REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 204 OF 2017

THOMAS NGARACHU NGUGI.....1ST PLAINTIFF

MARY NJAMBI NGUGI.....2ND PLAINTIFF

SIMON KURIA KUNGU3RD .....PLAINTIFF

DAVID MWAURA KANGETHE.....4TH PLAINTIFF

JOSEPH GITAU WAITHERA.....5TH PLAINTIFF

JOHN NDEGWA KANGETHE.....6TH PLAINTIFF

VERSUS

JOHN WILFRED WANYOIKE.....1ST DEFENDANT

FRANCIS NJUGUNA KARANJA.....2ND DEFENDANT

JOHN IRUNGU WAWERU.....3RD DEFENDANT

DAVID NGIGE MWANGI.....4TH DEFENDANT

MBIYU MWAURA.....5TH DEFENDANT

COUNTY GOVERNMENT OF MURANGA.....6TH DEFENDANT

HON. ATTORNEY GENERAL.....7TH DEFENDANT

JUDGEMENT

1. The 1st and 2nd Plaintiffs have pleaded that they are the owners of a 3- storey building on plot No 908/20 (suit land), Ngararia Market comprising of commercial and residential units. They averred that the sewerage system serving the building is interalia composed of soak and composite pits situate on public land used for the disposal of dry and wet waste.

2. The 3rd -6th Plaintiffs worked as casual workers for the 1st and 2nd Plaintiffs at the material time.

3. The 1st and 2nd Defendants own plots in the market which plots are adjacent to the suit property. The 2nd and 3rd Defendants were employees of the 6th Defendant working as a driver and a Works Officer respectively. The 4th Defendant was at the material time a Chief in Ngararia location while the 5th Defendant was a businessman and owned a building comprised of 25 rental units at the said market.

4. The Plaintiffs' case is that on the 20/1/2011 the 1st -6th Defendants and their agents filled the composite pit and damaged the cover of the soak pit situate on public land next to the suit land denying their tenants a place to dispose their refuse. That the said Defendant's acts amounted to nuisance and trespass on the suit land. They aver that to abate the said nuisance the 1st and 2nd Plaintiffs engaged the 3rd -6th

Plaintiffs to remove the soil from the composite pit leading to their arrest by the 3rd & 4th Defendants where they were later charged in Kandara Court vide RMCC No 33 of 2011 with the offence of carrying out development without the permission of the local authority under the Physical Planning Act.

5. Further the Plaintiffs accuse the Defendants of blocking the water drainage next to the suit land thus causing rain water to drain into the composite pit thus denying the residents in the building the use of the same for refuse disposal.

6. The Plaintiffs have urged the following orders against the Defendants;

a. Permanent injunction restraining the Defendants from interfering with the 1st and 2nd Plaintiff's enjoyment of Plot No. 908 /20 (suit land) in Ngararia Market.

b. A permanent injunction restraining the Defendants from interfering with the 1st and 2nd Plaintiff's user of the composite soak pit used by the Plaintiffs' tenants.

c. General damages for trespass and nuisance.

d. Special Damages.

e. Costs of the suit with interests.

7. The 1st – 3rd Defendants denied the claim as set out above. They state that they neither assisted the 5th Defendant to poach tenants from the 1st and 2nd Plaintiffs building nor filled the pits with soil nor caused the imprisonment and prosecution of the 3rd -6th Plaintiffs.

8. The 4th and 7th Defendants denied the claim of the Plaintiffs in their defence and contend that they are strangers to the claim. That by their own admission the composite pit is situate on public land owned and controlled by the 6th Defendant. That the 4th Defendant as a senior Chief of Ngararira should not be sued in his capacity while conducting official duties. That the suit violates Section 13 of the Government Proceedings Act and should be struck out.

9. The 5th Defendant denied the Plaintiffs claim, denied involvement either jointly or severally of any of the complained activities and termed the suit as baseless speculative and calculated to embarrass his reputation and an abuse of the process of the Court.

10. The 6th Defendant in denying the Plaintiffs claim contended that any acquittal of the 1st, 3rd -6th Plaintiffs does not absorb them of civil liability. It raised a Preliminary Objection that the suit interalia is bad in law and is devoid of a cause of action against the 6th Defendant.

