



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 62 OF 2017

JOSEPH MUTUA ZAKAYO PLAINTIFF

-VERSUS-

THE COUNTY GOVT. OF MAKUENI.....1ST DEFENDANT

THE COUNTY SECRETARY

COUNTY GOVT. OF MAKUENI.....2ND DEFENDANT

THE MINISTER OF LANDS, MINING & PHYSICAL PLANNING

COUNTY GOVT. OF MAKUENI.....3RD DEFENDANT

THE CHIEF OFFICER, LANDS, MINING & PHYSICAL PLANNING

COUNTY GOVT. OF MAKUENI.....4TH DEFENDANT

THE DIRETOR, LANDS, MINING & PHYSICAL PLANNING

COUNTY GOVT. OF MAKUENI.....5TH DEFENDANT

THE MAKUENI COUNTY LAND REGISTRAR.....6TH DEFENDANT

THE CHIEF LAND REGISTRAR, NAIROBI.....7TH DEFENDANT

THE CHAIRMAN, NATIONAL LAND COMMISSION.....8TH DEFENDANT

NATHAN MAKENZLI.....9TH DEFENDANT

NELLY NDUKU MUTUA.....10TH DEFENDANT

JUDGMENT

1. Through an amended plaint dated 28th September, 2017, the Plaintiff prays for orders against the Defendants for;

a) A permanent injunction restraining the Defendants from trespassing, entering, encroaching, changing the ownership records at the Makueni County Registry or at Ardhi House, Nairobi and or in any way interfering with the Plaintiff's occupation, possession and ownership of all that property known as plot No. 290 Emali town.

b) That an order do issue as against the 1st -6th, 9th and 10th Defendants to compensate the Plaintiff for the loss and damage occasioned as a result of the demolished structure.

c) General damages for trespass, loss of profits and illegal demolition.

d) That an order do issue against the 6th ,7th and 8th Defendants injunctioning them from in any way interfering with the

already existing records at the lands ministry, Nairobi Ardhi House and Makueni County and that the Plaintiff be issued with title deed for plot No. 290 Emali town.

e) That the Defendants do pay the costs of the suit.

2. The Plaintiff's case is that despite being the legal owner of plot No. 290-Emali town (*hereinafter referred to as the plot*) and following all the procedures required prior to permanent construction work, the 1st-5th, 9th and 10th Defendants descended on the plot on diverse dates in June 2016 and completely demolished the structures under construction.
3. The Plaintiff averred that he lived on the plot as a tenant for 3 years and eventually purchased it from Alois Mwaiwa Muia while it was still unsurveyed.
4. He averred that in all his years of occupation and ownership, there was no claim from anyone but a few days before demolition, the 9th Defendant alleged that the plot belonged to his deceased brother, James. M. Makenzi. Further, the Plaintiff became aware, after filing the suit, that the 10th Defendant is now laying claim to the plot as the legal representative of her deceased husband, James. M. Makenzi.
5. It is also his averment that the demolished building was a rental property with projected income of not less than 30,000/= per month and he is claiming it from the 1st-6th, 9th and 10th, with effect from July, 2016 to date.
6. The 1st-6th Defendants filed their statement of defence on 06th May, 2016, denied all the averment in the plaint and called for strict proof.
7. Although I could not find the defence by the 7th and 8th Defendants on record, their submissions indicate that they filed a statement of defence on 21st September, 2016 and denied the claim. The Plaintiff has also acknowledged the defence in his submissions.
8. As for the 9th and 10th Defendants, no defence was ever filed and I have seen a letter by the Plaintiff's Counsel dated 04th November, 2019 requesting the Deputy Registrar (DR) to confirm whether there was such defence in the Court file. The DR responded in the negative through a letter dated 14th November, 2019. It therefore follows that the evidence by the two Defendants is not grounded on any pleadings. They remain mere witnesses notwithstanding the fact that they filed their submissions.
9. The suit proceeded for hearing on diverse dates between 04th December, 2018 and 16th October, 2019.
10. The **Plaintiff** adopted his statement dated 08th April, 2016 in which he stated that he resided on the plot as a tenant of Alois Mwaiwa Muia (PW3) for about 3 years and then bought it from him on 02nd May, 1998 for a sum of Kshs 400,000/=. He produced the sale agreement as **P.Exhibit 2**. He stated being aware that PW3 had purchased the plot from the widows of Samson Kilonzo Mutua sometime in 1995.
11. He produced a certificate of confirmation of ownership dated 19th August, 2015 (**P.Exhibit 1**) which he got after presenting his documents to the Director of Physical Planning and Lands, Makueni County. He also produced an allotment letter dated 05th June, 1998 [**P.Exhibit 3(a)**] which he said was given to him by the Commissioner of Lands after buying the plot. He produced a second allotment letter dated 10th April 2002 [**P.Exhibit 3(b)**] which he said was arrived at after a committee visited the ground to verify the plot owners. That the committee came up with minutes of 04th April, 2002 and this was followed by a full council meeting which confirmed that the plot was his.
12. He identified a receipt from the Commissioner of Lands dated 05th November, 2002 for Kshs. 10,230/= and said that he had been paying ground rates. He produced a bundle of receipts as P.Exhibit 4.
13. He presented architectural drawings for approval and they were approved by the Director of Physical Planning at the Makueni County Government as well as the department of Public Health. He produced a copy of building plans as P.Exhibit 5.
14. He produced the two enforcement notices as P.Exhibit 6 and instructed his lawyer to write a demand letter (P.Exhibit 8) as to why the second enforcement notice was issued. He later visited the lands office at Makueni County where the officer promised to visit the site and certify where the problem was. The officer did not visit on 23rd May, 2016 as promised but instead, the Plaintiff was informed by his foreman that there were people on the ground demolishing his structures. He produced photos of the demolition as P.Exhibit 9 and further testified that the damage was assessed at Kshs. 1,158,885/=. He produced the valuation report as P.Exhibit 7.
15. It was also his testimony that the structures were demolished by the 1st and 9th Defendants. The 9th Defendant, whom he saw only once at Emali, claimed that the plot was allocated to his deceased brother, James Makenzie. Further, he testified that he was putting up commercial shops which were to be completed in a week's time and the projected income was Kshs. 30,000/=.
16. On cross examination by Counsel for the 1st-6th Defendants, he said that it was clear from the agreement that the plot was unsurveyed. He could tell it was 290 because he was a tenant at some point. He agreed that there was nothing to show that the plot he bought was 290 and not any other. He had no title to the land but said that P.Exhibit 1 was a confirmation that the plot was his. He however agreed that P.Exhibit 1 was not written as certificate of ownership.
17. He said that he read the conditions on the allotment letter but did not make the necessary payment within the required period. He also did not accept the offer in writing. He agreed that the offer had lapsed by the time he paid the necessary fee. He accepted the condition of the offer in the 2nd allotment letter and paid the rates as a sign of acceptance but did not have any formal acceptance of the offer. He was not at Emali on the day of demolition and relied on what other people told him.

