REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 205 OF 2010

NAFTAL OKWANYO MASARA.....1ST PLAINTIFF

JANE MASARA.....2ND PLAINTIFF

VERSUS

TOWN CLERK CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

DIRECTOR OF CITY PLANNING.....2ND DEFENDANT

DIRECTOR OF INSPECTORATE & ENFORCEMENT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

CITY COUNCIL OF NAIROBI.....4TH DEFENDANT

COUNTY GOVERNMENT OF NAIROBI.....5TH DEFENDANT

JUDGEMENT

1. The Plaintiffs are registered as joint owners of land reference number 1870/III/530 situated in Westlands, Matundu lane ("the Suit Property"). Their claim is that they submitted building plans which the 4th Defendant approved and registered as EV507 for the proposed alteration to the domestic building through the addition of DSQ and a boundary wall. The plans were approved on 2/3/2010. The Plaintiffs claimed that they also submitted drawing and architectural designs which were approved by the City Engineer and that after obtaining the approvals they commenced construction of the proposed DSQ and the boundary wall to the existing building on their land.

2. The Defendant's agents arrested the 1st Plaintiff after trying to stop him from carrying on with the construction on the Suit Property. The Plaintiffs further claimed that on 16/6/2010 the Defendants forcefully entered their land using an unruly gang and heavy mechanical bulldozers and demolished the Plaintiff's buildings besides damaging their building materials. The Plaintiffs filed suit seeking to stop the officers of the Defendants from trespassing onto their land, harassing and barring them from carrying out developments on their land.

3. In the Further Amended Plaint dated 9/5/2019 the Plaintiffs sought a permanent injunction to restrain the Defendant from interfering with the Plaintiffs' constructions or developments on the Suit Property. They also sought special damages of Kshs. 10,156,196/= together with interest at commercial rates at 24% per annum from 31/7/2010 until payment in full. They also sought exemplary and general damages for unlawful arrest and confinement and denial of privacy and liberty.

4. It is only the 5th Defendant (referred to as the Defendant in this judgement) which defended this claim. In its Further Defence filed in court on 23/6/2019, the Defendant denied the Plaintiffs' claim and admitted that it approved building plan number EV507 subject to certain conditions including that an occupation certificate would be obtained before occupation of the development. The Defendant maintained that the Plaintiffs' structures were never demolished because they had an injunction and added that the Plaintiffs were occupying the building erected on the Suit Property and the issue of damages did not therefore arise.

5. The Defendant averred that it later discovered that it had granted the approval to the Plaintiffs inadvertently when the Plaintiffs failed to disclose the nature of the immediate neighborhood which is a gated residential estate comprising a comprehensive scheme of single dwelling units. The Defendant averred that after receiving complaints from the affected residents in the neighborhood and after its representatives made site visits, they established that the development proposed by the Plaintiffs would constitute an additional residential unit contrary to the title, conveyance for the property and the prevailing development policy for that area. It averred that the proposed development would cause environmental injury to the other residential developments in the same court.

6. The Defendant maintained that the Plaintiffs commenced construction without an approved structural plan which was contrary to the approved plan registration number EV507 and that they were in breach of the conditions of approval. The Defendant admitted that the 1st Plaintiff was arrested on 25/3/2010 and booked at the Central Police Station for constructing contrary to approved plan number EV507. The Defendant contended that the Plaintiffs purported to obtain an approved structural plan after the arrest had been made. It added that the proposed development would constitute an additional illegal residential unit. It emphasized that the Plaintiffs' actions were illegal and contrary to the provisions of the Physical Planning Act. It also added that the injunctive orders granted on 3/5/2010 were granted based on wrong facts which the Plaintiffs presented to the court. The Defendant maintained that it executed its duties envisaged under the Physical Planning Act and the by-laws. It maintained that it was within its powers to stop the construction by the Plaintiffs. It added that the Plaintiffs were guilty of abuse of the court process.

7. The 1st Plaintiff gave evidence. He stated that the Defendant approved his application to undertake certain alterations to his domestic building to put up a servant quarter and construct a boundary wall around the Suit Property. The Defendant vide its letter dated 2/3/2010 approved his application on certain conditions including submission of satisfactory structural details including lintels and trusses; submission of certificate of workmanship; satisfactory ground soak pit and septic tank installation at the owners risk; all debris and excavation materials being dumped on sites approved by the Defendant; occupation certificate being obtained before occupation; and lastly, the plot not forming part of a disputed private or public utility allocation. The other conditions were that the Plaintiffs were to install a project signboard approved by the Defendant and no trees would be cut down or uprooted without the written submission of the Defendant's Director of Environment. He submitted structural plans in respect of plan EV507 and was issued a certificate on structural design signed by Engineer G. N. Mutula of the then City Council of Nairobi.

8. He stated that they commenced construction under Zack Construction Company who brought in the building materials after being engaged as the contractor. Sometime in April 2010 officers from the Defendant's Enforcement Section of the City Council of Nairobi started harassing his workers on the site claiming that he was constructing without an approved plan, a fact which they ought to have known it was incorrect. In March 2010, the City Council Officers arrested construction workers at the site and when he went to check why they were arrested he also got locked up at the Central Police Station and was later released on a cash bail of Kshs. 21,000/=. He demanded to see the charge but they refused to produce it. He was never charged with any offence and they have never released the cash bail to him. He claimed that he was arrested at 10.00 am and was held at Central Police Station in a small cell with a group of 20 criminals who insulted him and physically and psychologically tortured him up 8.00 p.m. when he was released on cash bail by the OCS, Central Police Station.

9. He filed suit and an application dated 3/5/2010 to enforce his rights. He obtained interim orders of injunction restraining the Defendant from interfering with his construction on the Suit Property. The Defendant refused to obey the orders he obtained because of a typographical error on the order. He stated that due to that error the Defendant demolished and brought down the construction on the same day with a bulldozer despite the fact that he had the approvals and in flagrant breach of a valid court order issued by Mbogholi J on 4/5/2010.