11. At the hearing of the suit the Plaintiff's case was led by two witnesses. PW1- Thomas Ngarachu Ngugi adopted his witness statement dated the 14/13/12 and the supplementary one dated the 11/2/19 as well as the list of documents marked as PEX NO. 1-25. He testified that the suit land is registered in the name of his wife, the 2nd Plaintiff. That the plot is developed with 3 storey building consisting of commercial and residential units which are rented out to tenants. The building is served by a sewer premised on the adjacent designated public land and is composed of a soak and composite pit for wet and dry waste. That the composite pit is emptied when filled up. That in addition there is a septic tank within the plot which drains waste water to the soak pit on the public road. That the 1st -6th Defendants designed schemes to poach tenants from his building for the benefit of the 5th Defendant since 2009 through interfering with the septic tank alleging to be illegally constructed on a public land. That the subcommittee of Murang'a County Council found that the compost and soak pit were placed on designated council land.

12. The witness stated that further attempts to interfere with his building was in 2011 when the Defendants filled the composite pit and on removal of the soil from the pit, his workers were arrested and charged in Kandara Court for carrying out development activities without the licence of the local authority contrary to the Physical Planning Act. That it is the 5th Defendant that offered his Motor vehicle KAQ 890C to transport the 3rd -6th Plaintiffs to Kandara police station on the instigation of the 3rd and 4th Defendants.

13. In his supplementary statement of dated the 11/2/19 the witness further stated that the 5th Defendant has lured his tenants to his (5th Defendants) building. He stated that the 5th Defendant and his sister Jane Wanjiru Mwaura together own a petrol station and a building at the Market. He testified that the 5th Defendant and his sister diverted water to his building for the construction of their properties denying his tenants water leading to the vacation of his building by his tenants losing rental income. That the vacating tenants moved to occupy the 5th Defendants building.

14. He stated that he did not have the permission to put up the composite and soak pit on the public land but insisted that the land was designated for refuse collection. He however did not produce any permit or licence from the council authorizing the construction of the composite pit on the public access road.

15. With respect to the 5th Defendant the witness stated that he was not at the site of the composite pit on the material date of 20/1/2011. On the allegation of diversion of water by the 5th Defendant, PW1 stated in evidence that he did not have written proof to support the allegation that the 5th Defendant destroyed /diverted the water to his building. Further he stated that the 5th Defendant was not the owner of the Petrol station but his sister Jane Wanjiru but that the 5th Defendant supervised the construction.

16. In addition, the witness informed the Court that he did not know where the tenants who vacated his building went to nor any evidence that the tenants occupying the 5th Defendants building are/were his tenants that he was not calling any as witnesses in the case. He decried that all the frustrations visited by the Defendants on his building might have been intended to condemn his building as unrentable despite the same having been approved by the county council as fit for occupation.

17. The witness stated that the composite pit was relocated about 5 years during the pendency of the case.

18. PW2- Simon Kuria Kungu testified and relied on his witness statement sworn on the 19/12/12 as his evidence in chief and stated that he and the 4th – 6th Plaintiffs worked for the 1st and 2nd Plaintiff. That on the material date they were asked by PW1 to empty the composite pit of soil. That the refuse pit was on the public road. That on arrival they found the 1st 2nd and 3rd Defendants on site shortly thereafter the Chief came with the administration Police and arrested them and later were taken to Kandara police station by the 5th Defendant and later charged in Court. That his case is against the Chief for wrongful arrest.

19. The 1st – 3rd Defendants evidence was tendered by 1st – 3rd Defendants as witnesses. DW1- John Wilfred Wanyoike stated that he owns plot No 19 which is separated by an access road from the suit land. That he knows PW1 and had previously helped to store his material on his plot when he was constructing and averred that there was no enmity between the two. That nevertheless the 1st Plaintiff has continued to frustrate him by blocking his building with a wall and digging a septic tank on the access road leading to his building. That he and the 2nd Defendant lodged a complaint at the Maragua County council with respect to the foul smell emanating from the soak pit. The council sent its officers to assess the situation. That he did not participate in the filling of the composite pit and neither did he instigate the arrest of the Plaintiffs. That the allegation that he poached tenants from the 5th Defendant is untrue.

20. DW2- Francis Njuguna Karanja testified that he worked as a driver at the Maragua County Council and that he and DW1 filed a complaint with the council in respect to the refuse pits that were dug on the public access road as well as the foul smell emanating therefrom. That later the council authorised the pits to be filled up with soil but the 1st Plaintiff instructed his employees to remove the soil leading to the arrest of the 3rd -6th Plaintiffs. That the septic pit was emitting foul smell to the detriment of the environment and its habitants. That he did not participate in the filling of the pit and that his role was to drive the council vehicle that was carrying the works officer who supervised the works.

