



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 37 OF 2016

TAIB INVESTMENTS LIMITED PLAINTIFF

VERSUS

FAHMI SALIM SAID..... 1ST DEFENDANT

TOOL HOUSE LIMITED2ND DEFENDANT

BUILD MY HOME LIMITED 3RD DEFENDANT

MUWA HOLDINGS LIMITED 4TH DEFENDANT

THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY....5TH DEFENDANT

THE COUNTY GOVERNMENT OF MOMBASA6TH DEFENDANT

JUDGMENT

(Plaintiff being owner of residential premises and complaining that the defendants have allowed the adjacent premises to be used as a factory without the requisite change of user approval or without an EIA licence; evidence showing that the premises is in a residential area and no change of user had been effected before the premises could be used for industrial purposes; EIA licence displayed by the defendants being one in respect of a different premises; argument that plaintiff has not demonstrated damage dismissed; any party at liberty to file suit to ensure that public authorities undertake their statutory functions of enforcement of developments; judgment entered for the plaintiff)

1. This suit was commenced through a plaint which was filed on 16 March 2016. The plaintiff is the registered proprietor of the land parcel Mombasa LR No. 5219/I/MN (the plaintiff's premises). It has pleaded that the 1st defendant is a tenant in occupation and the project proponent in the land parcel Mombasa LR No. 3242/I/MN (the suit premises). This property is adjacent to and shares a boundary with the plaintiff's property. It was pleaded that the 2nd defendant is also one of the parties illegally constructing an unlicensed structure on the suit premises. The plaintiff has pleaded that the 3rd defendant purports to be a limited liability company but a search in the companies registry has failed to provide any particulars of the 3rd defendant. The 4th defendant is the owner of the suit premises LR No. 3242/I/MN. The 5th defendant is the principal agency given mandate to oversee matters concerning the environment. The 6th defendant is the County Government of Mombasa.

2. The plaintiff has pleaded that on 27 July 2015, the 1st, 2nd, 3rd and 4th defendants illegally commenced the construction of a warehouse and/or commercial structure in the suit premises, using the plaintiff's perimeter structure as one of the main walls of the warehouse. This is pleaded to be a negation of the plaintiff's rights to its land and assets, and in contravention of Section 3 and 4 of the Trespass Act, Cap 294. It is further pleaded that the defendants have continued to alter the character of the suit premises, change the purpose for which it was designated, and continue to cause irreparable harm to the plaintiff and the neighbouring residents. It is contended that the structure being put up is for commercial purposes in an area strictly designated for residential purposes, and that the provisions of the Physical Planning Act have been contravened, inter alia that the requisite development permission from the County Government of Mombasa has not been obtained. It is further pleaded that the development is being put up without applying for development permission and without submitting the statutorily required Environmental Impact Assessment Report (EIA Report) to the 5th defendant (NEMA), in violation of Section 58 of the Environmental Management & Coordination Act, Cap 387, Laws of Kenya (EMCA). It is pleaded that no EIA was submitted for the suit premises, which is Plot No. 3242/I/MN, but instead, a fraudulent report was prepared for a different plot altogether identified as Plot No. 13452/I/MN. It is pleaded that the plaintiff complained of the structure to the County Government of Mombasa and to NEMA, and as a consequence, the 1st defendant moved to try to whitewash the project by belatedly applying for the necessary authorizations and approvals, and purported to submit an EIA report to the 5th defendant, which was in turn forwarded to the 6th defendant. It is pleaded that the 6th

defendant responded by inter alia pointing out that the project site is in a residential area and change of user is required which was not attached to the report, and further stating that there was no approval or title deed attached, and recommended that the project should not be licenced until all concerns raised are fully addressed.