10. He stated that without any reasonable cause, on 4/5/2010, Tom Odongo and other officers of the Defendant together with 5 armed administration officers descended on the Suit Property with brutal force and pulled down the ongoing construction and in the process damaged his property causing him to suffer substantial material and emotional loss. He gave the particulars of special damages as follows:

ITEM NO	**DESCRIPTION**	**AMOUNT (KSHS**
1	Preliminary & General	900,000.00
2	D.S.Q. Foundation Works	575,695.82
3.	D.S.Q. First Floor Works	1,250,000.00
4.	Boundary Wall and Parking	1,000,000.00
5.	Clearance of site, demolition of damaged works, foundations, column bases and disposal of waste materials including permits.	500,000.00
6.	Repeat work form foundation to 1st Floor, D.S.Q. & Boundary Walling – as demolished	3,250,500.50
7.	Extension of professionals services – Architect, Structural and Services Engineers	250,000.00
8.	New Signboard	50,000.00
9.	New site store	200,000.00
10.	New Hoarding	275,000.00
11.	Petition for Court restraining Orders to City Council	150,000.00
12.	Spoiled materials – Cement, Ballast, sand, stones, steel reinforcement, timber-materials on site and tools.	1,110,000.00
13.	Rented alternative accommodation for the project manager in lieu delayed completion of the building for 9 months @ Kshs. 40,000.00/=	360,000.00

14.	Strenuous expenses and loss of earning for the client due to disturbances 21 days @ 10,000/=	210,000.00
15.	Assessor's Fees	75,000.00
	Total	**10,156,196.00/=**

11. The 1st Plaintiff testified that he instructed a consulting engineer who undertook a comprehensive survey and prepared a damage assessment report. He sought the loss incurred from the Defendant's actions and produced several documents. He produced a letter from Savings and Loan Company Limited dated 5/5/2008 advising him that the mortgage facility of Kshs. 4,160,000/= was disbursed to him on 15/4/2008. He also produced a copy of the bank's letter dated 28/7/2009 advising him that the instalments had been adjusted to Kshs. 62,810/=. He produced a copy of the title deed issued under the Sectional Properties Act. He also produced a copy of the Defendant's indemnity form dated 26/3/2010 vide which the 1st Plaintiff indemnified the Defendant from any claims that might arise as a result of the building construction including the building collapsing or loss of lives as a result. There was a statement to the effect that the approval of the structural drawings did not relieve him of the responsibility for errors or omissions in the design which may subsequently be discovered. The Plaintiffs also undertook to comply with the building code and the Local Government bylaws cited in that indemnity form.

12. The 1st Plaintiff produced a copy of the contract for the construction of the extension and alteration of his domestic house. The contractor was to be paid Kshs. 5,300,000/= at different stages. He produced a copy of the approval dated 2/3/2010 given by the Director of the City Planning of the Defendant. The letter set out the conditions for the approval of the plan for the proposed alterations, DSQ and boundary wall to existing building. He produced payment vouchers issued to Nakitare dated 3/3/2010 for Kshs. 20,000/= for supervision; 24/10/2009 for Kshs. 80,000/= architectural drawings; 20/6/2010 for Kshs. 30,000/= for supervision and Engineer Robinson was paid Kshs. 20,000/= for supervision on 20/6/2010 and he was also paid Kshs. 80,000 and 20,000 on 24/12/2009 and 3/3/2010 for structural drawings and structural supervision respectively.

13. He produced a copy of the receipt issued by Mbuga Engineering and Construction Limited dated 17/6/2010 for Kshs. 75,000/= on account of technical assessment report. He produced an invoice dated 22/6/2010 issued by Zack Construction Limited for Kshs. 1,110,000/= in respect of a request for spoiled materials, that is, cement, ballast, sand, stones and steel reinforcement, timber, materials on site and tools. The second invoice dated 3/8/2010 from Zack Construction Limited sought payment of Kshs. 3,250,500.50 and is indicated to be a request for repeat work from foundation to 1st floor of DSQ and boundary wall as demolished. The invoice dated 4/8/20 was for Kshs 525,000/= being a request for new sign board, new site store and a new hoarding. Another invoice dated 20/6/2010 from Zack Construction Limited for Kshs. 500,000/= indicated that it was a request for clearance of site, demolition of damaged works, foundation, column bases and disposal of waste materials including permits. The invoice dated 16/3/2010 was a request for boundary wall and parking and sought payment of Kshs. 1,000,000/=. The invoice dated 15/3/2010 was for DSQ, first floor works and a request for down payment amounting to Kshs 1,250,000/=. The invoice dated 3/5/2010 for Kshs. 1,475,695.82 related to preliminary and general works including VAT and foundation works.

14. The 1st Plaintiff also produced a receipt from Mbuga Engineering and Company Limited showing that the sum of Kshs. 75,000 had been paid. He produced receipts issued by Zach Construction Limited dated 3/3/2010 for Kshs. 1,475,695.82/=; 15/3/2010 for Kshs. 1,250,000/=; 16/3/2010 for Kshs. 1,000,000; 20/6/20210 for Kshs. 500,000/=; 22/6/2010 for Kshs, 1,110,000/=; 3/8/2010 for Kshs. 3,250,500.50/= and 4/8/2010 for Kshs. 525,000/=. He produced rent receipts for Kshs. 40,000/= issued by Rehoboth Agency Limited bearing dated from 30/11/2010 up to 30/6/2011.

15. On cross examination, the 1st Plaintiff confirmed that he obtained approval of the building plan on 2/3/2011 and was supposed to build a DSQ on three levels and not on one level. He confirmed that the main houses in the estate were similar and that there were 24 units built with attics. Of these, only two houses were not built on three levels. He denied ever being served with an enforcement notice by the Defendant. He confirmed that he filed Nairobi Judicial Review Application No. 8 of 2011. He clarified that the sum of Kshs. 150,000/= in the damages he seeks includes the fees which he would have earned per day for the 21 days when he never went to work. He explained that he paid rent of Kshs. 40,000/= per month in Westlands as the accommodation of the Project Manager. He added that what he was constructing on the Suit Property was supposed to be a DSQ for his son. He stated that his son was managing the property. He denied that the payment for the new sign board and new site store were supposed to be paid to the Defendant. The new hoarding fees according to him was also supposed to be paid to the contractor and not the City Council. He explained that they paid the hoarding fees to the contractor to avoid being harassed by the Defendant's officers.

16. He produced photographs showing the demolition of the structure that he had constructed on the land. He stated that at the time of demolition he had already done the first floor slab. He stated that he borrowed Kshs. 4,000,000 to build the DSQ and was to add his pension and other funds. When he was referred to the Defendant's documents indicating that the approved development was supposed to measure 31.7 m^2 he explained that he was seeking damages of Kshs. 12,000,000/= based on the expert who gave him the figures. He stated that the boundary wall had been done and was demolished. He confirmed that he did not get clearance from the Defendant to clear the site in line with the approval given by the Defendant. He stated by 2011 the DSQ was complete and was occupied from 2012 up to 2019. Initially he had sought Kshs. 5,000,000/= but later changed the figure to include the costs for the engineer and contractor which had been left out.

17. The Defendant did not issue an occupation certificate to him although he had applied for one. He maintained that the approval the Defendant gave was for three levels since all the houses in the estate have three floors with a parking on the ground floor and an attic on third floor. He clarified that item numbers 2 and 3 on his particulars of special damages only related to the foundation and that item number 3 related to the walls and the first floor slab. He clarified that he obtained approval in 2010 and not 2011 and after construction he applied for an occupational license but did not get it because he had sued the Defendant and obtained an order against it.

18. Zachariah Mbuga gave evidence. He stated that he was a Civil and Structural Engineer trading as Mbuga Engineering and Construction Limited and that he was contracted by the 1st Plaintiff to do the technical assessment of the damage occasioned by the Defendant to the

Plaintiffs' extension and alteration of the domestic DSQ and boundary wall on the Suit Property. He produced a copy of the report giving an analysis of the damaged works which indicated that at the time of demolition the following had been constructed: the foundation of both the DSQ and the boundary wall; the ground floor slab and walling for the DSQ; suspended slab and staircase for the DSQ; first floor walling; super structure walling for the boundary wall; filling under parking and the slab at the yard; and hoarding of the site as per the requirements of the city by-laws.

19. He explained that an assessment was necessary to cost and estimate the value of the extent of the works demolished since the construction was ongoing and there was a cost implication for the subsequent repeat work. He explained that a registered constructor was duly engaged to undertake the construction of the works and the contract period was 6 months from March 2010 and that there was two months of progress at the time of demolition which he stated took place on 6/6/2010. He averred that at the time of demolition the works were at the suspended slab stage of construction. He conducted the assessment on 17/6/2010. He stated that the demolition was carried out by the Defendant under the supervision of the City Inspectorate. He carried out an analysis of the damaged works and stated that at the time of demolition various sections had been constructed. He explained that during the demolition the structure was demolished and the materials on site and store were mixed with the resulting debris and the Plaintiffs had to source for new materials. He added that in the process of repeat work additional works were necessary to restore the site to suitable ground conditions for the repeat work. He gave the cost implication as Kshs. 10,156,196.32 and produced a copy of his report.

20. On cross examination he confirmed that the Plaintiffs were to construct a DSQ and a perimeter wall as an extension to an existing property. He confirmed that when submitting plans for approval an applicant has to indicate the area of the proposed development. To get estimates one uses the size and the cost for that area. He did not agree that the DSQ was to be $31.7m^2$. He visited the site and gave the estimate area as $200m^2$. The approved drawings were for three floors. He conceded that for costing purposes, Kshs. $40,000/m^2$ would be around Kshs. 8,000,000/= for $200m^2$. He explained that he based his calculations on the letter he was shown. He did not see the receipts for the architectural and structural engineer fees but maintained that he gave in his report was an estimate. He made the bill of quantities to determine the footing for foundation works and first floor works which covered material and labour. He did his calculations from the approved drawings. He clarified that the new hoarding fees was to be paid to the Defendant with part of it being used to secure the site. He explained that the photographs he produced showed the materials which were mixed up and some had not been used. He did not see the receipts and based his calculations on what the client told him he had spent. On the cost for the project manager that is what the 1st Plaintiff told he had spent.

21. On re-examination he stated that the Defendant's document only showed 31.7 without the unit. He had seen that document for the first time. He clarified that the preliminary and general costs covered design, approvals and supervision during construction. He explained that hoarding was separate from the sign board and was for the safety of workers and neighbours which was also a requirement of the law.

22. Zachariah Onyancha Nyarwati also gave evidence for the Plaintiffs. He explained that they commenced construction under his company, Zack Construction Company. They bought materials after the 1st Plaintiff engaged him as his constructor to undertake the construction work. They went to the site and commenced construction. In April 2010 officers from the enforcement section of the Defendant went to the site and started harassing his workers claiming that they were constructing a building without an approval plan. In March 2010 the Defendant's officials arrested his workers at the site and when the 1st Plaintiff went to check he was also arrested and locked up at the Central Police Station. He was later released on a cash bail of Kshs. 21,000/=. He confirmed that the 1st Plaintiff obtained injunctive orders which had a typographical error. The Defendant refused to obey the orders and demolished the Plaintiffs' building. He stated that without justification or reasonable cause, Tom Odongo with other officers from the Defendant and five administration officers descended on the Plaintiffs' premises with brutal force and pulled down the ongoing construction work on 4/5/2010 in the process of which they damaged his property. He referred to the construction and reconstruction costs as well as the assessed costs which the 1st Plaintiff gave the particulars of. He stated that the cost of works he had already done up to the slab was Kshs. 5,200,000/= and that there were materials on the ground which were also destroyed during the demolition.

23. He confirmed that he lived in Nairobi and supervised the construction. He lived at his house and would go to the site. He also confirmed that his workers would go to the site in the morning and that nobody slept in the site. He did not know Rehoboth Agency Limited. He was paying all his workers plus the foreman in cash. He stated that they were arrested yet they had approved plans. He stated that the Defendant's officials went to the site when they were building the ground floor building and arrested his workers claiming that they did not have approved drawings. He sent for the drawings and they left after discussions. He also stated that the house was demolished after they had built the first floor slab. He stated that the court order was given after the demolition.

24. Subsequently they built a three floor structure with ground floor, first floor and an attic. The attic had one bedroom and was self-contained, the first floor had two bedrooms which are self-contained, while the ground floor had stairs and a small room. He maintained that going by the design they built a DSQ according to the drawings. He blamed the Defendant's officials for not telling them that that was a controlled area and that the plan had been disapproved. He had not seen any similar DSQ in that area. He was buying the building materials.

25. On the items for special damages, he stated that for the items relating to clearance of site, repeat work from foundation to first floor and spoiled materials he got the figures from the quantity surveyor. They spent the money rebuilding the house. He did not have a certificate for hoarding but maintained that they did hoarding. He could not remember how much they paid for the sign board to the Defendant. In 2010 he stated that it would cost about Kshs. 30,000/= to 40,000/= per m^2 to construct.

26. When the court asked Mr. Nyarwati to calculate the size of the project he stated that it would take him a long to calculate it. The court gave him time to calculate. He gave the area for the ground floor as $304.9m^2$. He stated that he was given approved plans by the client and only interpreted the drawings while working with the other experts. On re-examination he stated that an enforcement officer from the City Council told him to give a bribe so that he could be released. He clarified that he had not calculated the size for the perimeter wall, first floor and the attic because he required time to calculate the area from the designs. He stated that the Council officials did not tell them what was wrong with their drawings. He averred that the cost for the repeat work from the foundation to first floor was for the repeat reconstruction of the building after the demolition. They had to put up a new site store and redo the whole project based on the engineer's advice.

27. Wilfred Wanyonyi Masinde, an employee of the County Government of Nairobi gave evidence for the defence. He stated that he worked in the Urban Planning Sector as a Building Inspector. His duties were to inspect and monitor developments until completion and ensure that developers complied with the Physical Planning Act and county bylaws. He stated that on 25/3/2010 the City Council of Nairobi visited the Suit Property and established that the developer was carrying out a development contrary to approved plan Reg. no. EV507 dated 2/3/2010. Arising from that the 1st Plaintiff was arrested and booked at the Central Police Station for constructing contrary to approved plans and without structural plans. He added that on further investigation it was noted that the developer misrepresented facts to the City Council when he obtained the approval. He stated that the Defendant disapproved plan no. EV507 on 20/5/2010 under by law number 10 for the reason that the proposed alterations and additions comprised typical design of the comprehensive scheme. By the time he recorded the statement the developer had completed and occupied the house.

28. He stated that the court issued various orders in this suit including that of H. Okwengu J of 4/10/2010 restraining the Defendants from interfering with the Plaintiffs' construction of the development on the Suit Property. Okwengu J had previously extended the interim order on 27/7/2010. The order of Mbogholi J. given on 25/1/2011 directed that the status quo would be maintained and elaborated that that meant that Plaintiffs and the Defendants would not engage in any action that was likely to prejudice the fair determination of the application. Further, both parties were not to alter the structure that was on the Suit Property at the time. Following the Defendant's application dated 22/10/2010, Okwengu J issued a temporary injunction on 12/11/2010 restraining the Plaintiffs from continuing illegal construction on the Suit property and directed that that application would be heard on 23/11/2010 with the application dated 8/11/2010.

29. Mr. Masinde stated that the Plaintiffs fraudulently obtained approved plan no. EV507 through misrepresentation of facts. By the time the final order of 22/9/2011 was issued by the court, the City Council of Nairobi had already disapproved plan no. EV507. He maintained that the Plaintiffs constructed and completed an additional building on three floors and occupied it without approved plans and a certificate of occupation. He approximated that to construct a dsq of a plinth area of $31.7m^2$ in 2010 would have cost less than Kshs. 951,000/= which would be far less than the sum of Kshs. 12, 363,000/= the Plaintiffs claim. He added that the Plaintiffs paid Kshs. 17,000/= for the signboard and not Kshs. 50,000/= as they seek in this suit. He was emphatic that the Defendant had neither issued a hoarding licence to the Plaintiffs nor approved the hoarding in the Suit Property. He maintained that the Plaintiffs did not apply for change of user to construct two houses in a plot intended for a single dwelling unit and thus they contravened the Physical Planning Act. On item number 12 in the Plaintiffs' claim for special damages he maintained that the court directed each party to bear its own costs in the judicial review suit.

30. He produced a copy of the approval of the Plaintiffs' development dated 2/3/2010. The letter gave some conditions and referred to a proposed alteration, dsq and boundary wall to existing building. The certificate of structural design he produced for plan no. EV507 gave the details as being for the foundation, slab and roof. The drawing contained foundation/ground layout and upper floor slab layout including a staircase. He also produced a copy of the resolution of the Town Planning Technical Committee dated 20/5/2010 recommending the disapproval of the Plaintiffs' building plans which had been approved on 4/3/2010 on the ground that it had been established that the proposed alterations and additions would compromise the harmonized typical design of the comprehensive scheme. The plinth area for the Plaintiffs' development is given as $31.7m^2$ in that recommendation. He also produced a copy of F/R no. 412/147 showing the layout of the plots in the estate. He produced the minutes of the Town Planning Committee meeting held on 10/6/2020 where the recommendation of the Director of City Planning for the disapproval of the building plan for L.R. No. 1870/III/530- Westlands- Matondo Lane was approved. He also produced the judgement of W. Korir J in **JR ELC Case No. 80 of 2011** in which the court directed each party to meet its own costs for the application.

31. On cross examination Mr. Masinde stated that as the field officer and the inspector on site, he inspected the site and found the Plaintiffs doing the wrong things and that is why the 1st Plaintiff was arrested for building contrary to the plans and building a bigger house. He stated that the Director of City Planning filed the application for disapproval based on his field report. He believed that the disapproval was communicated to the Plaintiffs' architect. The 1st Plaintiff went to court and obtained orders blocking the Defendant from accessing the Suit Property. He stated that an enforcement notice was served on the 1st Plaintiff. He maintained that after the disapproval the building plans were null and void. In his view, the plans were disapproved because the approval given was for a dsq and a boundary wall and added that the Plaintiffs gave the Defendant wrong information through their architect. He reported to the Director of City Planning who sat in the Committee for Town Planning, which sat and disapproved the Plaintiffs' building plans.

32. Parties filed submissions which the court has considered. The Plaintiffs captured the issues for determination as:

a) Whether the Plaintiffs started construction contrary to approved plan no. EV507;

b) Whether the Defendant lawfully disapproved the Plaintiffs' building plans;

c) Whether the 1st Plaintiff's detainment was lawful and if not, whether he is entitled to damages;

d) Whether the Plaintiffs are entitled to the reliefs they seek in this suit;

e) Whether the Plaintiffs should be ordered to demolish the dsq on L.R. no. 1870/III/550; and

f) Who should pay the costs of this suit?

33. The Plaintiffs submitted that they applied for approval pursuant to Section 30 of the Physical Planning Act in February 2010 and obtained the Defendant's approval on 2/3/2010 before commencing construction on the Suit Property. The Plaintiffs submitted that they satisfied the conditions for the approval but the Defendant applied a unilateral criteria for disapproval. They added that it submitted the structural plans for approval on 8/4/2010 and were issued with the indemnity form dated 8/4/2010.

34. On the Defendant's contention that the Plaintiffs did not disclose that the development was to be done in a gated community, the

Plaintiffs submitted that the alterations were to be undertaken in their own compound which would not have occasioned any environmental harm whatsoever. The Plaintiffs submitted that the Defendant's witness was neither a surveyor nor an engineer to comment about the structure. The Plaintiffs submitted that they commenced construction after acquiring the relevant approvals from the City Council of Nairobi and that the dsq that they constructed on the Suit Property was in compliance with the approvals they sought and urged that the Defendant was liable to pay damages. They relied on **Abdulhamid Ebrahim Ahmed v Municipal Council Of Mombasa [2004]eKLR** in which Maraga J (as he then was) found that the Plaintiff had complied with all the building regulations before he commenced the construction and that the Defendant had no right to interfere with his construction and was therefore liable to pay damages to the Plaintiff.

35. On the disapproval of the building plans, the Plaintiffs contended that their right to be heard was breached. They relied on Section 33 of the Physical Planning Act requiring a local authority to notify an applicant in writing of its decision refusing to grant permission. The Plaintiffs challenged the minutes of the committee for not giving a list of the names of the persons who were in attendance, who lodged the complaint and who represented the Plaintiffs in that meeting and whether he had notice of that meeting. The Plaintiffs further contended that if such a meeting was held at which their plans were disapproved then it was held in contempt of the court orders since there was a case between the parties from 3/3/2010. The Plaintiffs maintained that they were never served with the demolition notice and relied on Article 47 of the Constitution and urged the court to award them damages for the demolition.

36. The Plaintiffs relied on Article 49(1) (a) (1) of the Constitution on the rights of a person when an arrest is made and pointed out that to date the 1st Plaintiff has never been charged in court. They submitted that the 1st Plaintiff who is an advocate of the High Court of Kenya suffered humiliation and anguish when he was wrongfully arrested and detained for which he ought to be paid aggravated damages of Kshs. 5,000,000/= and relied on the decision in **Harriet Karimi v the Attorney General (2005) eKLR**.

37. The Plaintiffs urged the court to grant the special damages they sought in the Further Further Amended Plaint and relied on the photographs of the demolished building, the assessment of damages by Mbuga Engineering & Construction Limited, the vouchers from the contractors and the other documents produced by the Plaintiffs. They quoted the decision in **Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa [2004] eKLR** that the Plaintiff was entitled to the value of the work that had been done and of the damaged materials. They prayed for construction and reconstruction costs of Kshs. 10,156,196/= and accrued interest on the additional advance funds used to construct of Kshs. 4,000,000/= at the commercial bank rate of 24% per annum until payment in full.

38. The Plaintiffs submitted that the Defendant ought not to demolish the dsq on the Suit Property based on Article 40 (3) and (5) of the Constitution which safeguards the right to property and prohibits the State from depriving a person of their property.

39. The Defendant submitted that the Plaintiffs had not met the requirements of a prima facie case and irreparable damage for the court to grant them a permanent injunction and added that the extent of the damage can be ascertained. The Defendant submitted that it was enforcing the repealed Physical Planning Act which authorised it to conduct investigations and inspections on the development plans it had approved. It added that the community where the Plaintiffs' development was to be carried out was going to be affected. It referred to Section 38 of the repealed Physical Planning Act on an enforcement notice where development permission granted under that Act had not been complied with.

40. The Defendant also made reference to Section 56 of the Physical and Land Use Planning Act, Number 13 of 2019 which replaced the Physical Planning Act which mandates a county government to prohibit or control the use and development of land and buildings in the interest of proper and orderly development in its area of jurisdiction. That Act further tasks the county government to consider and approve all development applications and grant development permissions; and ensure the proper execution and implementation of approved and land use development plans. Section 57 of that Act empowers a county executive committee to revoke development permission if the Applicant contravenes the Act or the conditions imposed on the development permission or for any justifiable cause. The Defendant urged that it was mandated to ensure that approved development plans were executed and implemented in accordance with the law and the conditions attached to the approval.

41. On the prayer for special damages, the Defendant submitted that the figures given by the Plaintiffs were inflated and had no basis. It pointed out that the Plaintiffs had claimed Kshs. 50,000/= for the signboard yet they paid Kshs. 17,000/= to the Defendant for the signboard. The costs for the judicial review were not payable according to the Defendant which also submitted that item numbers 1, 3, 4, 6 and 13 of the Plaintiffs' particulars of special damages were grossly inflated and not proved. It submitted that there was no nexus between payment receipts produced and the Defendant's actions. It also pointed out that items 6 and 13 of the special damages claimed by the Plaintiffs refer to the same works but were couched in different words. It argued that the cost for repeat works covered the value of materials destroyed which cannot be claimed twice by the Plaintiffs. The Defendant contended that there was no demolition of the Plaintiffs' structures and submitted that a close scrutiny of the photographs produced by the Plaintiffs shows that the steel wires and building blocks were new and unused.

42. Further, the Defendant submitted that the Plaintiffs had been in occupation of the development since 2012 in blatant violation of the conditions for the approval that required it to obtain an occupation certificate. The Defendant submitted that item 7 of the particulars of special damages on extension of professional services did not arise because the Plaintiffs obtained a court order on 4/10/2010 allowing them to continue constructing. It submitted that its approval to clear the site was not sought by the Plaintiffs to entitle it to seek damages for clearing the site. On the claim for accommodation for the project manager, the Defendant submitted that Zachary Mbuga the contractor, confirmed that the project only stalled for one month and so the sum claimed is not payable. It urged the court to disallow the prayer for strenuous expenses and loss of earnings on the basis that the Plaintiffs were constructing which was expected to take time.

43. The Defendant submitted that it was legal for the 1st Plaintiff to be arrested pursuant to Section 48 of the repealed Physical Planning Act. It maintained that the Defendant had a right of entry into the Plaintiffs' development in performance of its duties pursuant to Section 46 of the Physical Planning Act. It added that both the Physical Planning and Land Use Act gave it powers to arrest, gain entry and investigate any violation of development plan approvals. On the claim for exemplary damages, it submitted that no evidence was tendered to show that the Defendant acted in an unlawful, oppressive or arbitrary manner. It maintained that it was discharging its mandate under the Physical Planning Act and should not be penalized to pay the exemplary damages the 1st Plaintiff seeks.

44. The Defendant submitted that considering the conduct of the Plaintiffs in refusing to adhere to the terms of the approval of their

development plan and their failure to cooperate with the Defendant in ensuring the law was followed, the Plaintiffs should not be awarded costs in this suit.

45. The Plaintiffs filed submissions in reply to the Defendant's submissions and urged that the Defendant had mixed up the principles for grant of a temporary injunction with those for a permanent injunction. They maintained that they sought the relevant approvals from the Defendant to make alterations to their house. They maintained that they had proved the special damages they seek. On the contention by the Defendant that during the site visit that the court made to the Suit Property on 24/7/2020 it was apparent that only the Plaintiffs had constructed such a development in the community, the Plaintiffs urged that they had an indefeasible title and that they have the discretion to construct anything they would wish on their property. They urged that there is no law to control or regulate the Plaintiffs' community.

46. The court did a site visit to the Suit Property on 24/7/2020 in the presence of the 1st Plaintiff, a representative of the Defendant and the advocates for both parties. According to what the 1st Plaintiff told the court during the site visit, the structure the Plaintiffs erected right in front of their house comprises 2 parking slots on the ground floor and has a kitchen, sitting room and toilet on the first floor. The upper floor has three bedrooms and one toilet. The 1st Plaintiff gave the court the house layout and stated that his son lived in the new house with his family. He informed the court that the neighbouring townhouses had two parking slots on the ground floor with a living room and kitchen. The first floor had three bedrooms while the attic had 3 bedrooms with the master bedroom being en suite. Unlike the Plaintiffs' plot, the rest of the estate has only one townhouse per plot.

47. The court noted that the structure erected by the Plaintiffs' in front of their house number 17 was out of character with the setting of the other houses in the community that has a common gate for most of the houses that do not abut on Matundu Lane. If other residents were to each replicate what the Plaintiffs and erect a second house on their land, it would create an unsightly place leading to a drop in the property values in the estate. There is no doubt that the development put up by the Plaintiff will cause harm to the structure of the estate and the other residents of Matundu Villas.

48. Going by the issues framed by the Plaintiff, what is to be determined in this dispute can be summarised as follows:- whether the Plaintiffs constructed their development contrary to the plans approved by the Defendant; whether the Defendant lawfully disapproved the Plaintiffs' building plans; was the arrest and detention of the 1st Plaintiff lawful? And lastly are the Plaintiffs entitled to the reliefs they seek or should the court issue an order for the demolition of the Plaintiffs' dsq.

49. The Plaintiffs contended that their right to own property guaranteed under Article 40 of the Constitution was unfettered and that they had the discretion to construct anything they wished on their property while contending that there was no law to control or regulate the their community. The court does not agree with these arguments. The Plaintiffs' held their interest over their land subject to the land laws and other city planning laws and bylaws applicable to that land. The fact that the Plaintiffs applied for development permission from the Defendant and submitted structural plans before commencing construction of the proposed dsq and boundary wall confirms that even though they enjoyed the right to the Suit Property they could only alter the development on their land with the approval of the Defendant as the local authority in whose area the Plaintiffs' land was in accordance with the Physical Planning Act which was in force at the time.

50. The law relating to approvals of development plans that was in force in March 2010 when the Plaintiffs sought the Defendant's approval to alter their dwelling house by constructing a dsq and perimeter wall around the Suit Property was the Physical Planning Act, which is now repealed. At that time the Constitution of Kenya 2010 had not been promulgated. The approval dated 2/3/2010 which the Defendant granted the Plaintiffs was for the proposed alteration to the domestic building by construction of a dsq and boundary wall to the existing building.

51. The object of the Physical Planning Act was to provide for the preparation and implementation of physical development plans and for connected purposes. The provisions of the Act applied to all parts of the country except the areas which the Minister specified by notice in the Gazette. The Act defined a development and classified it as A or B with the proviso that alterations to a building that did not exceed 10% of the floor area of the building did not constitute development. Part V of the Act dealt with control of development and Section 29 gave each local authority power to do certain things including to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area; to consider and approve all development applications and grant development permission; and to formulate by laws to regulate zoning in respect of use and density of development. These powers were subject to the provisions of that Act.

52. Section 31 of the Physical Planning Act enjoined anyone requiring a development permission to make an application to the clerk of the local authority responsible for the area where the land was situated, using the form prescribed in the Fourth Schedule. Subject to the comments of the Director of Physical Planning, the local authority such as the Defendant could grant an applicant a development permission in the form prescribed in the Fifth Schedule with or without conditions pursuant to Section 33 of the Act. That section set out the procedure to be followed where the local authority refused to grant an applicant the development permission he sought.

53. Section 30 of the Act prohibited any person from carrying out development within the area of a local authority without a development permission granted by the local authority under Section 33. A person who contravened that requirement was guilty of an offence and was liable to pay a fine not exceeding Kshs. 100,000/= or to imprisonment not exceeding 5 years or to both. Section 31 enjoined anyone requiring a development permission to make an application to the clerk of the local authority responsible for the area where the land was situated, using the form prescribed in the Fourth Schedule. Subject to the comments of the Director of Physical Planning, the local authority such as the Defendant could grant an applicant a development permission in the form prescribed in the Fifth Schedule with or without conditions pursuant to Section 33 of the Act. That section set out the procedure to be followed where the local authority refused to grant an applicant the development permission he sought.

54. The evidence of the 1st Plaintiff is hazy and unclear as to precisely when the Plaintiffs began construction of the dsq and perimeter wall which is the subject of these proceedings. It is clear from the evidence adduced that the Plaintiffs applied for and were granted development permission on certain specified conditions to make alterations to their existing structure by adding a dsq and constructing a boundary wall. This would have been in conformity with Sections 30, 31 and 33 of the Act. The Defendant approved the Plaintiffs' development plans on 2/3/2010. The approval was subject to conditions specified in the letter of approval. One of the conditions was the submission of satisfactory

structural details including lintols and trusses.

55. What emerges is that following the approval dated 2/3/2010, the Plaintiffs were required to submit their structural plans for the Defendant's approval which it would seem were approved after 26/3/2010 being the date shown in the indemnity form executed by the developer, the architect and the structural engineer. The Plaintiffs stated that they submitted the structural plans for approval on 8/4/2010 and were issued with the indemnity form dated 8/4/2010. The 1st Plaintiff was arrested on 25/3/2010. This would mean that at the time the 1st Plaintiff was arrested in March 2010 he had not obtained satisfactory structural plans in compliance with the condition for the approval dated 2/3/2014.

56. Section 30 of the Act prohibited any person from carrying out development within the area of a local authority without a development permission granted by the local authority under Section 33. A person who contravened that requirement was guilty of an offence and was liable to pay a fine not exceeding Kshs. 100,000/= or to imprisonment not exceeding 5 years or to both. The law allowed the Defendant to enforce the Act with respect to issuing development permissions and created an offence where a person carried out development without permission. The court is not satisfied that the Defendant acted unlawfully when it arrested the 1st Plaintiff on 25/3/2010 and took him to Central Police Station for carrying out a development contrary to approved plans and without approved structural plans. The Plaintiffs claim for damages for unlawful arrest and detention for hours therefore fails.

57. If it came to the attention of a local authority that development of land was being carried out without the required development permission or without compliance with the conditions of a development permission then the local authority could serve an enforcement notice on the owner, occupier or developer of the land under Section 38 of the Act. The enforcement notice had to specify the development alleged to have been carried out without a development permission or the conditions of the development permission which had been contravened. The notice would also give measures to be taken within the period specified in the notice to restore the land to the original condition it was in before the development took place or for securing compliance with the conditions that had been contravened. The notice could also require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities. Where a person commenced work upon any alteration or additions to any existing building or carried out any development before receiving the approval of the local authority in consultation with the Director of Physical Planning, Rule 36 enjoined the local authority to serve a notice on that person to cease the development.

58. The provisions of the repealed Physical Planning Act mandated the Defendant to play a central role in regulating developments within Nairobi City. It approved development applications and granted development permission. Its role did not end with the grant of development permission but extended to ensuring that the development was implemented in accordance with the law and conditions upon which the D had granted the development permission to the applicant.

59. It is not in dispute that on or about May 2010, the Defendant demolished the structure which the Plaintiffs had erected on the Suit Property. There is no evidence that the Defendant served an enforcement notice upon the Plaintiffs when it came to its attention that the Plaintiffs were carrying out the development on their land without the required development permission or without compliance with the conditions of a development permission. The court finds that the Defendant's act of demolishing the Plaintiff's development without issuing an enforcement notice as required by the Physical Planning Act was unlawful and the Defendant is liable to pay the Plaintiffs the value of the structure which they demolished.

60. The other issue for determination is whether the Defendant lawfully disapproved the Plaintiffs' building plans. The procedure the Defendant followed in its meetings and proceedings was regulated by the Local Government Act which was in force at the time. The Plaintiffs did not lead any evidence or demonstrate that the Defendant was required to have the Plaintiffs represented at its Town Planning Committee Meeting of 26/5/2010 when it recommended the disapproval of the Plaintiffs' building plans on the ground that it had been established that the proposed alteration would compromise the harmonized design of the comprehensive scheme.

61. Rule 33 of the Physical Planning (Building and Development) (Control) Rules, 1998 gave the planning grounds for refusal by the Director of Physical Planning to recommend any building or proposed alteration to any existing building if the plans were not correctly drawn or omitted to show information required under the rules; or the proposed structure was to be used for any purpose which might be calculated to depreciate the value of the neighbouring property or interfere with the convenience or comfort of neighbouring occupants; or the proposed building was injurious to amenities or detrimental in respect of appearance or dignity or it failed to comply with requirements as to design, height, elevation, size, shape, structure or appearance. The reasons the Defendant gave for disapproving the Plaintiffs' approval for the development of the dsq and boundary wall was that the proposed development would compromise the harmonized typical design of the comprehensive scheme.

62. Rule 35 prohibited any person from erecting or authorising the erection of any building except in accordance with the plans submitted to and approved by the local authority in consultation with the Director of Physical Planning. The Plaintiffs went ahead to construct their development on the Suit Property after the Defendant had disapproved their development permission given on 2/3/2010. The development the Plaintiffs constructed on the Suit Property after the disapproval of its building plans in June 2010 was undertaken without a development permission as required by the Physical Planning Act and the Rules under that Act. The Plaintiffs undertook the development of the second dwelling house on the Suit Property without being granted a development permission by the Defendant after they obtained injunctive orders from the court which restrained the Defendant from interfering with their construction on the Suit Property. If the Defendant is minded to demolish the Plaintiffs' structure for being erected without development permission, then it has to do so in strict observance of the law.

63. The Plaintiffs' obtained approval to construct a dsq and boundary wall to the existing building. The term dsq in the court's view denotes a domestic servant quarter even though the parties referred to it in the abbreviated form throughout the pleadings, evidence and their submissions. The Plaintiffs maintained that they were constructing their development in accordance with the approval they obtained from the Defendant. The Plaintiffs did not produce any evidence of the application they made to the Defendant for the development permission which would show the proposed size of the dsq. The Defendant gave the size of the proposed dsq which it had approved as 31.7m2, which is what is indicated in the Defendant's resolution for the disapproval of the Plaintiffs' building plans. The court is inclined to believe that that was the size of the dsq the Plaintiffs submitted to the Defendant when they applied for approval of their development plan. The Plaintiffs departed quite significantly from the approved plan for a small dsq when they erected a grotesque structure that stands out and is not in harmony with

the surrounding houses within that gated estate comprising single dwelling townhouses per plot.

64. The Physical Planning (Building and Development) (Control) Rules, 1998 gave further stipulations regarding developments. The rules did not define a dsq but they defined a domestic building as a building used, constructed or adapted to be used for human habitation. The rules defined a dwelling house as a building designed for use exclusively as one self-contained dwelling by a single family, together with such out-building as are ordinarily used therewith. Going by the size of the house the Plaintiffs constructed on the Suit Property the court doubts that it can be described as a domestic servant quarter. The 1st Plaintiff confirmed that his son was living in the house and that it was on three floors with three bedrooms.

65. Weighing the evidence of the Plaintiff against that of the Defendant, the court is satisfied that the Defendant demolished the Plaintiff's structure. The Plaintiff's witness Mr. Mbuga testified that at the time the Plaintiffs' development was demolished, it had gone up to the first floor. The photographs show some rubble containing building stones and steel bars. The Plaintiff indicated under item 6 of the particulars of special damages that he incurred expenses in the sum of Kshs. 3,250,500.50 to do the repeat work of what was demolished to the first floor, dsq and the boundary wall. In the court's view this is the sum that the Plaintiffs have proved that they are entitled to. Following the demolition, the Plaintiff must have cleared the debris from the site before they could commence the construction afresh. The court grants the Plaintiff item number 5 for the clearance of the site and disposal of the debris.

66. In the court's view the items listed as preliminary works, foundation and first floor works as well as the boundary walling and parking that the Plaintiffs claim are not recoverable for that would amount to double compensation. In any event these are the costs the Plaintiffs would have incurred in the development of their property if there had been no interference or demolition from the Defendant. The Plaintiffs are only entitled to the repeat work they undertook after the Defendant demolished their structure together with the cost of clearing the debris from the site.

67. The Plaintiffs did not prove the other items relating to new signboard, hoarding and the strenuous expenses and loss of earnings, some of which would ordinarily have been paid to the Defendant. The court in the judicial review matter directed each party to meet its costs so the Plaintiffs claim for Kshs. 150,000/= cannot succeed. In the court's view, the cost of spoiled materials is subsumed in the repeat work that had to be undertaken after demolition and is not therefore payable as a separate claim. The court declines to grant the prayer for rented alternative accommodation as it was not proved by the Plaintiffs. The contractor confirmed that he supervised the construction while living in his own home. The Plaintiffs failed to prove the damage they claimed to have suffered in terms of penalty interest and accrued interest of the additional money they used to construct.

68. The court awards the Plaintiffs special damages of Kshs. 3,750,500.50 together with interest at court rates from the30/7/2010 until payment in full. The court declines to grant the other prayers sought in the Further Further Amended Plaint dated 9/5/2019. Since the Plaintiff has partially succeeded in his claim, each party will bear its own costs.

Delivered virtually at Nairobi this 7th day of December 2020.

K. BOR

JUDGE

In the presence of:-

Ms. Faith Njuguna for the Plaintiff

Ms. Gladys Matunda for the Defendant

Mr. V. Owuor- Court Assistant