21. DW3 – John Irungu Waweru stated that he is a Works Officer working in Machakos but during the material time was an employee of Maragua County Council. That the council received a complaint from the 1st and 2nd Defendants against the 1st and 2nd Plaintiff's septic tank. That he visited the site and confirmed the presence of the septic pit and reported the matter to the Clerk to council who authorized the issuance of 21-day notice to the 1st and 2nd Plaintiff to fill up the pits. That despite 21 days' notice there was no compliance by the 1st and 2nd Plaintiffs. That the clerk authorized him to fill the pit which he did with the help of casual workers paid by the council. That the 1st Plaintiff proceeded to remove the soil from the refuse pit and he sought the help of the Clerk who authorised him to report the matter to the Chief. Later the 3rd -6th Plaintiffs were arrested when they were found removing the soil. That he did not interfere with the 1st and 2nd Plaintiffs tenants nor influence the occupation of the buildings of the 1st and 5th Defendants. That he was carrying out a lawful duty as authorised by his employer which was to stop the 1st and 2nd Plaintiffs from disposing waste on the access road thus blocking the access of the 1st and 2nd Defendants' plots. That there are designated refuse collection points in the market which is about 50 meters from the Plaintiffs pits.

22. DW4 – David Ngige Mwangi stated on behalf of the 4th and 7th Defendants that he was the area chief at the material time. That he was called by DW3 that there was a problem at the market and he went there to maintain law and order which he was duty bound to. That once the suspects were at the Chief's camp, he requested the 5th Defendant to take them to Kandara police station. That the Administration police acted under instruction of the Officer Commanding Station and arrested the suspects. That he did not abuse his office. That his office has a temporary holding cell where the suspects were held before being taken to the police station. That the 5th Defendant only assisted to take the suspects to the police station at no pay. That he was not involved in any scheme to frustrate Mr. Ngarachu's tenants. Neither did he influence the acquisition of tenants for the 5th Defendant.

23. DW5 – John Kenneth Mbiyu Mwaura testified that he is a businessman in the Market. That he owns a building at the market and lives opposite the Chiefs camp which he uses many at times to park his matatus at night. That it was not his first time to assist the Chief with the use of his vehicle which he took it as civic duty. He gave an example in the past when his pickup was used at night to rescue Mr. Ngarachu when he was attacked by thieves. He confirmed that there was a designated place for refuse collection at the market which serves many buildings, his included. He refuted claims of diverting water to the construction of the petrol station which he explained belonged to his sister. That the tenants of his building were procured by a management agent namely Greenwich and that he had no reason to poach tenants from the 1st and 2nd Plaintiffs building.

24. At the conclusion of the hearing the parties filed written submissions which I have read and considered in the Judgement.

25. The issues for determination are;

a. Whether the Environment and Land Court has jurisdiction to entertain the suit.

b. Whether the suit is statute barred.

c. Whether the Plaintiff's suit offends section 13 of the Government Proceedings Act.

d. Whether a claim under Articles 42 and 70 of the Constitution as read together with Section 3 of Environmental Management and

Coordination *Act* (EMCA) can be sustained in this case.

e. Whether the Defendants trespassed on the suit land.

f. Whether the Defendants were liable for the tort of nuisance.

g. Whether the Plaintiffs are entitled to general and exemplary damages.

h. Who meets the costs of the suit?

26. Jurisdiction of a Court is the power of that Court to make decisions as conferred by either the constitution or legislation or both. It has been held time without number, that jurisdiction is everything. No Court can wish it away as without it, a Court must down its tools at once.

27. The Supreme in the case of Samuel **Kamau Macharia Vs Kenya Commercial Bank & 2 others CA No 2 of 2011** held interalia that;

> "a Court's jurisdiction flows from either the Constitution or legislation or both. …."

28. In the case of **Allarakhia v Aga Khan [1969] EA, 613**, it was held that parties cannot by mutual consent confer jurisdiction upon a Court which has no such jurisdiction.

29. The jurisdiction of the ELC Court flows from Article 162 (2) (b) of the Constitution read together with Section 13 (1) and (2) of the Environment and Land Court which grants the ELC Court the original and Appellate jurisdiction on matters relating to ownership, title to use of land as well as ancillary related claims on land. It states as follows;

> "The Court shall have original and Appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;
>
> (d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) any other dispute relating to environment and land.

30. From the reading of the Constitution and substantive legislation malicious prosecution, false imprisonment and arrest do not fall within the jurisdiction of the ELC Court. These are issues that fall within the realm of another forum.

31. In the case of the **Owners of the Motor Vessel "Lillian SS" -vs- Caltex Oil Kenya Limited [1989] KLR, Nyarangi, J.A** (as he then was) stated:

> "**…**I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized… of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction there would be no business for a continuation of proceedings pending other evidence. It lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

32. Consequently, the ELC Court downs its tools with respect to causes of actions relating to malicious prosecution, false imprisonment and arrest. That leaves the issues of trespass and nuisance to the suit land for determination.

33. The claims of the 1st and 3rd -6th Plaintiffs as far as relates to malicious prosecution, false imprisonment and arrest are hereby struck out.

34. The next issue for determination is whether the suit is statute barred. Causes of action for nuisance and trespass are actions in tort. Section 4 (2) of the Limitations and Actions Act provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. In this case the cause of action is pleaded to have arisen on the 20/1/2011 and thereafter this suit was filed on the on 19/12/12. The suit was brought within time and the claim of time bar is hereby dismissed.

35. The 4th & 7th Defendant's defence comprised of an objection on the ground that the Plaintiff's action against it cannot be sustained and that the suit offends the provisions of Section 13 of the Government Proceedings Act. This section is worded as follows;

"no proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form has been served on the Government in relation to those proceedings."

36. In the case of **Kenya Bus Service Ltd & Another –vs- Minister for Transport & 2 Others [2012] eKLR** the Court found Section 13A (1) to be unconstitutional for being in contravention of Article 48 of the Constitution. The judge held that;

> "Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the Government Proceedings Act provides an impediment to access to justice. Where the state is at the front, left and centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that Section 13 of the Government Proceedings Act as a mandatory requirement, violates the provisions of Article 48."

37. Guided by the above decision I hold the view that the suit does not offend the provisions of the Government Proceedings Act. That said nothing prevented the Plaintiff from issuing notices to sue in the ordinary manner. The absence of such notice is not fatal but has an impact on costs of the suit.

38. The objection therefore is rejected.

39. The 1st Plaintiff testified that the suit land is registered in the name of the 2nd Plaintiff. I have seen a copy of a letter of allotment dated the 17/12/1971, lease registered on the 22/8/1979 in the name of the 2nd Plaintiff together with an approval of extension of lease dated 19/6/1979 for a period of 99 years from 1/6/1979. Next is the surrender of lease by the 2nd Plaintiff registered on the 22/8/1979. There is no dispute on the issue of ownership as it is commonly acknowledged that the 1st and 2nd Plaintiff enjoy legal and possesionary rights over the suit land.

40. The 1st and 2nd Plaintiffs submitted that their rights pursuant to Article 42 and 70 of the Constitution were violated by the Defendants. That Article allows a party to file a claim for breach of a right to a clean and safe environment even though the loss and damage is not personal to the claimant and as long as the suit is not frivolous. It is also trite that locus standi under the Constitution is accommodative thus any person may urge breaches of fundamental rights and freedoms.

41. In this case the Court must consider firstly whether any breaches under Article 42 and Section 3 of the EMCA was the bone of contention and thus an issue for determination during trial. Secondly, whether the Court's jurisdiction under Section 3 of EMCA and Article 42 of the Constitution was invoked during the inception of the suit or at the hearing of the suit. Simply put was breach of rights to a clean environment an issue for the Court to consider in the case.

42. The general rule is that issues for determination are framed from pleadings and evidence, the exception applies where certain issues emerge in the course of trial and it is evident that parties left the issues to be resolved by the Court in its judgment. The 1st and 2nd Plaintiffs' claim as set out in the plaint do not include any plea on breach of any constitutional rights under Article 42 of the Constitution or Section 3 of EMCA. These are issues raised in submissions. Submissions are not pleadings of a party.

43. It is trite that the place of submissions must be distinguished from evidence as set out in the case of **Douglas Odhiambo Apel & Another V Telkom (K) Ltd** , where the Court of Appeal held that:

> "……. a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or submissions. Cases are decided on actual evidence that is tendered before the Court……Unless a consent is entered into for a special sum, then it behoves the claiming party to produce evidence to prove the special damages claimed. Submissions, as he correctly observed, are not evidence……..."

44. It is for the above reasons that the Court declines to entertain the issue.

45. The 1st and 2nd Plaintiffs pleaded that the Defendants frustrated their tenants through interfering with the refuse collection pits and poached them for the 5th Defendants building. That as a result their building was voided and suffered damages and loss. The 1st and 2nd Plaintiffs did not tender evidence to support their claim that tenants vacated the building and were poached to the 5th Defendant building. None of the tenants were called to testify. DW5 led uncontested evidence that his building is managed by Greenwich agents who source tenants for his building.

46. DW1 and DW2 testified that they filed a complaint with the County council after the foul / noxious smell came from the septic tank which is 20 meters from DW1's building. That the designated waste was within 50 meters of the Plaintiff's building and yet the 1st and 2nd Plaintiffs insisted on using the public road access as a refuse pit. The Plaintiff does not deny the claim and also that he was put on notice under the Public Health Act but he failed to remove the waste on the soak pit. The conclusion is that the actions of the 3rd Defendant were consistent to enforcement of the law.

47. While under cross examination, PW1 admitted that he dug a pit on public land with the permission of the public health officer however he failed to present evidence in support of any licence or permit. The question that the Court must answer is whether trespass can be founded on public land. The starting point is the definition of trespass.

48. The definition of trespass on land is spelt out in **Clerk and Lindsell on Torts (17th Edition) at paragraph 17** as: -

"An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass".

49. Section 3 (1) of the Trespass Act, Cap 294 of the Laws of Kenya provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence".

50. It is essential that the claimant has possessory rights over the land. In the case of **Charles Ogejo Ochieng –Vs- Geoffrey Okumu (1995) eklr** the Court defined trespass as an injury to a possessory right.

51. In the case of **M'Mukanya -v - M'Mbiiiwe, (1984) KLR 761**, the Court held that

"**…**Trespass to land is a tort against possession and there must be an entry on the suit property by the tortfeasor. The evidence on record does not show that the Respondent had entered the suit property. The record does not show that the Respondent is cultivating or tilling the land. We find that the action of entry, cultivation or tilling was not proved by the Appellant on a balance of probability

52. In his testimony PW1 informed the Court that he sued the 1st and 2nd Defendant because they were part of the people that filled the composite pit with soil on the instruction of the 3rd Defendant. That the act of filling the composite and soak pits with soil amounted to trespass. On being cross examined by the 5th Defendant's Counsel, he stated as follows;

"I am not sure if the people who refilled the compost pit were public officers. The people who prevented me from removing the soil were not Government officials"

The above expression of evidence is clearly a testament that the Plaintiff was in doubt as to whether the 1st and 2nd Defendants actually filled the compost pit. DW1 and DW2 led unchallenged evidence that they were not on the site on the 20/1/2011 when the alleged filing of the composite took place. DW3 led uncontroverted evidence that with the permission of the Clerk to the County Council he hired casuals to fill up the composite pit in the course of his duties.

53. The Plaintiff does not claim that the road reserve forms part of his Plot No. 20, nor has the Plaintiff demonstrated that he acquired rights over any part of the portion as access road. In the case of **Homescope Properties Ltd & Another-Vs-David Gachuki & Pamela Odera sued as Chairman & Secretary of Karen Ngong View Estate & Another (2014) eKLR,** the Court defined a public road as one that is set apart and designed as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by relevant authorities.

54. The 1st Plaintiff admitted that he constructed the composite and soak pit on the Public land. DW1-4 led evidence that the said acts of the 1st Plaintiff blocked the access way to the properties of 1st and 2nd Defendants and that was the basis of the complaint that they raised with the County council. DW3, DW4 & DW5 explained to the Court that there was a designated place for refuse collection by the County council but the 1st Plaintiff despite notices adamantly maintained the septic tank on the public road.

55. The end result is that the Plaintiff 's action for trespass in land cannot succeed as there was no proof that the Plaintiff owned the area occupied by the soak pit. Also, the 1st and 2nd Plaintiffs have not proved that they had the licence from the local authority to dispose refuse on the public access road so as to gain possessory rights. They have also not proved any entry into Plot No 20 by the Defendants to entitle them to a claim of trespass.

56. It is the finding of the Court that the 1st and 2nd Plaintiffs failed to proof any trespass on the part of the Defendants.

57. As to whether the Defendants were liable for the tort of nuisance, nuisance is defined as act or omission which interferes with or causes annoyance to a person's right to use or enjoy right over or in connection with land. It occurs when the consequences of the tortfeasor's actions on his land escape to his neighbor's land causing an encroachment, physical damage and unduly interferes with the neighbors use and enjoyment of his land. See **Clerks & Lindsell 1354,24-01**.

58. The rule in **Rylands –Vs- Fletcher (1861-1873) ALL ER** is still good law in matters relating to nuisance to land. The English Courts established nuisance as an occurrence where a party accumulates water or filthy or noxious fumes on his land. That should such substance escape and causes damage to his neighbor he does so at his own peril however careful he may have been or whatever precautions he may have taken to prevent the damage.

59. In the case of **Jaswinder Singh Jabbar –vS- MarkJohn Tilbury & Anor (2014)eklr** , the complaint was that the trees growing on the Defendants land had overgrown over the Plaintiff's land becoming a nuisance and damaged the Plaintiff's building. The Defendant was called upon to prune the trees.

60. The main basis of the tort of nuisance is that a person's right to enjoy his possession has been intruded. In this case the 1st and 2nd Plaintiffs did not own/possess the road reserve. The case would qualify if the Plaintiff proved that the soak pit was on his plot and the Defendants encroached on the land and blocked the pit. In the absence of proof of any evidence as set out above the 1st and 2nd Plaintiffs have failed to establish nuisance. This claim fails.

61. As to whether general damages can be granted and to what extent, damages are awarded as compensation to repair the actual loss

suffered by the claimant as a result of the tort. It is intended to put the Plaintiff in the same position he was before the tort or invasion of the Defendant. Where trespass has been established the claimant does not have to prove the specific damage or loss suffered because trespass is actionable perse.

62. In the case of Philip **Aluchio –Vs- Crispus Ngayo (20140 Eklr** the Court held that the Plaintiff is entitled to general damages for trespass, the measure of damages for trespass is the value of the property immediately after the trespass or costs to restore the property to such state, whichever is lower.

63. In this case the Court has found no evidence of trespass of the suit land by the Defendants. The soak pit was constructed on the road which did not belong to the 1st and 2nd Plaintiffs. As regards nuisance the Plaintiffs failed to establish the nuisance nor the nature of loss suffered as a result of the alleged tortious actions. It is pleaded that the Plaintiff's tenants were inconvenienced or suffered hardship forcing them to relocate to the 5th Defendants' premises. No evidence was presented by the Plaintiffs to support these allegations.

64. Further the 1st and 2nd Plaintiffs have sought for exemplary damages of Ksh 9 Million for each tort. Exemplary damages are punitive in nature and attach where the Defendant's actions are oppressive, arbitrary and unconstitutional actions of state officers or where damages are expressly authorized by statute.

65. In the case **Rookes –vs- Barnard (1964) 1 All ER 367**, the Court held that:

> 'exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff."

66. In this case the 2nd 3rd and 4th Defendants are employees of the county council and central Government respectively. The office of the Attorney General and the County Government are also enjoined as Defendants. However as stated elsewhere in this judgement the nature of actions was not arbitrary or oppressive in any way because the 1st and 2nd Plaintiffs were given notice to remove the illegal structure on the road reserve. The notice lapsed without any action from the said Plaintiffs. The actions of the 2nd, 3rd and 4th Defendants do not warrant the granting of exemplary damages.

67. With respect to the remedy of injunctive reliefs, it is evident that the 1st and 2nd Plaintiffs enjoyed full and exclusive use of Plot No. 20 in Ngararia Market. That the Plaintiff instead encroached on the public road by constructing his refuse pits and ignoring a notice to remove the obstruction. The 1st and 2nd Plaintiffs therefore have not proved a primafacie case over public land upon which the composite was placed. In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal noted that;

> "…….in order to secure the injunctive relief sought, the Appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third-party claim in respect of the same property."

68. As regards costs, the Court will be guided by Section 27 of the Civil Procedure Act. In this case costs follow the event.

69. The 1st and 2nd Plaintiffs have failed to prove their case against Defendants. It is dismissed.

70. The costs shall be payable to the Defendants by the 1st and 2nd Plaintiffs.

71. It is so ordered.

DATED, SIGNED & DELIVERED AT MURANG'ATHIS DAY OF 30TH DAY OF NOVEMBER 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ndungu HB for Dr. Kamau Kuria Senior Counsel for the 1st – 6th Plaintiffs.

Kiroko Ndegwa HB for Kimwere for the 1st – 3rd Defendants

4th Defendant: AG is absent

Mbuthia for the 5th Defendant

Kiroko Ndegwa HB for Kimwere for the 6th Defendant

7th Defendant: AG is absent

Njeri & Kuiyaki: Court Assistants