3. It is pleaded that the 6th defendant failed to notice some other discrepancies, including that the summary of the EIA report showed that the proposer is the 1st defendant, and he proposed to carry extension on Plot No. 13425/I/MN yet the construction was actually taking place in the Plot No. 3242/I/MN; that the report shows that the project is a garage yet what is being put up is a factory or plant; that the report falsely stated that the project has received the requisite approvals, yet no approval for change of use or any development plans had been given; the EIA report falsely stated that interviews and consultation with the immediate neighbourhood had been done when in fact no neighbours had been interviewed and no questionnaire circulated; an attached questionnaire failed to identify who the immediate neighbours said to be consulted were and which properties they own; no physical inspection or photography of the premises was done contrary to what was stated in the EIA report; the report in addressing mitigating measures stated that it was a residential house being put up and not the garage that the report earlier referred to, nor the factory or plant that was actually being constructed; that it falsely stated that the project was in the Plot No. 13425/I/MN and not Plot No. 3242/I/MN; that part of the report under the heading "Environmental Screening" disclosed the premises as located in Malindi and not Mombasa; that under the heading "Baseline Conditions" the report falsely indicated the land as measuring 0.25 acres and not 0.5 acres; that the longitude and latitude in the report do not refer to the suit premises; that the report stated that the premises is owned by the 1st defendant, yet the rates payment statement shows that it is owned by Muwa Holdings Limited, the 4th defendant; that the report falsely states that the project is in character with its surroundings; that under the heading "Physical Feature and Natural Resources" the report falsely indicates that the project is four floors; that the report falsely states that the land is connected to the old Malindi Road; The Business Permit attached is one of Build My Home, the 3rd defendant, and not that of the 1st defendant.

4. The plaintiff has pleaded that NEMA responded to its queries stating that it is still processing its report and the plaintiff has thus pleaded that the project was undertaken without first NEMA issuing a licence. In essence the plaintiff pleads that the project in issue is illegal. The plaintiff has pleaded that the 5th and 6th defendants failed to uphold and/or enforce the law under its regulatory mandate and failed to ensure the plaintiff's right to a clean and healthy environment and peaceful enjoyment of its property. Fraud is pleaded against all the defendants. As a result, the plaintiff avers that it has lost its peaceful and quiet enjoyment of its land; its boundary wall is threatened with collapse; the houses on the plaintiff's side are now leaking whenever it rains; the plaintiff's privacy is interfered with as the project is in a low density area; that the project will cause substantial increase in noise pollution and traffic; that the project will increase insecurity; that the property will suffer devaluation.

5. The plaintiff has pleaded that it has suffered loss and has pleaded special damages in the sum of KShs. 213,700/= mainly being professional fees for various services related to the suit. In the suit, the plaintiff has asked for the following orders (some paraphrased for brevity) :-

- a. An interlocutory injunction restraining the 1st, 2nd, 3rd and 4th defendants from continuing with construction or development of the Plot No. 3242/I/MN or carrying out business or industry and or any commercial or other activity and or any activity thereon whatsoever until this suit is fully heard and determined.
- b. A permanent injunction restraining the 1st, 2nd, 3rd and 4th defendants from constructing or developing the Plot No. 3242/I/MN or carrying out business or industry and or any commercial or other activity and or any activity thereon whatsoever.
- c. The 1st, 2nd, 3rd and 4th defendants be compelled to demolish, deconstruct, disassemble and remove all the offending and or the structures illegally constructed on the suit premises and remove all additions and constructions based on and or constructed upon the plaintiff's boundary wall and or property.
- d. That all irregularly obtained EIA Licences and Change of User approvals and or any consents and authorisations issued or given by the 5th and 6th defendants be nullified, quashed, revoked and or expunged.
- e. That the 5th & 6th defendants be compelled to comply with the laid down laws, rules and regulations, and to notify the plaintiff in writing before any further application for or the grant of any change of user or approval of plans or any EIA licence in respect of the suit premises.
- f. Removal of all offending construction and the restoration of the damaged wall and roof of the plaintiff's property in the same condition as it was before the trespass by the defendants and commencement of the illegal construction.
- g. General damages to the plaintiff for trespassing on their boundary wall and interfering with the plaintiff's right to a safe and peaceful enjoyment of its property.
- h. Costs of the suit.
- i. Interest on all the above on a compounding basis at the rate of 24%.

6. The 1st and 3rd defendants filed a joint statement of defence. The 1st defendant pleaded that he is in occupation and control of the property known as Mombasa LR No. 3242/I/MN. The 3rd defendant is pleaded to be a company carrying out business in Mombasa. It is pleaded that they have a lease with the 4th defendant over the suit premises but that their tenancy has lapsed and the suit premises is no longer occupied or controlled by the 1st and 3rd defendants. They pleaded to be strangers to the other particulars of the plaint. They denied that there was any heavy duty cutting machinery or garage as alleged by the plaintiff, but an assembly of PVC windows, and that this was communicated by the 1st defendant on behalf of the 4th defendant, to the 5th defendant (NEMA) in the project report. They have pleaded that an EIA licence was

issued by NEMA after confirmation that the project had met the standards set out in EMCA. They contended that the plaintiff never lodged any complaint over the proposed project to NEMA. They otherwise pleaded that the prayers of the plaintiff have been overtaken by events since the 1st and 3rd defendants vacated the property and ceased carrying out activities on the suit premises as from 1 April 2017.