18. On cross examination by Counsel for the 6th and 7th Defendants, he said that he was not seeking any compensation from the 6th Defendant and agreed that the Chief Land Registrar and Land Registrar never issued him with an allotment letter. He also agreed that the documents he had mentioned did not exist at the Lands Ministry.
19. On cross examination by Counsel for the 9th and 10th Defendants, he agreed that the plot could not be identified from the agreement and was not aware if he shared a postal address with James Mackenzie. That Jackson Daudi wrote the letter for the County Director of Planning and he (Plaintiff) assumed that he had authority to sign the letter. The seller of the plot told him that the area was unsurveyed.
20. He did not know the person who was Commissioner of Lands then. The names of Nyamweya Mercy and I.A Machoke did not ring a bell in his mind. He agreed that upon being served with the enforcement notice, he went to the minister of lands but the procedure was to see the Director of Physical Planning. The Minister assured him verbally that there would be no demolition.
21. On re-examination, he said that he got the 1st allotment letter after producing the sale agreement. He was with PW3 and the information was recorded in a manual register. He did not pay immediately as he was looking for money and was also afraid of double allocation. The size of the plot had been indicated in the agreement. The information about demolition was from his foreman who is also a witness. He also said that he had fully complied with the conditions set out in the allotment letters.
22. Francis Mutua Musoma (PW1), is the Plaintiff's foreman and a dealer in hides and skins. He adopted his statement dated 15th December, 2017 in which he stated that on 23rd March, 2016, he was at the Plaintiff's construction site with the electrician, who was doing wiring to the premises when 15 men arrived with all manner of weapons and started demolishing the premises when while shouting that their boss's plot had been stolen and had been paid to demolish. They took about 30 to 45 minutes to bring down the building. He said that he went to the Police Station but was told that the owner should make the report personally. He called his boss who arrived later and reported the incident.
23. He did not personally see the 9th and 10th Defendant's but his (PW1's) workers told him that they had seen the 2 Defendants at a hotel opposite the said premises. The men who demolished also went to that hotel after finalizing their mission. The 9th Defendant had been claiming the plot and had even threatened him with death if he testified about the incident.
24. On cross examination by Counsel for the 1st and 6th Defendants, he said that he did not see the employees of the County Government at the scene on 23rd March, 2016.
25. On cross examination by Counsel for the 7th and 8th Defendants, he said that the people he saw did not talk to him when asked to identify themselves. He was only able to identify Mwaura and Kosovo but can pick out the rest if he sees them.
26. On cross examination by Counsel for the 9th and 10th Defendants, he said that he did not see the 9th Defendant on the material day but he threatened him once and demanded that he shuts up over the plot as it belonged to him.
27. Musau Kibungo (PW2) adopted his statement dated 15th November, 2017 in which he stated that he was a witness to the sale agreement between the Plaintiff and PW3 for plot No 290 Emali. He was also a witness when PW3 bought the plot from the widows of the late Samson Mutua Kilonzo. The deceased was his good friend and had acquired the plot from the then Machakos County Council under the supervision of the then Councillor, the late Peter Matee Nganga.
28. He also stated that the late Samson Mutua Kilonzo had contracted him to build some rental rooms where he (Samson) also lived with his two wives and children. In his oral testimony, he said that Kilonzo got the plot in 1967 and PW3 bought it from him in 1972.
29. On cross examination by Counsel for the 1st and 6th Defendants, he maintained that he was present when the Plaintiff bought the plot from PW3 but agreed that the agreement does not show the plot number. He also agreed that it was possible for the agreement to refer to another plot in Emali town. He reiterated that the plot was initially allocated to Samson Mutua Kilonzo by the then Machakos County Council but had no document to prove the allocation.
30. On cross examination by Counsel for the 9th and 10th, he said that the Plaintiff bought the plot for Kshs 400,000/=, that they visited the plot and he personally took the measurements. Previously, the Surveyors of the County Council would always hire him to build for them. He said that James Mackenzie and his wife Nduku were known to him as they hailed from the same area.
31. On re-examination, he said that during those days, plots were never assigned numbers but he knew it was the subject plot because Mutua Kilonzo had initially built on it after being allocated by the Machakos County Council.
32. **Alois Mwaiwa Muia** (PW3) adopted his statement dated 15th December, 2017 in which he stated that the Plaintiff was known to him by virtue of being his former tenant. He bought the plot from the widows of Samson Kilonzo Mutua for about Kshs.55,000/= sometimes in the mid 1990's. He Knew James Mackenzie and knew that he worked as an Under Secretary in one of the Ministries of the National Government.
33. It was within his knowledge that in the early 1990's, senior people in the Government got allotment letters for the plots in the said region without doing a ground search on whether there was actual occupation or not. It was his honest belief that due to James's position in the Government, he could have used his influence to acquire the allotment letter.
34. Further, he stated that James never laid a claim during his (PW3) occupation of the plot. In 1998, he sold the plot to the Plaintiff who had established a hides and skin business thereon. He said that he had a copy of the sale agreement (*P.Exhibit 2*) which was shown to him. It was

within his knowledge that at the time of sale, survey was yet to be done and it took place about a year or so later. It was also within his knowledge that the Plaintiff has never parted with actual occupation and possession.

35. It was also within his knowledge that the Plaintiff demolished some of the temporary structures which he (PW3) had constructed to pave way for permanent building but the permanent structures were demolished just before roofing, allegedly by the 1st Defendant in collusion with the 9th Defendant. To the best of his knowledge, the late James must have abandoned his claim when he found him in actual occupation and possession.

36. On cross examination by Counsel for the 1st and 6th Defendants, he agreed that the sale agreement does not mention the plot number but denied the possibility of another plot with the same number in Emali town.

37. On cross examination by Counsel for the 7th and 8th Defendants, he said that when he bought the plot from the widows of the late Samson, they did not give him any document apart from the structures on the plot. He also did not hand over documents to the Plaintiff when he sold it to him. He was aware that someone else was claiming ownership and had seen the documents filed by the Plaintiff. The plot was unsurveyed and he was aware that the land in question was owned by the Government. He helped the Plaintiff to acquire a letter of allotment. He said that they got P.Exhibit 3(a) from the Commissioner of Lands but agreed that his name could not be found at the Commissioner of Lands.

38. On cross examination by Counsel for the 9th and 10th Defendants, he said that he had acquired the necessary experience and they measured the plot with a tape measure to ensure that it was 40 by 80 ft. With regards to his sentiments on land grabbing, he said that he lodged his complaint with the County Council and could produce documents if given a chance. He could not remember who the Commissioner of Lands was when he assisted the Plaintiff to acquire the plot.

39. On re-examination, he said that the widows of the late Samson were introduced to him by his brother in law before he bought the plot. The plot did not have any document of title from the Government and he accompanied the Plaintiff to Ardhi house to acquire documents of ownership.

40. **Peter Musyoki Muia** (PW4) requested Court to look at his affidavit sworn on 24th June, 2016 where he deposed that the Plaintiff and 9th Defendant were known to him and that he had car wash business adjacent to the Plaintiff's plot No. 290, Emali town. He deposed that the 9th Defendant was his customer and he had washed his car on several occasions. He deposed that on 17th June, 2016, he saw the 9th Defendant in the company of 10 persons coming out of Kindumall Restaurant which is directly opposite his car wash business. They crossed the road and started to demolish the structures on the Plaintiff's premises with crude weapons.

41. The people that he saw were shouting and making a lot of noise while saying that the Plaintiff had filed a case which he failed to prosecute and were therefore on the premises to complete the demolition since the Plaintiff had been defeated in that case. He pointed out the 9th Defendant stood close by and supervised them on the parts to demolish. They left after about 15 minutes and congregated at the same hotel. After their departure, he approached the Plaintiff's watchman who said that he had already alerted his boss.

42. On cross-examination by Counsel for the 1st and 6th Defendants, he said that the car wash business was on plot No 271 and he got the information from the plot owner who also told him that the adjacent plot was 290. He was at work when the demolition took place but did not see vehicles or officers belonging to the County Government.

43. On cross examination by Counsel for the 9th and 10th Defendants, he said that he knew the 9th Defendant and saw him on that day. That he used to wash his car which was Wish by make and registration No. KCC 789 but could not remember the last letter.

44. The Plaintiff's case was closed upon which Mr. Nzioka for the 1st to the 6th Defendants indicated that his only witness, Jackson Daudi was still at Emali. Ms. Nyawira for the 7th and 8th Defendants indicated that they would not be calling any witnesses. Since there was no objection, the Court proceeded with the 9th and 10th Defendants' case.

45. Nelly Ndiku Mutua (10th Defendant) is the wife of the late James Mackenzie. She adopted her statement dated 30th April, 2018 in which she stated that plot No. 290 Emali was allotted to her and her deceased husband *vide* a letter of allotment dated 22nd June, 1995. She produced the letter of allotment dated 22nd June, 1995 as D.Exhibit-1. The grant was for 99 years running from 22/06/1995 with an annual rent of Kshs. 800.00/=. She didn't bother with the plot until her husband's demise in 2004 although she knew it's physical location.

46. Upon discovering the Plaintiff's presence on the plot, she referred the matter to the Ministry of Lands-Makueni and was issued with an enforcement notice dated 17th August, 2015 which she produced as D.Exhibit-2. Further, she stated that she had complied with the letter of offer and had a fees receipt for title registration dated 09th September, 2015 which she produced as D.Exhibit-3. She sought to produce a letter dated 09th September, 2015 being a confirmation of plot ownership but an objection was raised and sustained. The letter was marked D.MFI-4.

47. She stated that in 2005 or thereabout, the Plaintiff went to the plot and built a hides shed. He said that PW3 had sold the plot to him. According to her, PW3 used to be councilor and therefore had connections at the County Council Government. In 2013, she was issued with a rate clearance certificate confirming that all the rates due to the County Government had been paid upto that time. She produced 5 receipts as D.Exhibits 5(a)-(f).

48. She produced a document titled 'BILL' as D.Exhibit-6 and said that it was issued by the County Government showing the rates and premiums that she was supposed to pay. She cleared in 2015 and sought to get a title deed. By this time, the Plaintiff had started building on

the land but was stopped by an enforcement notice dated 17th August, 2015. The Plaintiff defied the notice and as a result, her brother in law (9th Defendant) and some other people from the County Government demolished the structure.

49. She produced her husband's death certificate as D.Exhibit-7, a rate clearance certificate dated 12th May, 2005 as D.Exhibit-8 and a grant of letters of administration as D.Exhibit-9. She followed up with the County Government and Ministry of Lands to find out the status of the plot and was issued with the letter dated 26th August, 2015 which was marked as D.MFI-10.

50. On cross examination by Counsel for the Plaintiff, she said that she works as a civil servant at NSSF. She agreed that her late husband was also a civil servant working as the Director of Budget at the Ministry of Finance. She agreed that she only began to follow up on the plot after her husband's death. She did not have any documents that her husband had prior to 2005. She confirmed that in 2005, she found structures on the plot which she agreed was evidence of occupation by the Plaintiff.

51. She agreed that after finding the structures, she went to the council and was told that unless she paid, they could do nothing for her. She confirmed that between 2005 and 2015, there were 10 years of inaction. When referred to the 'Bill' (D.Exhibit-6), she agreed that she was trying to meet the conditions in the allotment letter (D.Exhibit-1). She agreed that the allotment letter gave her 30 days to pay Kshs.10,527/= but she paid the amount 15 years later. She also agreed that there was an indication in the allotment letter to the effect that the Government would not accept liabilities in the event of prior commitments or otherwise.

52. When referred to P.Exhibit-4 dated 05th November, 2002, she argued that by the time she paid the money, it cannot be said that the plot was not available. She also agreed that the same County Government that issued the enforcement notice to the Plaintiff was the same one that issued a letter confirming the Plaintiff as the owner of the plot. She agreed having said that the County Government issued an enforcement notice because the Plaintiff's building plans were not approved. She however agreed that the building plans shown to her had been duly approved by the County Government.

53. She did not know whether the enforcement notice was erroneous and only saw the Plaintiff's building on the photos. She agreed that according to her statement, it was her brother in law and some County Government officials who demolished the building. She agreed that she has never resided on the plot.

54. On cross examination by Counsel for the 1st - 6th Defendants, she agreed that her late husband was issued with the letter of offer and was supposed to comply within 30 days but he did not. She used to visit the plot but could not access it. There was a mud structure constructed by the Plaintiff. She did not lodge any suit in Court between 2005 and 2015 but verbally complained to the County Council and County Government. She said that she was in Nairobi when the structure was demolished and could therefore not tell who demolished it.

55. On cross examination by Counsel for the 7th and 8th Defendants, she said that she was not aware as to whether her husband had applied for the plot to be allocated to him. She agreed that she wrote a letter to the Ministry of Lands and it prompted D.MFI-4 to be written. She had been paying rent and rates to the County Government of Makueni and was not aware that rent is supposed to be paid in Nairobi.

56. In re-examination, she said that she did not know the Plaintiff or why he was given a confirmation of ownership.

57. The 9th Defendant was Nathan M. Makenzi. He said that he was a civil servant with the Ministry of Education and adopted his statement dated 07th February, 2019 in which he stated that the 10th Defendant was his sister-in-law.

58. He recalled that sometime in the year 1997, his brother, James Makenzi, took him to his plot in Emali. The plots had been demarcated and an allotment letter had already been issued to the deceased. There were no constructions but only sheds. His brother who even had map of the area told him that the plots were from the Ministry of Lands and not local Government. According to him, the deceased had planned to construct a family home on the plot. After his demise, his sister-in-law started looking for documents pertaining to the deceased's estate which took some time and so the plot stayed idle.

59. Further, he stated that prior to devolution; the Chairman of the County Council of Makueni had powers to allot plots but not the ones whose records were with the Ministry of Lands. He also stated that he always passed through the site location on his way to work and at some point; he noticed that there was foundation which had been dug. He went to the County Government to confirm whether the site was the same one which had been allocated to his brother and that's how the two enforcement notices were written to the Plaintiff. Upon being issued with the second enforcement notice, the Plaintiff went to the site with police officers. He denied being present during the demolitions or supervising them.

60. On cross examination by Counsel for the Plaintiff, he said that the sheds which he saw in 1997 were not a sign of occupation. He did not agree that they were sheds for hides and skins. He agreed seeing the allotment letter given to his brother but denied any knowledge of whether his brother had complied with the terms. He was aware that in the year 2015, the Plaintiff was constructing on the ground and the sheds had been removed. Further, he stated that construction was at the foundation when demolition was carried out.

61. He agreed having stated that he accompanied the County Government officials and police to the site but said that he left the officials to do their work. He agreed that they started pursuing the plot in 2015, twenty years after the allotment letter was issued. He denied being involved in the demolition of the building that had been roofed.

62. Robert Simiyu testified on behalf of the 9th and 10th Defendants as DW2. He said that he was the Principal Lands Officer from the Ministry of Lands and Physical Planning, Ardhi House, Nairobi. He stated that DMFI-4 emanated from their office and produced it as D.Exhibit-4. Further, he said that he had worked with a colleague known as Kariuki for 8 years. He said that D.Exhibit-4 tallies with a letter of allotment issued to James Makenzie, Ref No.11306/vi dated 22nd June, 1995 which allocated unsurveyed BCR plot No. 290 Emali. He said

that the legal fees of Kshs.10,527/= was paid by James through receipt No. 4258578 and there were no other records concerning the plot in question in their custody. Further, he said that there was no evidence of allotment of the plot to the Plaintiff.

63. On cross examination by Counsel for the Plaintiff, he agreed that the payment for the plot by James was not made within 30 days period required by the Government. He was not aware that the Commissioner of Lands had allotted the same plot to the Plaintiff in 1998 after Mackenzie failed to comply. He agreed that the deceased paid kshs 3,860/= in 2015 yet the Government demanded kshs 10,527/=. According to their records, the plot has not been issued with a title deed and is currently under the Ministry of Lands. He was not aware that James Mackenzie never took up occupation of the land. From the records, the deceased fully complied by making payment to the Government.

64. On cross examination by Counsel for the 1st -6th Defendants, he confirmed that the offer had not lapsed by the time the deceased made payment in 2015 but according to the letter of offer, he did not comply.

65. In re-examination, he said that it is not possible for one to be allocated land and the Ministry has no record. A plot file is always opened once a plot is allotted.

66. Bii Kenneth Ng'eny testified on behalf of the 9th and 10th Defendants as DW3. He said that he was the Director in Charge of Land and Urban Planning in the County Government of Makeni. He stated that DMFI-10 originated from their office and produced it as D.Exhibit-10.

67. He said that the inventory of allocations from the Commissioner of Lands which had been registered by the defunct County Council of Makeni showed that the plot belongs to James Makenzi. He said that where an allottee does not comply with the conditions, a statement is issued for the allottee to forfeit the allocation in order to facilitate fresh allocation and in their case, it was not done.

68. He said that the records from the Commissioner of Lands are recorded manually but the County Government has put a digital system to capture the allocations. The plots that were allocated by the County Council of Makeni were uploaded in what they call 'Local Authority Integrated Financial System' for purposes of ascertaining mode of payment of dues to the County Government. He also talked of a Part Development Plan (PDP) which indicates where a particular plot is situated on the ground.

69. On cross examination by Counsel for the Plaintiff, he said that he started working for the County Government in 2014 and has been the Director since then. He said that D.Exhibit-10 was signed by the Surveyor on his behalf because he was not in the office when the letter was required. The information was from the manual register. He agreed that the County Council could re allocate the land if the original allottee failed to comply with the terms of allotment by the Commissioner of Lands. When referred to P. Exhibit-3(b), he said that on the face of it, it originates from Makeni County Council but did not have the record of allotment by the County Council in Court. From the manual record, the deceased complied with the terms of allotment and paid arrears from 2003-2004. The last receipt was paid in 2015. From their record, the deceased did not comply within 30 days and it's possible that that was the reason why the County Council allocated the plot to the Plaintiff. He confirmed that the Plaintiff paid within 30 days and that the receipts are from the Commissioner of Lands.

70. He agreed that the letter of confirmation (P.Exhibit-1) showing the Plaintiff as the owner originated from their office. He also agreed that the building plans (P.Exhibit-5) were approved by their office and he signed them. He confirmed that the necessary dues were paid up to 2016. He also agreed that there are double allocations from the Commissioner of Lands and County Council. He agreed being the one who issued the enforcement notices to the Plaintiff and that he had already approved the building plans at that time. He explained that the issue was the physical location of the plot. From the County Government records, the plot belonged to Joseph Zakayo.

71. On cross examination by Counsel for the 1st -6th Defendants, he said that upon receiving an allotment letter from an allottee, they write to the Commissioner of Lands for verification. He checked the register of records to confirm that the plot belonged to the deceased but did not check anywhere when the Plaintiff presented his document. They checked in the local financial management integrated system. The Plaintiff presented two letters of allotment, one from the Commissioner of Lands and the other from the County Government.

72. In re-examination, he said that if an allottee has not complied with the terms, the County Government could put a notice and re-allocate.

73. The 9th and 10th Defendants closed their case at that juncture.

74. Jackson Kyalo Daudi testified as DW1 on behalf of the 1st -6th Defendants. He adopted his statement dated 25th May, 2016 in which he stated that he is employed as a Planner by the County Government of Makeni. He previously worked for Makeni County Council. He enumerated his duties as;

- a) *Preparation of physical development plans for towns and markets within the jurisdiction of Makeni County.*
- b) *Vetting and approval of development applications submitted to the office for approval, change of user, extension of user, land subdivisions, building plans among others.*
- c) *Undertaking development control and enforcement through issuance of enforcement and compliance notices where the supervisor deems necessary.*
- d) *Any other duties assigned by the supervisor.*

75. He stated that on 18th August, 2015, the Plaintiff presented an allotment letter from the defunct County Council of Makeni and after checking the plot details from the computer database; he wrote a letter on the same day confirming that the Plaintiff was the owner of plot 290, Emali town. He did not check anywhere else to confirm ownership because allocations from the County Council were only in the

computer database. He sought to produce an extract from the database but it was opposed on the ground that being electronic evidence, there were rules of evidence giving the procedure of producing such documents.

76. In response, Mr. Nzioka for the 1st -6th Defendants argued that the witness checked the computer himself and then printed. He contended that a certificate would only be necessary if the document had been prepared by someone else. In sustaining the objection, the Court ruled that documents must conform to section 106B of the Evidence Act before it could be admitted in evidence. Mr. Nzioka elected to proceed without the document.

77. Further, DW1 stated that on 25th August, 2015, the late James Makenzi presented an allotment letter for the same plot issued by the Commissioner of Lands and after checking the manual register where such allocations were entered, he confirmed that the deceased was indicated as the owner. At that point, he realized that there was an ownership problem and the office wrote to the chairman of the National Land Commission (NLC) enquiring about the rightful owner. They are yet to receive a response from the latter.

78. Having previously worked for the County Council, he was aware that the manual register was used to enter only plots whose allotment was made by the Commissioner of Lands and the computer database was for plots whose allotment was made by the County or Town Council. He was also aware that the numbering system for the Commissioner's allotments and the Councils allotments were different. He said that in Emali alone, there were many cases of double allocations where both the Commissioner and Council allocated different numbers to a plot but on the ground, there were two parties laying claim to the same plot. He was however not aware of any plot where a similar number issued by both the Commissioner and the Council since the numbering system was different.

79. On cross examination by Counsel for the Plaintiff, he agreed being the author of D. Exhibit-1 which confirms that the Plaintiff is the owner of the plot. He was not familiar with the allotment letter shown to him (P. Exhibit-3a). He confirmed that P. Exhibit 3(b) originated from the County Council of Makueni. The Council deliberated on the plot *vide* committee minutes No. TIM/16/2002 and then there was a full Council minute No. 08/FC/2002 of 16th May, 2002. He confirmed that the Plaintiff has been paying rates as demanded by the County Government. The receipt dated 05th November, 2002 shows that the Plaintiff paid the amount demanded by the Commissioner of Lands.

80. The late Makenzi had not complied with the conditions from the Commissioner of Lands and from their records; the Plaintiff is the owner of the plot. He confirmed that the drawings (P.Exhibit-5) were approved by the County Council. The enforcement notice was issued on the basis of a complaint that another person owned the plot. They needed to ascertain ownership and were waiting for the Court to make a determination. He denied the involvement of the County Government in demolition of the plot.

81. On cross examination by Counsel for the 7th and 8th Defendants, he confirmed that he was still working at the County Government department of Lands an Urban Planning as a Physical Planner. He said that the purpose of issuing the enforcement notice was due to erection of structures on disputed plot without approval from the County Management Board. He agreed that the structures had been approved by the County Government on 21st April, 2015 but on 14th May, 2016, they alleged that there was no approval. He confirmed that the structures were approved.

82. On cross examination by Counsel for the 9th and 10th Defendants, he said that issuing a letter to the Plaintiff was within their mandate and that digitizing of the records issued by the County Council began before he was employed. He confirmed that he had authority to access the data base. He learnt that the Plaintiff had an allotment letter from the Commissioner of Lands which he never presented to him but only produced it when the enforcement notice was issued.

83. He said it was impossible for the Plaintiff to have an allotment letter from the Commissioner of Lands which was identical to that of the County Council. According to him, the issuing authorities should determine how the two numbers were given. He agreed that he had not produced the letter which they wrote to the National Land Commission. He explained that the reason for saying that the Plaintiff's allotment letter was genuine was because it was registered in the existing records as kept by the County Council.

84. In re-examination, he said that the deceased's letter had conditions to be fulfilled and premiums to be paid but the deceased did not pay the premiums.

85. The 1st to the 6th Defendants soon thereafter closed their case.

86. As earlier on observed elsewhere in this judgement, Ms. Nyawira for the 7th and 8th Defendants indicated that they would not call any witness.

87. At the end of the trial, all the parties were given 21 days each to file and serve their submissions. The matter was slated for highlighting on 02nd December, 2019 but full compliance was achieved on 19th December, 2019.

88. The Plaintiff identified the following as the issues for determination;

a) Whether the Plaintiff is the legal owner of plot No. 290 situate within Emali town Makueni County.

b) Whether the Plaintiff met all the legal procedures and approvals from the 1st -5th Defendants to put up a construction on plot 290 Emali town.

c) Whether the 1st -5th Defendants issued enforcement notices to the Plaintiff and the effect thereof.

d) Whether the Defendants illegally demolished the Plaintiff's permanent structures under construction on the disputed plot No. 290 Emali.

e) Whether the Plaintiff has suffered loss as a result of the illegal demolition and the extent thereof.

f) Whether the Plaintiff is entitled to compensation to the extent of the loss suffered.

g) Whether demand and notice to sue were duly issued.

h) Whether the Plaintiff is entitled to the prayers sought.

89. On the 1st issue, the Plaintiff submitted that the late James Makenzi did not comply with the terms and conditions within 30 days as stipulated and that he only paid part of the demanded amount in 2015, about 20 years after the offer had lapsed. He contends that at the date of allotment, the plot was not available for allocation as there was evidence of occupation by PW3.

90. He submitted that he was already in occupation of the plot when it was allotted to him in 1998 and that due to massive double allocations in the area, the defunct County Council of Makueni carried out a verification exercise of all the plots in the area in 2002 with a view of establishing the actual owners. That the committee involved in the verification exercise found him on the ground and approved his ownership. That he was then issued with an allotment letter with special conditions and he paid the total demanded amount of kshs 10,230/=. He submits that the defunct County Council of Makueni had authority to reallocate a plot where the initial allottee did not meet the terms of the offer.

91. It was also his submission that he has had uninterrupted occupation of the plot for more than 20 years and that the late Makenzi, 9th and 10th Defendants were aware of his occupation from as early as 1997 but did nothing about it. He contends that Equity aids the vigilant and not the indolent. He relied *inter alia* on the case of **Mbau Saw Mills Ltd –vs- Attorney General & 2 Others (2014) eKLR** where Ombwayo J expressed himself as follows;

“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the Plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the Plaintiff and therefore all transactions between the allottee and the Plaintiff were a nullity in law.”

92. On the 2nd and 3rd issues, the Plaintiff submitted that he exhibited approved architectural drawings and that the officers who testified for the County Government of Makueni confirmed that the drawings were duly approved

93. On the 4th, 5th and 6th issues, the Plaintiff submitted that the 10th Defendant, being the person claiming the ownership of the plot, is aware of the people who carried out the illegal demolition and any other deviating evidence by her is an afterthought.

94. He submitted that the demolition occurred due to the negligent handling of the dispute by the various organs in the Ministry of Lands, Makueni.

95. It was also his submission that he exhibited a valuation report to show the loss incurred and contends that he is also entitled to compensation to loss of rental income as well as general damages.

96. The 1st to 6th Defendants identified the following as the issues for determination;

a. Who between the Plaintiff and James Makenzi is the legal owner of plot No. 290 at Emali town?

b. Who demolished the structures on plot No. 290 at Emali town?

c. Whether the Plaintiff's suit offends the provisions in section 13 and 16 of the Government Proceedings Act.

97. On the 1st issue, they submitted that the suit premises have no title deed and that the two allotment letters issued to the Plaintiff do not confer proprietary interest. Further, they submitted that by the time James Makenzi purported to comply with the terms of allotment, the offer had lapsed. Accordingly, it is their submission that the claim by Makenzi's representative is statutorily time barred and bad in law. They relied *inter alia* on the case of **Bubaki Investment Co. Ltd –vs- National Land Commission & 2 Others (2015) eKLR** where the Court held that;

“Having held that the petitioner did not comply with the terms and conditions of the letter of allotment, it follows that the petitioner could not and did not acquire any proprietary interest in the suit property notwithstanding the payment it made. The offer extended

through the letter of allotment having lapsed by effluxion of time, there was no offer to accept at the time the petitioner made the payment. The petitioner ought to have sought and obtained a renewal of the offer and/or extension of the period within which to accept the offer.”

98. On the 2nd issue, they submitted that their officials were not involved at all as per the evidence of all the witnesses and that there was a confirmation from the Plaintiff that the County Government had halted the process.

99. They submitted that the County Government had no interest on who the ultimate owner would be and did not side with any party. That when the dispute on ownership erupted, the notices were suspended to pave way for dispute resolution. They submitted that the dispute was not resolved as anticipated by the 9th and 10th Defendants and their agents demolished the buildings on the suit land.

100. On the 3rd issue, they submitted that the Plaintiff did not issue a statutory notice to the County Government of Makeni contrary to the provisions of the Government Proceedings Act. They relied on **Hudson Laise Walumbwa –vs- Attorney General HCCC No. 2714 of 1987** where Ringera J stated as follows;

“Section 3 of the Government Proceedings Act is clear, mandatory terms do not permit any excuses or exceptions. It’s plain meaning, to my mind, that no proceedings against the Government, under the Government Proceedings Act can be instituted before the Statutory Notice has been given and expired. The dictionary meaning of the word lie in this context is, according to the Concise Oxford Dictionary, 8th edition, ‘be admissible or sustainable.’

A suit which does not lie cannot be tried by a Court of law. This section (S.13) is not in the nature of statutory period of limitation which must be pleaded and which could be waived by the Defendant expressly or by conduct. It is in the nature of a substantive peremptory bar to institution and the trial of a suit filed in disregard of its requirements. The Attorney General cannot waive it. Neither can the Court. And it matters not why it was not complied with. As a part of substantive law, the Defendant may or may not plead it.”

101. It is also their submission that an injunction cannot lie against the Government and the County Government is part of the Government of Kenya. Further, they submitted that the doctrines of Equity cannot override provisions of Statute.

102. The 7th and 8th Defendants in their submissions identified the following as the issues for determination;

a. Whether there is any claim against the 7th and 8th Defendants.

b. Whether the Plaintiff should be awarded costs of the suit.

103. On the 1st issue, they submitted that the Plaintiff has only raised issue with them because of the allotment letter that is purported to have been issued by the Commissioner of Lands. They submitted that from the evidence produced, the suit property is unregistered. They went on to submit that the allocation of public land begins with allocation of a plot and ends with the Land Registrar issuing a title documents.

104. They submitted that once an allotment letter is issued, the allottee accepts the offer by complying with the conditions set out therein which includes, making the necessary payments within the stipulated time. This is followed by the process of issuance of the lease which includes; survey and preparation of the cadastral map, preparation of the lease document, forwarding of the executed lease document and cadastral map to the chief Land Registrar for registration and issuance of lease to the proprietor.

105. They submitted that the suit property has not crystallized to the registration stage and as such, the 7th Defendant is not a proper party to the suit. They relied *inter alia* on **Nairobi Civil Appeal no. 71 of 1997(UR)** where the Court stated that;

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.”

106. They submitted that the Plaintiff himself confirmed that he did not have a claim for compensation against the 7th Defendant. Further, they submit that from the evidence on record, the County Government of Makeni is the allocating authority and is best suited to ascertain who the genuine owner is.

107. On the 2nd issue, they submitted that the Plaintiff did not produce any notice of intention to sue the Government and is therefore not entitled to costs of the suit. They relied on; **Kenya Bus Service Ltd & Anor –vs- Minister for Transport & 2 others [2012] eKLR** where the Court stated;

“38. The provisions for demanding prior notice before suing the government is justified on the basis that the Government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example Order 3 Rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.”

108. In their submissions, the 9th to 10th Defendants decided to give sole importance to the issue of ownership of plot No 290 Emali. They submitted that all the other issues are subordinate thereto and derive importance there from.

109. They submitted that the sale agreement produced by the Plaintiff does not identify the plot that was being sold and that the widows who allegedly sold the land to PW3 were never called as witnesses despite being alive and compellable witnesses.

110. They submitted that the 10th Defendant learnt about the occupation of the suit premises in 2008 and immediately took up the issue with the County Government but was told to finish paying the rates before any action could be taken.

111. They submitted that the Plaintiff did not feature in the manual records of the County Government and any payments which he made towards the suit premises should be treated as suspicious.

112. It is also their submission that the Plaintiff did not satisfy the conditions of his allotment letter so as to validate his claim before the Court.

113. They also submitted that the allotment letter issued to James Makenzi was valid and that his estate complied with the conditions. Their overall submission is that the Plaintiff did not discharge his legal burden of proving that he is the owner of plot 290, Emali.

114. Having looked at the pleadings, evidence on record and rival submissions, it is my considered view that the following issues arise for determination;

a) Whether the Plaintiff's failure to issue a Statutory Notice to the County Government of Makenzi is fatal.

b) Whether the plot claimed by the Plaintiff is plot No. 290- Emali.

c) Who is the legal owner of plot No. 290-Emali?

d) Who is responsible for demolition of the structures on plot No. 290-Emali?

e) Which orders should the Court issue?

115. Section 13A(1) of the Government Proceedings Act (GPA) is couched in mandatory terms and requires a 30 days notice to precede any suit against the Government. County Governments are constitutionally recognized as levels of Government hence making the section applicable to them. The Plaintiff did not exhibit anything to demonstrate compliance with the section if at all he did.

116. The **Walumbwa case (supra)** which the County Government relied on was decided more than 30 years ago and is obviously very rigid. Emerging jurisprudence frowns upon unnecessary roadblocks in the quest for justice. I agree with the sentiments of Majanja J. in the **Kenya Bus case (supra)** where he stated that;

"37. By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism."

117. Accordingly, the non compliance is not fatal and in line with the submissions of the 7th and 8th Defendants, the appropriate remedy is to deny costs to a successful litigant and not to curtail access to justice.

118. On Whether the plot claimed by the Plaintiff is plot No. 290, Emali, the agreement produced by the Plaintiff (P.Exhibit-2) does not identify the plot which was being sold but refers to it as '*..the isolated plot situated at emali town measuring 40 x 80..*'

119. The documents produced by the 9th and 10th Defendants as well as those produced by the Plaintiff refer to plot No. 290 Emali and the evidence shows that they were issued by Government authorities. DW1 and 3 were officers from the County Government of Makenzi (*herein after 'the County Government'*) and they both agreed that there was an ownership problem between the Plaintiff and the late Makenzi with regard to plot 290 Emali.

120. The Plaintiff testified that when he bought the plot, he was aware that the area was unsurveyed but he could tell it was plot 290 because he was a tenant at some point. The plot seller, PW3, said that they measured the plot and ensured it was 40 x 80.

121. From the evidence adduced, I have no doubt that the plot claimed by the Plaintiff is plot No. 290, Emali.

122. On the issue of who is the legal owner of plot No. 290-Emali, the Plaintiff had two allotment letters; one from the Commissioner of Lands and another one from the County Government while Makenzi's widow (10th Defendant) had one allotment letter from the Commissioner of Lands. All the allotment letters had special conditions requiring acceptance in writing and payment of specified amounts within 30 days. The conditions went on to specify that the offer would lapse if compliance was not achieved within the stipulated time.

123. The first allotment letter (P.Exhibit-3a) was issued to the Plaintiff in 1998 and in his evidence; he agreed that he did not comply with the conditions therein. According to him, he got the letter after producing the sale agreement was in the company of PW3 and the information was recorded in the manual register. PW3 confirmed that he helped the Plaintiff to acquire the allotment letter.

124. The 2nd allotment letter (P.Exhibit-3b) is dated 10th April, 2002 and the receipt for kshs 10,230/= is dated 05th November, 2002. Evidently, the payment was not made within 30 days and the Plaintiff agreed that he did not accept the offer formally.

125. As for the late Makenzi, his allotment letter was issued on 22nd June, 1995 and contained a demand of Kshs.10,527/=. D.Exhibit-3 shows that his widow paid Kshs.3,860/= in 2015 and DW2 confirmed it to be the only amount paid. According to DW3, it is possible that the County Council allocated the plot to the Plaintiff after the deceased's failure to comply.

126. It is therefore evident that none of the parties is 'clean' so far as compliance with the conditions is concerned but there is additional evidence which will break the stalemate.

127. P.Exhibit-1 is dated 18th August, 2015 and confirms that according to the County Government records, the Plaintiff is the owner of plot 290. On the other hand, D.Exhibit-10 is dated 26th August, 2015 and confirms that according to the County Government records, plot 290 is registered in the name of James M. Makenzi.

128. According to the Director in Charge of Land and Urban Planning in the County Government, DW3, records from the Commissioner of Lands are recorded manually but the County Government has put a digital system to capture the allocations. It was his further evidence that the information on Makenzi's confirmation was from the manual register. I find it strange that an allocation made in 1998 was yet to be captured on the digital system 17 years later if at all it mattered! Otherwise, what would justify the manual retrieval of information when the easier option was a click away?

129. On the other hand, DW1, the planner from the County Government testified that the Plaintiff's confirmation was informed by details from the computer database and that he did not check anywhere else to confirm ownership because allocations from the County Council were only in the computer database. In my view, this lends credence to the Plaintiff's version that his second allotment letter was preceded by verification of plot ownership by a committee which visited the site and subsequent confirmation of ownership by the full council. The fact of the committee visit and full council meeting was corroborated by DW1.

130. From the totality of the evidence, I am convinced that after the lapse of the offer to Makenzi due to non compliance, the plot was re allocated to the Plaintiff and even though he did not comply immediately, the lapse of his offer was waived by the County Government's conduct when it accepted the demanded payment on 05th November, 2002. DW3 confirmed that the County Council could re allocate land if the original allottee failed to comply with the terms of allotment. In **Banning –vs- Wright (1972) 2 ALL, ER 987 at Pg 998** the Court acknowledged that waiver can be express or by conduct. It stated as follows;

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to stipulation in a contract or over statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes, a person's actions can be interpreted as a waiver – waiver by conduct”

131. It is common knowledge that the operations of the defunct County Councils were inherited by the County Governments and that explains why the Plaintiff's details were in the County Government's database in 2015. Further, the office of the Hon. Attorney General, through the State Counsel who represented the 7th and 8th Defendants agreed that the County Government is the allocating authority and is best suited to ascertain who the genuine owner is. In my view, the ownership crisis is a creation of some elements in the County Government and there was really no need of the hullabaloo that ensued.

132. Away from the allotment letters, evidence shows that the Plaintiff's occupation of the plot was uninterrupted until he started construction of the permanent structures in 2015. In my view, his testimony of how he acquired the plot is credible. The seller, PW3, confirmed the sale and PW2 confirmed that he was a witness to the sale. Further, PW3 testified that he acquired the plot in the 1990's and confirmed that during his occupation, the late Makenzi never laid claim to the plot. There was no evidence that he ever laid claim before his death in 2004. In my view, it is probable that the only consideration for the allocation was the fact that Makenzi was a senior Government official.

133. As for Makenzi's widow, her evidence was that she knew the physical location of the plot but did not bother with it until his demise. Despite Makenzi's death in 2004, real action on her part was in 2015 when she attempted to comply with the conditions in the deceased's allotment letter and even then, she only made a part payment of kshs 3,860/= in 2015 yet the Government demanded kshs 10,527/=. Her brother in law (9th Defendant) confirmed that they started pursuing the plot in 2015-a classic example of too little too late. In my view, disturbing the *status quo* after so many years of indolence is simply inequitable.

134. From the totality of the evidence, it is my considered view that on a balance of probability, the Plaintiff is the legal owner of plot No. 290 Emali.

135. On who is responsible for demolition of the structures on plot No. 290-Emali, PW4 was an eye witness to the demolition and he testified that it was the 9th Defendant and 10 other people that brought down the structure. He said that the 9th Defendant and his gang left the Kindumall Restaurant, which is opposite his car was business, and proceeded to the site. It was also his evidence that the 9th Defendant was his customer hence personally known to him. His evidence was not shaken in cross examination.

136. His evidence was corroborated by the 9th Defendant's sister in law (10th Defendant) who agreed that the demolition was done by the 9th Defendant and some people from the County Government. Being an interested party and an in-law of the 9th Defendant, she must have been privy to his dealings with regard to the plot and I am convinced that her evidence is a true account of what took place. Her evidence should

be taken as it is and as correctly submitted by the Plaintiff, any deviation should be treated as an afterthought. The 9th Defendant's disassociation with the demolition was a mere denial.

137. Before putting up the structures, the Plaintiff had exercised great caution by seeking confirmation of ownership and going through the procedures to have his building plans approved. From the evidence of DW1, the County Government approved the Plaintiff's building plans but later on issued an enforcement notice on the basis that there was no approval. Apart from the participation by some county officials in the actual demolition, it is clear that the County Government handled the situation in a negligent manner and the enforcement notice was a catalyst.

138. Accordingly, the County Government (1st Defendant) the 9th and 10th Defendants are culpable for the demolition and should be held jointly and severally liable for the loss.

139. Regarding the orders that the court should issue, the Plaintiff testified that damage was assessed at Kshs. 1,158,885/= and produced a valuation report as P.Exhibit-7. Since there was no rebuttal in the form of an independent report, the Plaintiff is entitled to the amount.

140. He also claimed for loss of profits and testified that the demolished structures were commercial shops with a projected income of Kshs. 30,000/= per month. His foreman PW1 said that the electrician was wiring the premises at the time of demolition. The Plaintiff submitted that the construction would be complete in a week.

141. The demolition took place in March 2016 and the Plaintiff submitted that, taking all factors into consideration including the time it would take to get all units occupied, he would be having a steady rental income by end of 2016. In my view, the projection is reasonable and the loss of income should be calculated from January 2017 to April 2020. That makes it 40 months x 30,000 =1,200,000/=.

142. As for the general damages for trespass, I agree with the holding in **Park Towers Ltd –vs- John Mithamo Njika and 7 Others 2014 eKLR** where the Court stated as follows;

“...where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”

143. **Halsbury's Laws of England 4th Edition Volume 45 para 26, 1503** provides as follows on computation of damages in an action for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.*
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.*
- c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.*
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.*
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.*

144. It is therefore my considered view that general damages for trespass can still be awarded even where actual loss has been proved and provided for. I consider an award of 150,000/= to be fair in the circumstances.

145. The total award works out as follows;

Actual damage	1,158,885/=
Loss of rental income	1,200,000/=
General damages for trespass	<u>150,000/=</u>
Total	<u>2,508,885/=</u>

146. The upshot of the foregoing is that the Plaintiff's suit against the 2nd to the 8th Defendants is not proved to the required standard. It must therefore fail and in the circumstances, I hereby proceed to dismiss his suit against the aforementioned defendants with costs. As for the 1st, 9th and 10th Defendants, I am satisfied that the Plaintiff has on a balance of probabilities a cause of action against them. In the circumstances, I proceed to enter judgement for the Plaintiff and against the 1st, 9th and 10th Defendants jointly and severally as hereunder: -

(1) A permanent injunction is hereby issued restraining the Defendants from trespassing, entering, encroaching, changing the ownership records at the Makueni County Registry or at Ardhi House, Nairobi and or in any way interfering with the

Plaintiff's occupation, possession and ownership of all that property known as plot No. 290 Emali Town.

(2) An order is hereby issued against the 1st, 9th and 10th Defendants to compensate the Plaintiff for the loss and damage occasioned as a result of the demolished structure.

a) Kshs. 2,508,885/= being general damages for trespass, loss of profits and illegal demolition.

Signed, dated and delivered at Makueni via email this 28th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi