3, P. Exh. 4 and P. Exh. 5 copies of the letter that he wrote to the 3rd Defendant to which the 3rd Defendant did not respond. He stated that a report that he made to the Kenya Anti-Corruption Commission did not also resolve the issue. He produced in evidence as P. Exh. 6 a copy of a letter that the Kenya Anti Corruption Commission wrote to the 3rd Defendant on the issue. He stated that he managed to obtain a copy of a letter that the 3rd Defendant had written to the 1st Defendant authorizing him to carry out repairs on the suit property.

The Plaintiff stated that the said letter did not authorize the 1st Defendant to carry out construction on the parking of the suit property. He produced the said letter by the 3rd Defendant dated 23rd July, 2009 as P. Exh. 7. The Plaintiff stated that he had taken photographs showing the offending wall that the 1st Defendant had constructed on the parking. He produced the said photographs in evidence as P. Exh. 8(i), (ii) and (iii). He also produced in evidence as P. Exh. 9 a copy of the site plan for the suit property which shows the location of the maisonettes and the servant quarters. He stated that the maisonettes on the suit property were constructed in 1979.

The plaintiff denied that he had a meeting with the 1st Defendant over the issue of parking and that the residents of the suit property had agreed on the allocation of the parking lots. He stated that everyone had individual spaces and that the same had nothing to do with the parking area. He stated that he was entitled to exclusive use of the garden in front of his maisonette and that the extension that he had carried out was within his exclusive space. He denied that he was running a guest house on maisonette 3 without the permission of the 1st and 2nd Defendants. He stated that the 1st Defendant found him on the suit property running the same business. He stated that he had obtained a change of user to run the business on the premises. He stated that the 3rd Defendant could not have issued him with a business permit without a change of user.

The Plaintiff stated that the 1st Defendant had erected an extra gate for the exclusive use of his maisonettes. He stated that the 2nd Defendant had also put a gate at the rear of the building. He stated that the blockage of the parking had caused his guests to stop coming to his guest house as they had nowhere to park. He stated that he was forced to close down his business because he could not operate it without parking. He stated that he was no longer able to generate income. He stated that he used to earn about Ksh.200,000/= per month. He produced in evidence as P. Exh. 10 copies of cheques which he claimed to have been issued to him by some of his clients. He urged the court to enter judgment in his favour as prayed in the amended plaint.

In cross examination by the 1st Defendant's advocate, the Plaintiff stated that, he purchased his maisonette 3 in the year 1989 and that although the user of all the maisonettes on the suit property was residential, the same was changed to business. He stated that he started running a guest house on the suit property soon after he purchased the same. He stated that he purchased maisonette 3 for the purposes of running a business thereon and that he started running the business even before a change of user from residential to business was obtained. He admitted that according to the lease for maisonette 3, the user of the premises was residential. He admitted further that he had no evidence

of the change of user from residential to business. He stated that his business was licensed by the 3rd Defendant and that he used to earn Ksh. 200,000/- per month from the business which income ceased when the parking was blocked by the 1st and 2nd Defendants. He stated that his guest house had 12 rooms and that he had 5 employees.

In cross-examination by the 2nd Defendant's advocate, the Plaintiff reiterated that the user of the suit property was residential but he obtained a change of user for his maisonette 3 to commercial. He stated that although the 2nd Defendant was not privy to the lease in respect of maisonette 3, the lease for maisonette 4 owned by the 2nd Defendant had similar terms as that of maisonette 3. The plaintiff stated that at the time he lodged a complaint against the 1st Defendant, the 2nd Defendant had not blocked the rear parking for the suit property. He denied that due to the nature of his business, he used to strain the parking. He admitted that he had not produced statements of accounts to show the income he was generating from his business.

In cross-examination by the 3rd Defendant's advocate, the plaintiff stated that the 3rd Defendant had approved the illegal structures that the 1st and 2nd Defendants had put up on the suit property in that it had refused to take action against them when a report of their activities was made to it. The plaintiff admitted that he had put up a shed on the parking area. He admitted that when putting up the said shed, he did not obtain approval from the 3rd Defendant.

In re-examination, the Plaintiff stated that the 1st and 2nd Defendants were also running businesses on the suit property with the 1st Defendant having shops on the parking area. He stated that the area that the 2nd Defendant had blocked with a gate was not the 2nd Defendant's garden but the rear parking for the suit property. The plaintiff stated that the shed that he had put up on the suit property was open for use by all the residents of the suit property. The Plaintiff stated that the 2nd Defendant had put up an illegal wall on the suit property after he had filed this suit.

The 1st Defendant's evidence:

In his evidence in chief, the 1st Defendant told the court that he owned maisonettes 1 and 2 on the suit property and that he was residing on maisonette 2 with his family. He stated that the Plaintiff and the 2nd Defendant were his neighbours. He stated that the Plaintiff owned maisonette 3 while the 2nd Defendant owned maisonette 4. He stated that he started the process of acquiring the two maisonettes in the year 2005 and completed the process in 2006 when he took possession of the same. He stated that when he was purchasing the maisonettes, he discovered that the land rent had not been paid for the suit property for several years. He stated that before the two maisonettes were transferred to him, the outstanding land rent had to be paid. He stated that the persons who sold the maisonettes to him paid only a portion of the land rent. He stated that since the maisonettes had a single mother title, the land rent for the suit property had to be cleared in full prior to the transfer of the maisonettes to him. He stated that at the time, the Plaintiff was already in occupation of the suit property. He stated that the owners of all the maisonettes paid their respective shares of the land rent for the suit property and the entire outstanding amount was cleared. The 1st Defendant stated that thereafter, it was agreed between him and the Plaintiff and the 2nd Defendant to have regular meetings to discuss the affairs of the suit property.

He stated that they had a meeting in the year 2007 to discuss how to manage the suit property which meeting was attended by all of them. At the meeting, it was agreed that the payment of the land rent for the suit property be made yearly based on each person's share in the suit property. It was agreed further that the payment was to be made to him because he had two(2) shares in the suit property. He stated that he was nominated to be the secretary of the meeting. The 1st Defendant stated that when they had this meeting, he had already constructed a gate and the lower perimeter wall while the 2nd Defendant had constructed the upper part of the perimeter wall neighbouring her house. He stated that all these were done without any contribution from the Plaintiff. He stated that at the said meeting it was agreed that for any development on the suit property, they would contribute equally depending on the shares held by each of them. He stated that they agreed to construct a guard house and a water meter box. He stated that the 2nd Defendant and he contributed towards these projects while the plaintiff did not do so. He stated that at the said meeting, the issue of parking was also discussed. He stated that when he was purchasing the two maisonettes, the understanding was that the lower parking was for maisonettes 1 and 2 and the upper parking for maisonettes 3 and 4. He stated that at the said meeting, it was agreed that the status quo be maintained and that if it was necessary to change the arrangement, they could have another meeting for that purpose.

The 1st Defendant stated that a problem arose when the Plaintiff converted his vehicles to hearses and started cleaning the vehicles at the parking. He stated that he took photos of the scene when the cleaning was being undertaken. He stated that at the time, he had rented out maisonette 1 and the tenants started complaining about the Plaintiff's activities. He stated that he wrote several letters to the 3rd Defendant complaining about the Plaintiff's activities aforesaid. He stated that the letters were written on 30th October, 2007, 22nd August, 2008, 17th September, 2008 and 23rd July, 2009.

The 1st Defendant stated that the 3rd Defendant in response to the said letters asked him to come up with a solution to the problem and that it was at that point that he requested the 3rd Defendant to allow him to construct the walls in question so that they could have independent compounds. He stated that the Plaintiff had started running a guest house in his maisonette. He stated that since the plaintiff's gate and his gate were next to each other, most of the times, the plaintiff's guests would come to his compound and enter his house. He stated that some of Plaintiff's guests were not of good behavior and that the Plaintiff's guest house raised security concerns. He stated that he had a duty to protect his children and that the 3rd Defendant allowed him to erect a wall around his compound and this brought to an end the many disputes that he had with the Plaintiff.

The 1st Defendant denied that he had blocked the Plaintiff's parking. He stated that when he was putting up the wall, he left the parking on the lower side of the suit property for visitors. He stated that he had mango trees on his compound and that the Plaintiff had hired thugs who entered the compound using a ladder and started cutting down the said mango trees. He stated that he found the thugs in his compound and called the police who arrested them. He stated that the incident which took place in July, 2011 was reported at Capitol Hill Police Station

and that he did not pursue the matter further.

The 1st Defendant stated that he did not have a problem with the 2nd Defendant. He stated that the 2nd Defendant and he had proposed that their differences with the plaintiff be resolved through arbitration. He stated that the 2nd Defendant and he appointed one arbitrator while the plaintiff appointed the other. He stated that they met with his arbitrator and subsequently with the plaintiff's arbitrator. He stated that the two arbitrators found the plaintiff to be on the wrong.

In cross-examination by the 3rd Defendant's advocate, the 1st Defendant stated that he had been authorized by the 3rd Defendant to erect a wall around his compound. He stated that he could not trace the letter of authorization that had been issued to him by the 3rd Defendant. The 1st Defendant admitted that it was illegal to construct a wall without a permit from the 3rd Defendant. In cross-examination by the Plaintiff's advocate, the 1st Defendant admitted that he had not produced any evidence of the authority that was allegedly given to him by the 3rd Defendant to construct the disputed wall. He stated that the security breach in his compound was reported to the Police and that he had taken photographs of the Plaintiffs' cars being cleaned in his compound. He admitted that he had constructed the disputed wall. He stated that the construction of the wall was approved by the 3rd Defendant and that the wall affected his compound only. The 1st Defendant admitted that the wall that he had put up was on the common parking area. He stated that the plaintiff, the 2nd Defendant and he, were the directors of Upper Hill Properties Limited, the head lessor who owns the suit property. He stated that as directors of the head lessor, they had approved the construction of the said wall. He stated that he did not have the minutes of the meeting at which the said approval was given. He stated that he was running a hospital business on maisonette 1 and that he had an approval to do so. The 1st Defendant admitted that he had received demand letters from the Plaintiff.

The 2nd Defendant's evidence:

The 2nd Defendant testified as follows. She was the owner of maisonette 4 which is situated on the suit property. She purchased the property in 2004. The Plaintiff is her neighbour. When she purchased the property, the previous owner had told her that they had agreed on parking arrangement. The agreement was that the lower side parking was reserved for maisonette 1 and 2. There was however one parking lot reserved for maisonette 3. The parking on the upper part where her maisonette is situated was reserved for her but there was also one parking lot for maisonette 3. She stated that there was a common gate at the entrance of the suit property. She stated that in the compound, the Plaintiff and the 1st Defendant had erected gates leading to their maisonettes non the drive way. She stated that at the end of the drive way is a perimeter wall for the suit property where the servant quarters are situated. She stated that the plaintiff had put up a shed next to the servant quarters and that the shed was put up on the parking lot that had been chosen by the plaintiff for his own use. She stated that the plaintiff was given the parking at this end of the compound and another parking on the lower side of the property. She stated that after the plaintiff had chosen the parking next to the servant quarters, she put ballast on the remainder of the parking area at her own cost. She stated that although the plaintiff had his parking he was still using the entire parking area to the disadvantage of her tenants. She stated that after the plaintiff had chosen one parking lot, the remaining parking area belonged to her.

The 2nd Defendant stated that when the plaintiff used to run a hearse business, people used to come to this parking area to view bodies and that there were seats put in the shed for that purpose. She denied that she had erected an illegal gate on the suit property. She stated that the said gate was at the entrance to her maisonette and that the same was not on the drive way. She stated that her maisonette is adjacent to the servant quarters and that she installed the gate complained of after the plaintiff and the 1st Defendant had installed their gates mentioned earlier. The 2nd Defendant stated that she installed the said gate because her tenants used to have vehicles parked on their walls. The 2nd Defendant stated that the Plaintiff did not serve her with a demand letter before she was joined in this suit. The 2nd Defendant denied any wrong doing. She urged the court to dismiss the Plaintiff's suit. The 2nd Defendant produce in evidence as exhibits several photographs.

In cross-examination by the 1st Defendant's advocate, the 2nd Defendant stated that each maisonette had been allocated parking and that the Plaintiff had chosen a parking lot. The 2nd Defendant stated further that the plaintiff used to run a hearse business and that during that period, the tenants on her maisonette used to complain. In cross-examination by the Plaintiff's advocate, the 2nd Defendant stated that when she purchased her maisonette in 2004, she found the plaintiff on the suit property and that the parking lots had been assigned to the maisonettes. She stated that there was a meeting to confirm the parking arrangement. She stated that she did not require any approval to put up a gate on her maisonette. She admitted that the servant quarters were to be shared equally. She stated that the fence and the gate that she had put up were not on the common area of the suit property. She also denied that one had to pass through her gate to reach the servant quarters. In re-examination, she stated that the Plaintiff and the 1st Defendants had access to the servant quarters. She denied blocking the servant quarters.

The submissions:

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed submissions and further submissions on 2nd March, 2017 and 20th September, 2017 respectively. The 1st Defendant filed his submissions on 12th June, 2017 while the 2nd Defendant filed her submissions on 9th June, 2017. The 3rd Defendant filed its submissions on 3rd May, 2017.

The issues for determination:

I have considered the pleadings and the evidence that was tendered by the parties. I have also considered the submissions of counsel and the various authorities that were cited in support thereof. The parties did not agree on the issues for determination by the court. From the pleadings and the evidence tendered by the parties, the following in my view are the issues that arise for determination in this suit:

1. Whether the 1 and 2nd Defendants unlawfully erected structures and barriers on the common areas of the suit property thereby denying the Plaintiff the right to access, use and enjoy the same?

2. Whether the 3rd defendant was negligent in the performance of its statutory duties owed to the Plaintiff in relation to the said acts by the 1st and 2nd Defendants?
3. Whether the Plaintiff suffered loss and damage as a result of the said acts by the defendants?
4. Whether the plaintiff is entitled to the reliefs sought in the amended plaint?

Analysis and determination of the issues arising:

The first issue:

It was not disputed that the maisonettes owned by the Plaintiff and the 1st and 2nd Defendants are situated on the suit property which is owned by Upper Hill Properties Limited (“the head lessor”). It was also not disputed that the Plaintiff and the 1st and 2nd Defendants hold individual leasehold interest in the said maisonettes from Upper Hill Properties Limited (“the headlessor”) for the unexpired term of 99 years with effect from 1st March, 1976 (less the last ten (10) days). It was also not disputed that the said maisonettes were let to the Plaintiff and the 1st and 2nd Defendants on similar terms which provided for among others the use and enjoyment of common areas. I have set out at the beginning of this judgment the excerpts from the lease for maisonette 3 owned by the Plaintiff. It was not disputed that under that lease, the Plaintiff was entitled to use in common with the 1st and 2nd Defendants the main drive way, the paths and other common areas forming part of the suit property save for the gardens adjacent to each of the maisonettes which were designated for the exclusive use by the owners of the said maisonettes.

The 1st Defendant did not deny that he erected a wall on the common area of the suit property that was being used by the residents of the suit property for parking. The 1st Defendant did not also deny that he has put up a wall along the drive way of the suit property. The wall is pronounced in the photographs that were produced in evidence by the Plaintiff as P.Exh. 8(i), (ii) and (iii) and by the 2nd Defendant as D. Exh. 4. The court also visited the site and saw the wall. The court took photographs during the visit which got lost when the cellphone that was used to take the photographs was stolen. I confirm however that the photographs that were put in evidence by the Plaintiff and the 2nd Defendant give a true picture of the structures on the suit property more particularly the disputed walls. The Plaintiff having demonstrated that the 1st Defendant had built a wall on the common area of the suit property, the onus was on the 1st Defendant to justify his action that infringed on the Plaintiff’s right to use the said common area for parking.

The 1st Defendant put forward several justifications for the said wall. In his evidence, the 1st Defendant contended that he had taken the step of putting up the said wall in response to the unwelcome guests that the Plaintiff used to attract to his maisonette that he had illegally converted to a guest house some of whom would miss their way and would knock on his door. The Plaintiff contended that since some of these guests were of questionable character, he had to take action to protect his family. This he did by putting up a perimeter wall around maisonettes 1 and 2. The 1st Defendant also claimed that the Plaintiff used to operate a hearse business and had the habit of cleaning his hearses in front of his maisonettes a practice that he and his tenants found offensive. The Plaintiff did not deny that he had converted his maisonette into a guest house. Although he claimed that he had obtained a change of user for the said maisonette that was let to him for residential use, no evidence of change of user was placed before the court. The Plaintiff did not also deny that he used to operate a hearse business. I have no doubt that by converting his maisonette 3 to a guest house, the Plaintiff was attracting unusually large crowd onto the suit property which may have put a strain on the parking space and also posed a security threat to the residents. It was not however open to the 1st Defendant to take the law into his own hands.

As I have mentioned earlier in this judgment, the suit property is owned by the headlessor. The leases under which the maisonettes on the suit property were let to the Plaintiff and the 1st and 2nd Defendants provided that the headlessor could come up with reasonable rules and regulations for the enjoyment of the common areas on the suit property. The Plaintiff and the 1st and 2nd Defendants are the directors of the headlessor. They could call for a meeting and pass a resolution on the use of parking and other common areas. I am of the opinion in the circumstances that the conduct of the Plaintiff did not justify the action that was taken by the 1st Defendant.

The 1st Defendant had also claimed that they had a meeting as directors of the headlessor at which they confirmed that the lower parking which is on the side where he erected a wall next to the gate was reserved for maisonettes 1 and 2 while the parking on the upper side of the suit property next to the servant quarters was reserved for maisonettes 3 and 4.

The 1st Defendant contended that in view of the agreement that was reached at that meeting, the wall that he had put up was in no way infringing on the Plaintiff’s right to use the lower parking that was reserved for the 1st Defendant’s two maisonettes. I am in agreement with the 1st Defendant that he could meet with the 1st and 2nd Defendants as directors of the headlessor and agree on the allocation of parking lots. The problem is that this meeting was denied by the Plaintiff and the 1st Defendant did not produce the minutes of the same. I am at a loss as to how the 1st Defendant who claimed to have been nominated as the secretary at the meeting could fail to take down the minutes of that important meeting. In the absence of the minutes of that meeting, I am in agreement with the Plaintiff that the alleged agreement to allocate parking lots was not proved.

The 1st Defendant had also alleged that the walls that he had put up on the suit property were approved by the 3rd Defendant. Again the 1st Defendant did place any evidence before the court regarding the alleged approval.

From the totality of the evidence before me, I am satisfied that the walls that the 1st Defendant had erected on the parking area on the lower side of the suit property next to the gate were unlawful and amounted to an infringement on the plaintiff’s right to enjoy the use of that common area. Since the wall was also put up without approval from the 3rd Defendant, the construction thereof was illegal. I will comment

later on the wall that was put up by the 1st Defendant on the drive way of the suit property.

With regard to the fence and the gate that was constructed by the 2nd Defendant, I am satisfied that the gate was put up illegally. I have not however found the fence illegal for reasons that I will give later. The 2nd Defendant justified the construction of the said fence and gate on the fact that the Plaintiff and the 1st Defendant had put up similar fences and gates. The 2nd defendant had also contended that the Plaintiff, the 1st Defendant and she had agreed on the allocation of the parking lots and as such she had not blocked the Plaintiff's parking or access to the servant quarters.

I have noted from the evidence before the court that the Plaintiff had also fenced the front portion of maisonette 3. The Plaintiff's fence extends to the drive way like the wall that had been put up by the 1st Defendant around Maisonette 2. The only difference between the Plaintiff's fence and the 1st Defendant's fence is that the 1st Defendant's fence consists of a concrete wall while the Plaintiff's fence consists of used iron sheets. The 2nd Defendant's fence on the other hand is made of barbed wire. At the trial and in their respective submissions, all the parties justified these fences which they claimed to have put up around the gardens that were reserved for the exclusive use of their respective maisonettes.

I have considered clause (1) at page 5 (pagination at the bottom of the page) and clause (xvii) at page 9 (pagination at the bottom of the page) of the lease for maisonette 3 that was produced in evidence as P.Exh.1. I have also looked at the site plan for the suit property that was produced in evidence as P.Exh. 9. I am in agreement with the Plaintiff and the 1st and 2nd Defendants that they each had a right to exclusive use of the gardens in front of their respective maisonettes. It also appears from clause (xvii) at page 9 of the lease aforesaid that the owners of the maisonettes had a right to fence the said gardens. What I noted when I visited the suit property were however extensions beyond the gardens to the drive way by all the parties. Since all the parties were in agreement that they had a right to the exclusive use of the gardens in front of their maisonettes and had all fenced the same, in the absence of clear evidence as to dimensions of each maisonette's garden, I am unable to say that the perimeter wall and the other fences around maisonettes 2, 3 and 4 are illegal.

What I have found to be illegal is the wall that the 1st Defendant had put up at the entrance of the suit property in front of maisonette 1 in the common area that was to be used for parking. I also find the 2nd Defendant's gate next to the servants quarters illegal. The area where the gate has been erected should be open. I am in agreement with the Plaintiff that the area does not form part of the 2nd Defendant's garden.

The second issue:

It is not in dispute that the 3rd Defendant has the mandate to enforce development and physical planning regulations. The evidence placed before the court shows that the 1st Defendant constructed the wall in dispute illegally without approval from the 3rd Defendant as required under the Physical Planning Act, Chapter 286 Laws of Kenya. The Plaintiff placed evidence before the court showing that he drew the attention of the 3rd Defendant to the fact that the 1st Defendant was putting up illegal structures on the suit property and called for action. It is not disputed that the 3rd Defendant failed to take any action against the 1st Defendant. I do not think that the installation of the gate by the 2nd Defendant required approval by the 3rd Defendant. I have noted that no complaint was made to the 3rd Defendant regarding the gate by the 2nd Defendant. I am in agreement with the Plaintiff that by its failure to stop the 1st Defendant from putting up illegal structures on the suit property, the 3rd Defendant neglected its statutory duty of controlling developments within its jurisdiction.

The third issue:

From the findings that I have reached above, I am satisfied that the Plaintiff is entitled to the declaratory and injunctive reliefs sought although not as prayed for. I am not satisfied that the Plaintiff is entitled to general damages for loss of business and mental anguish. The evidence before the court shows that the plaintiff was operating a guest house on the suit property illegally. The lease that was placed before the court shows that Maisonette 3 was reserved for residential use. The Plaintiff failed to show evidence of change of user of the premises from residential to business or business cum residential. I am in agreement with the Defendants that the Plaintiff cannot benefit from an illegality. Furthermore, the Plaintiff did not tender reliable evidence of the income he used to earn from the business on the basis of which his loss could be assessed. Again no evidence was placed before the court linking the Defendant's activities complained of to the collapse of the Plaintiff's business or alleged mental anguish. I wish to add also that from the evidence before me, the Plaintiff contributed to the situation that he found himself in.

Conclusion:

In conclusion, it is my finding that the Plaintiff has proved part of his case on a balance of probabilities against the Defendants. I therefore enter judgment for the Plaintiff against the Defendants on the following terms:

1. I declare that the 1st Defendant's acts of fencing and annexing the common area/parking that was meant to be used by all the owners of the four (4) maisonettes on the suit property, L.R No. 209/8737/1 were illegal.
2. I declare that the metal gate that has been erected by the 2nd Defendant on the suit property next to the servant quarters adjacent to maisonette 4 is illegal.
3. A permanent injunction is issued restraining the 1st and 2nd Defendants from interfering with the Plaintiff's access and use of the common areas on the suit property.
4. A mandatory injunction is issued compelling the 1st Defendant to pull down and demolish within 60 days from the date hereof the wall

that he has erected on the common area/parking of the suit property, L.R No. 209/8737/1 next to the main gate opposite maisonette 1.

5. A mandatory injunction is issued compelling the 2nd Defendant to remove within 60 days from the date hereof the metal gate that she has erected on the space between maisonette 4 and the servant quarters.

6. The orders issued herein shall not prevent the plaintiff and the 1st and 2nd Defendants from agreeing on how to manage the common areas/parking and other activities on the suit property in future.

7. Each party shall bear its own costs of the suit.

Delivered and Dated this 3rd day of May 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of

Mr. Kigerea for the Plaintiff

Ms. Wairimu holding brief for Mr. Nderitu for the 1st Defendant

Ms. Oloo holding brief for Mr. Macharia for the 2nd Defendant

No appearance for the 3rd Defendant

Catherine Court Assistant