7. No Appearance was entered for the 2nd defendant.

8. The 4th defendant entered an appearance through M/s Gikandi & Company Advocates and later there was a notice of change of advocates filed by M/s Mwakisha & Company Advocates on 29 March 2016. I have not seen any defence filed by the 4th defendant.

9. The 5th defendant (NEMA) filed defence vide which it averred to be a stranger to the plaintiff's averments. It pleaded that it had not received an EIA project report for the plot No. 3242/I/MN for issuance of an EIA licence. It averred that it received an EIA project report from the 1st defendant but for the Plot No. 13425/I/MN Nyalı.

10. The 6th defendant is represented by M/s Kiprop & Company Advocates. No defence was however filed.

11. The evidence of the plaintiff was presented by Mr. Abdalla Ali Taib, the director of the plaintiff company. He had filed a witness statement which he relied on. He also relied on an affidavit sworn on 16 March 2016 as part of his evidence. In his statement, he has inter alia stated that the plaintiff owns the Plot No. 5219/I/MN and the plot adjacent to it is Plot No. 3242/I/MN. On 29 July 2015, while he was out of the country, he was called and informed that somebody was constructing on the boundary wall (separating the two premises), and that the person undertaking construction was the 1st defendant. Inquiries revealed that the suit premises was owned by the 4th defendant who had leased it to the 1st defendant, and that the 1st defendant owned the 2nd defendant company, Tool House Limited. He got the mobile number of the 1st defendant and he called him, asking him to stop the construction. He declined to do so, stating that the wall was not of the plaintiff, and because it sat between the two properties, it belonged to both and he was within his rights to build on it. He also declined to move his activities of window frame making on the grounds that he wanted his business near his residence in Nyalı.

12. Mr. Taib stated that he reported to the police who advised that this was a civil dispute. He thereafter reported the issue to NEMA, who informed him that they have no record of any application for approval, or any approval, that they have issued over the suit premises. NEMA eventually issued an order to stop the works on 13 August 2015 but the 1st defendant continued with his activities. He stated that what the 1st defendant proceeded to do was to now belatedly sanitise his activities. An advertisement for change of user was placed in the Standard Newspaper of 20 August 2015 seeking change of user from residential to commercial or industrial. He raised an objection with the 6th defendant (County Government of Mombasa) but no response was received yet the construction continued. On 16 October 2015, NEMA provided him with an EIA report. At around the same time, the 6th defendant wrote to NEMA recommending to NEMA not to issue a licence, for reasons inter alia that the project site was within a residential area and requires change of user, and that there was not attached a copy of the title document. He himself studied the documents and noticed that the EIA report did not indicate the suit premises but a Plot No. 13425/I/MN which is alien to the locality; that the EIA report indicated the project to be a garage and not a factory; that the report falsely indicated that approvals from the authorities had been given, which was not correct, since no change of user had been approved; that the report falsely indicated that interviews had been conducted with neighbours and questionnaires circulated; that the report indicated in part that what was being built was a residential house; that the report in other parts indicated that what was being built was a commercial building; that the Business Permit attached was for an entity called Build My Home (the 3rd defendant) and was also for the premises Plot No. 13425/I/MN and not the suit property; that the longitudes and latitudes provided in the EIA report related to property elsewhere and not in Nyalı; that the site owner was said to be the 1st defendant when it was actually owned by the 4th defendant. He continued to state that the 1st, 2nd, 3rd and 4th defendants proceeded to construct a warehouse or a commercial structure without having obtained any change of user or any approved building plans and without an EIA licence.

13. He stated that because of the construction on the wall, there is risk of the same collapsing because it is not a weight bearing wall. He stated that as a result the plaintiff has suffered loss which he quantified, that is, KShs. 6,600/= being service fees to obtain CR 12 forms from the Registrar of Companies; KShs. 7,100/= for service fees for searches in the Lands Registry; KShs. 100,000/= for preparing an investigation report; and KShs. 100,000/= for a Survey & Architectural report. He stated further that the plaintiff's premises have now been damaged and the activities complained of will affect the plaintiff's enjoyment of its property.

14. He testified that the suit premises was used as a factory for purposes of cutting and assembling aluminium windows (probably meant frames). He did state that there was a big shed in addition to a workshop, with part of the workshop being built against the plaintiff's boundary wall. He testified that he was involved in the construction of the original wall and it is not a load bearing wall. He stated that because of interference to the wall, it now suffers leakage and damage to his domestic servant quarters.

15. Cross-examined, he did maintain that there was no EIA report when the construction started. He pointed out that the EIA licence issued on 1 December 2015 was in the name of the 4th defendant and not the 1st defendant. He observed that the EIA licence was for construction and operation of a commercial premise for assembling PVC doors and windows. He said that the works that were going on involved the assembly of aluminium frames and that there was a lot of cutting, hammering and machine noise. The Plot number indicated in the documentation was 13425/I/MN yet the activities were on the Plot No. 3242/I/MN. He was not aware that the 1st and 3rd defendants had vacated the premises. He stated that though the 3rd defendant (Build My Home Limited) purports to be a company, it does not exist in the companies registry. He got this name from the Single Business Permit sent to him by NEMA when he requested to see the EIA licence. He stated that Tool House Limited (2nd defendant) is an enterprise of the 1st defendant and this is where he sold aluminium frames and windows. They got information from the owner of the property that it had been leased to the 1st defendant. He wrote to NEMA requesting for the EIA report and NEMA forwarded it to him. Subsequently NEMA did issue an EIA licence on 15 December 2015.

16. With the above evidence, the plaintiff closed its case.

17. The defendants closed their respective cases without calling any evidence. I did give a date for judgment, but I felt the need to visit the premises before I could render myself in this matter. The premises was visited on 4 August 2020. I observed that the suit premises is situated along 1st Avenue Nyali, which is predominantly low density. The premises of the plaintiff and the premises of the 4th defendant are separated by a wall. The plaintiff's witness pointed out to court the wall and its original height. He demonstrated that the height of the wall was increased. This was clearly visible as there was a brick coloured strip above which the wall was increased. There was thus an addition to the original height of the wall.

18. My further observation of the premise of the 4th defendant is that it measures about ½ acre or so. There is one house (residential) with a detached Servant Quarter. There is a metal gate. There is a concrete slab area at one corner of the plot adjacent to the wall. There were some loose window panes with louvers lying in the garage which looked old and abandoned. There was no visible activity on the plot. The plaintiff's premises is on a much bigger plot and its user is residential. Against the wall that separates the plaintiff's premise and the 4th defendant's premise, the plaintiff has built a strip of servant quarters, so that the boundary wall is the back for the servants quarters. The offending wall covers about 4/5th of the servants quarters area. There are four abutting properties along this wall. It was clear that the wall is only raised on the property of the 4th defendant as the height of the wall along the length of the other three abutting properties is standard.

19. Counsel (except counsel for the 6th defendant) did write written submissions and I have taken them into account in arriving at my decision. Mr. Taib, learned counsel for the plaintiff reviewed his client's case. He pointed out the several flaws in the EIA report which the plaintiff pleaded and gave evidence on. He submitted that no public participation was conducted before the EIA licence was issued. He further submitted that there was no change of user for the premises and no approval issued by the County Government of Mombasa.

20. Mr. Gikandi for the 1st & 3rd defendants, first submitted that this court has no jurisdiction. He submitted that under Section 38 of the Physical Planning Act, CAP 286 (repealed) it is the local authority with power to control developments, and since the 6th defendant did not act, this court cannot usurp its powers. Counsel also submitted that this court has no jurisdiction because there are alternative dispute resolution mechanisms in the Physical Planning Act and in EMCA. He thought that the plaintiff has not pointed out with precision what structure needs to be demolished. He submitted that the plaintiff has not adduced evidence of the old buildings and the additions thereof. He wondered why the plaintiff did not move to court immediately the structures were coming up. He submitted that no evidence was tendered to prove that the wall in issue would collapse and there was no proof adduced of the level of noise. He submitted that the court did not have jurisdiction to order a site visit. He submitted that the plaintiff did not produce the approved plan for the wall to show its authorized height. He thought that the plaintiff is an oversensitive neighbour who is irritated by the presence of neighbours. He submitted that no injury has been suffered by the plaintiff even assuming the defendants undertook the activities complained of. He submitted that for a common wall, no neighbour has superior rights to the other.

21. On the part of the 4th defendant, Mr. Mwakisha, learned counsel, inter alia submitted that the 4th defendant would only be liable if the perpetrator of the offending activity was an employee or agent of the 4th defendant, and that the 4th defendant cannot be liable solely for reason of being the owner of the premises. He submitted that a tenant is not in a position analogous to that of agent or servant. He submitted that the plaintiff has not proved nuisance and had no evidence on the levels of noise. He also submitted that this court has no jurisdiction as the plaintiff could have complained using the mechanisms provided in the Physical Planning Act, 1996 (repealed) and EMCA, that is to the Physical Planning Liaison Committee, and to the National Environment Tribunal. He also submitted that the plaintiff has not demonstrated the scope of what needs to be demolished.

22. For the 5th defendant, Mr. Ngara, learned counsel, inter alia submitted that NEMA has not issued an EIA licence for the suit premises but for the Plot No. 13425/I/MN. He submitted that an EIA licence issued for one plot cannot be used in another plot. He submitted that NEMA issued a stop order upon finding that the project was being undertaken without an EIA licence.

23. I have taken all the above into consideration and I now hold the following view.

24. There is no question that the plaintiff is the owner of the Plot No. 5219/I/MN. The 4th defendant on the other hand is the owner of the suit premises which is Plot No. 3242/I/MN. The two properties are adjacent to each other and are separated by a wall. What the plaintiff complains of is that the 1st, 2nd and 3rd defendants proceeded to develop on the suit premises, structures that have not been approved by the 6th defendant, and also proceeded to use the premises as a factory without the requisite EIA licence or change of user from the 6th respondent. The owner of the suit premises, that is the 4th defendant, has also been sued, and I believe it is principally because all these activities complained of were taking place within her land.

25. Before I go too far, I wish to address the issue of jurisdiction that has been raised by Mr. Mwakisha and Mr. Gikandi in their submissions. Counsel did submit that this court has no jurisdiction as the plaintiff ought to have pursued the complaint mechanisms provided for in the Physical Planning Act and in EMCA. The issue of jurisdiction was raised as a preliminary objection and was substantively argued before my brother Angote J who delivered a ruling on the same on 6 April 2016. He did hold that this court has jurisdiction. If any party was aggrieved by that decision, it was upon that party to pursue an appeal to the Court of Appeal. I am not aware of any that was filed and none of the parties told me that the issue was ever taken up on appeal. The issue of jurisdiction is thus spent and I need not address it here, for as I have said, that was substantively addressed in the ruling of 6 April 2016.

26. Mr. Gikandi in his submissions, did submit that what the plaintiff needed to file was a judicial review application to force the 6th defendant issue an enforcement notice. I do not agree. Judicial Review is only one form of procedure of commencing suits. Indeed, it is a limited procedure for prerogative orders. Nothing bars a person from filing an ordinary suit to enforce rights provided in statute. Mr. Gikandi further submitted that the court would be usurping the role of the County Government if it issued the orders. That argument is convoluted because if you extrapolate on it, it would mean that nobody can come to court, if an authority does not act. The very reason you have a court is to have a forum where among other things, public authorities can be directed to act, when they have failed to act as required by their mandate.

27. Going to the substance of the case, I think the plaintiff's complaints can be categorised into three, that is :-

- a. That there was activity in the suit premises which went contrary to the user of the premises when there was no change of user.
- b. That there was development in the suit premises which was not approved by the 6th defendant, as the planning authority.
- c. That the activities in the suit premises were conducted without an EIA licence.

I propose to address myself on these three points.

28. On the first issue, there is no contest that both the plaintiff's premises and the suit premises are in residential areas. Their user is residential. It means therefore that the premises are only to be used for residential purposes. I am of the view that if any person is of opinion that certain premises are not being used for the purposes intended, he is at liberty to file suit, so as to have public authorities enforce their mandate of ensuring that properties are used for their intended purpose. Such person does not need to demonstrate any direct injury for this would be a public interest litigation. It is certainly in the interests of the public that there be compliance with laid down planning and building regulations. There is a purpose as to why we have planning laws, the principal aim being to ensure that the health, safety, comfort and convenience of the public, is safeguarded. It would be a chaotic society if every person was allowed to develop any sort of structures or undertake any sort of activity irrespective of the location thereof. Chaos apart, there would be danger to the lives of people, for some activities that endanger life and health, could be taking place in their midst, without the requisite mitigation measures. That is why you have zoning, which is really a large plan in relation to towns, which sets apart certain areas for specific purposes, including industrial and residential. It is in the public interest that these be adhered to, and thus any member of the public, even if not directly affected has every right to approach court for redress. That is why I do not agree with Mr. Gikandi's submissions when he describes the plaintiff as an "oversensitive neighbour." The plaintiff is within his rights to enforce planning laws and regulations, and to me, it would matter not if he lived in Changamwe and the complained of activity is in Nyali, and it also would not matter that the plaintiff cannot demonstrate a direct injury. I am thus not too particular with whether or not the plaintiff has demonstrated an injury. What I am keen with, is whether there were activities being undertaken on the suit premises, which were unauthorised and unlicensed. That to me is what is important and I am of the view that the plaintiff has proved on a balance of probabilities that there were activities going on in the premises which were not suited for the user of the premises. I will reiterate that the user of the premises was residential. The activities being undertaken by the 1st, 2nd and/or 3rd defendants on the suit premises were industrial in nature.

29. In their statement of defence, the 1st and 3rd defendants averred that "*there were no heavy duty cutting machinery or a garage as alleged by the plaintiff but assembly of PVC windows.*" Clearly, the assembly of PVC windows, if we are to assume that this is indeed what was happening, is not a user that is residential. It is industrial, whichever way you want to look at it. I have no evidence that prior to these activities being commenced, there was a change of user of the premises from residential to industrial. I have seen that probably because of the complaints by the plaintiff, the 1st, 2nd, 3rd and/or 4th defendants proposed a change of user and placed a notice inviting any objections in the Standard Newspaper of 20 August 2015. I have looked at that advertisement; it notes that "*the owner of the Plot MN/I/3242 proposes to change user from residential to Commercial (Telecommunication Centre) subject to approval of the County Government of Mombasa.*" Plot MN/I/3242 is the suit premise. It will be observed that this proposed change of user was not from residential to industrial. The 1st, 2nd and/or 3rd defendants were certainly also not proposing to develop a telecommunication centre but intended to assemble PVC windows. Even assuming that one can say that the activities in the notice fell within those that the 1st, 2nd and 3rd defendants proposed to undertake, there is no evidence that any change of user was ever given by the 6th defendant.

30. The fact of the matter remains, that there was never any change of user for the suit premises from residential to industrial, commercial, or indeed any other activity. The activities that were being undertaken by the 1st, 2nd and/or 3rd defendants were thus illegal and the plaintiff was within its rights to enforce compliance with planning regulations.

31. The 6th defendant was informed of these activities but no enforcement notice was ever issued and indeed I have no evidence that they took any action to ensure that the activities of the 1st, 2nd and/or 3rd defendants stopped despite the complaint by the plaintiff. The 6th defendant was thus in breach of its public duty. It needed to issue an enforcement notice to the 1st, 2nd, 3rd and/or 4th defendant for the unauthorised activities to stop but it failed to do so despite being duly notified.

32. The other matter related to planning was whether the buildings that were constructed on the suit property were approved. The Physical Planning Act (CAP 286) (now repealed by the Physical and Land Use Planning Act, Act No. 13 of 2019) at Section 30 provided as follows :-

30. (1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under Section 33.

33. Section 31 of the same statute provided that a person needing a development permission required to make an application to the local authority. Section 33 provided for the manner of their approval. In our case, the defendants have not presented any application for development permission. Neither have they presented any approval for any development.

34. I am aware that there was question raised in the submissions of Mr. Gikandi and Mr. Mwakisha as to whether there was evidence of the development that is impugned. The evidence is there in both the oral/statement evidence and the exhibits of the plaintiff. I have no reason to doubt the oral and statement evidence that the plaintiff's witness adduced that there was development on the site and further that part of the development was to increase the height of the wall. Apart from this oral/statement evidence, the plaintiff also produced as exhibits, several photographs to demonstrate the developments. These specifically are exhibits 21, 22, 23 and 24. These photographs show a shed and the increased wall. All this is not denied by the defendants. I will take us back to the replying affidavit of the 1st defendant sworn on 24 March 2016. It also shows a shed which is roofed with blue iron sheets. It is the same structure in the plaintiff's exhibits. I therefore do not see what quarrel the 1st – 4th defendants have and I see no place in their argument that the developments complained of were never specifically

pointed out by the plaintiff. They are there, as clear as day. Of course when the court visited the site these developments were not there as they had been removed. The defence of the 1st & 3rd defendants is that they moved out of the site and this indeed seems to be true. What appears to be the leftover is the increased height of the wall. But it doesn't take away the fact that they undertook developments on the suit property which were not approved. At the time the plaintiff came to court, these developments were still there and thus the plaintiff had every right to come to court for redress. I have not forgotten the submissions of Mr. Gikandi that the court ought not to have visited the site. I will address those submissions. When a court is seized of a matter, the court may wish to visit the locus in quo in order to understand the dispute. It is not for purposes of gathering evidence for any of the parties. Courts indeed routinely visit sites and I know of no law that bars the court from visiting any site in dispute and indeed none was offered to me. Nothing arises from that argument.

35. Aside from the physical planning issue, the other question is whether there was issued an EIA licence for the project undertaken in the suit premises. The case of the plaintiff is that these activities were being undertaken without an EIA licence, and that the EIA licence which was later issued is a fraud. I have looked at the EIA licence which was availed. That EIA licence is dated 1 December 2015 and is issued in the name of Muwa Holdings Limited, the 4th defendant. The project in issue is "*construction and operation of a commercial premise for assembling of PVC doors and windows.*" The licence identifies the premises upon which the project is to be undertaken to be Plot No. 13425/1/MN. Clearly, the EIA licence does not identify itself with the suit premises, which is Plot No. 3242/1/MN. The EIA Project Report also identifies the location of the project to be Plot No. 13425/1/MN. So, can it really be said that the 1st – 4th defendants have displayed any EIA licence to undertake a project in the suit premises? The simple answer would be "no" and with that answer, it means that the 1st, 2nd, 3rd and 4th defendants had no EIA licence to operate the project that they undertook in the suit premises. It will be recalled that the 1st – 4th defendants do not deny that there were industrial activities on the suit premises. The activities are indeed very elaborate in the affidavit sworn by the 1st defendant on 24 March 2016. That affidavit has photographs of the activities on site. If you look at the affidavit and the photographs, you will see a shed with machinery, and materials littered all over. There are also finished window or door frames. This was certainly a project that was at full blast yet no EIA Project assessment and report had been done for the premises.

36. There was, in my view, a violation of Section 58 of EMCA which provides as follows :-

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

37. The defendants cannot argue that they have an EIA Project Report for the premises, for the simple reason that what is displayed is a project report for the site 13425/1/MN, which is not the suit property and it has been demonstrated that the coordinates given in that EIA Project Report are for the suit property. Indeed, the case of the 5th defendant is that it never issued any EIA licence for a project falling within the suit property. I agree that none was issued. The import is that the defendants allowed a project to be undertaken on the suit property without an EIA Project Report and without an EIA licence. Assuming that the EIA Project report was for the suit property, it wouldn't be a good report upon which a licence could be issued, firstly because it would have mis-described the plot number, and there are also very many discrepancies in the report, as pointed out by the plaintiff in her pleadings and also through her witness.

38. All this evidence of the plaintiff was never rebutted by the defendants as they never tendered any evidence of their own. It is therefore clear that the 1st – 4th defendants allowed a structure to be put up without any development permission, undertook activities on the suit property that were not related to the user of the suit property, and never had an EIA licence to undertake the project that is the subject matter of this case. Who then is culpable?

39. The 1st defendant did not deny that he was the one undertaking the developments and the project in issue. That is indeed admitted in the statement of defence of the 1st and 3rd defendant. I note that the enforcement notice from NEMA was addressed to Tool House Limited, the named 2nd defendant. I would assume that they went to the ground and the information received is that the project is being undertaken by Tool House Limited. It is therefore apparent that the project was being undertaken, either jointly and/or severally, by the 1st, 2nd and 3rd defendants. In his submissions, Mr. Mwakisha submitted that the 4th defendant is not the agent of the 1st, 2nd, and 3rd defendants. That may be so, but the 4th defendant is the owner of the premises, and as owner, the 4th defendant is bound by the conditions of use of the premises, so that it would be irregular for the 4th defendant to enter into a lease for use of the premises that would not be residential. That is exactly what the 4th defendant did. The 4th defendant was certainly aware of the activities of the 1st – 3rd defendants. She was thus aware that the 1st – 3rd defendants were going to undertake or were undertaking activities that were not within the confines of the user of the suit premises. The increase in the height of the wall was being done from her property and for the benefit of her tenant. She has not filed any defence in this case to excuse her actions. She thus cannot escape culpability. The 6th defendant had a duty to issue an enforcement notice to stop the construction of the sheds and the activities in issue since they were not authorised. The 6th defendant took no action despite being notified. No enforcement notice was ever issued. The 6th defendant called no evidence to demonstrate why it should not be found liable and I cannot excuse the 6th defendant from liability. The 6th defendant is therefore culpable. The 5th defendant's case is that it issued an enforcement notice. The 5th defendant however did not come to court to say why it did not go any further than that, despite its enforcement notice being ignored. If the 5th defendant finds someone undertaking an activity that causes or has potential to cause harm to the environment, is it good enough to simply issue an enforcement notice, then walk away and do nothing, even if the harmful activity goes on? If its enforcement notice is being ignored, and in order to protect the environment, wouldn't one expect NEMA to go further and try and see that its enforcement notice is complied with? Nothing stops NEMA from pursuing criminal or civil remedies or even reporting to the planning authority for them to also issue an enforcement notice. No explanation was offered in this instance as to why NEMA did not pursue the issue beyond the mere dropping of a compliance notice. It appears to me as if NEMA was just going through the paces but without any heart or real intention of ensuring that the impugned project was actually stopped. I do not see how NEMA can thus escape liability. They have a duty to the public to protect the environment and I am not persuaded that they discharged their duty to the public in the circumstances of this case. NEMA needs to take more seriously the complaints that are addressed to it.

40. It will be seen that I have found all defendants liable. I will now turn to the remedies that are appropriate in this case.

41. The first prayer (a) in the plaint is for an interlocutory injunction pending hearing of this suit. That is spent. Prayer (b) seeks orders in the nature of a permanent injunction. I will issue a permanent injunction stopping the 1st, 2nd, 3rd and 4th defendants and/or their successors in title and/or employees and agents, from undertaking constructions or developments on the Plot MN/I/3242 that violate the intended use of the premises which is residential without the requisite approvals from the relevant authorities and without following the due process laid by law. Prayer (c) seeks orders to compel the demolition of the offending structures. It does appear that all structures complained of, save for the wall, were pulled down. In relation to the wall, I issue an order for the 1st, 2nd, 3rd and 4th defendants jointly and/or severally, and after liaising with the plaintiff, and with the 6th defendant, to reinstate the wall in the manner that it was before it was raised. The costs of this exercise will be shouldered jointly and/or severally by the 1st, 2nd, 3rd and 4th defendants. Prayer (d) seeks the nullification of the EIA licence, but since it came out that the said EIA licence is not for the suit premises, I will say no more on it, save to order that the said EIA licence cannot be used to undertake any activity or any project within the land parcel Plot No. 3242/I/MN. Prayer (e) seeks orders to compel the 5th and 6th defendants to comply with the laid down laws and regulations and notify the plaintiff before any further application for change of user or plan approval or EIA is issued. I think all I can say is that the law provides for the procedure to be followed and I would only order that the 5th and 6th defendants ensure that due process and proper procedure is undertaken before making any approval or issuing any licence in respect of the suit property. Prayer (f) seeks removal of all offending structures and restoration of the damaged wall and roof on the plaintiff's premises. The offending structures were removed save for the increase in height of the wall, which I have already addressed in (c) above. Prayer (g) is for general damages. I am of the view that the plaintiff deserves to be compensated for there was indeed violation of its peaceful enjoyment of its property. There was opportunity for the defendants to address the concerns of the plaintiff but it does appear that they chose to ignore the plaintiff. It is always good to listen to a complaint being made by a neighbour and not ignore it and where possible make amends. I would commend the 1st – 4th defendants for ceasing their activities and removing most of the offending structures. I am still at a loss as to why they did not deem fit to deal with the wall. In fact, I am at a loss as to why this matter was allowed to proceed to full hearing. This, to me, was a perfect case for a settlement. That said, there must have been disturbance caused to the plaintiff, and its peace and quiet was interfered with, for the duration of time that the offending activities went on. I will award general damages in the sum of KShs. 500,000/= (Kenya Shilling Five Hundred Thousand) payable jointly and/or severally by all the defendants. In making this award, I have factored in the amends made by the 1st – 4th defendants in ceasing the impugned activities otherwise I would have made a much higher award. Although the plaintiff stated that it incurred some expenses, I have not seen any prayer for special damages and I will leave it at that. The only other issue is costs. The plaintiff deserves costs and is awarded costs jointly and/or severally against the defendants. All this will attract interest at court rates and not the proposed 24% compound rate.

42. Judgment accordingly.

DATED AND DELIVERED THIS 14 DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA