

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC NO. 95 of 2017
{Formerly Machakos ELC Case No. 165 of 2011}

PETER JOHN THUO NGANGAPLAINTIFF

VERSUS

LOIS NALANG'O NGOSSOR1ST DEFENDANT

JOSEPH NGOSSOR2ND DEFENDANT

JUDGEMENT

Introduction

1. Originally, the Plaintiff had filed this case in Machakos being Machakos ELC Case No. 165 of 2011 vide a Plaint dated 8th July 2011. The file was subsequently rechristened Kajiado ELC 95 of 2017 following its transfer to this court. The Plaintiff later amended the claim by way of the Amended Plaint dated 8th November 2011 filed on 9th November 2011, wherein the Plaintiff seeks judgment against the Defendants jointly and severally for the following prayers:

- a. *An injunction restraining the Defendants, their servants, workmen and agents, from further damaging or interfering in any way or further damaging the Plaintiffs property, use and enjoyment of L.R. No.4480/163 NGONG.*
- b. *Special damages for restoration of the building in the sum of Ksh.5,200,000/=.*
- c. *General damages for loss of business.*
- d. *Interest on (b) and (c) above.*
- e. *Cost of the suit.*

2. The Plaintiff alleges that he is the registered owner of L.R. No. 4480/163 NGONG Township wherein he runs a restaurant business and which is adjacent to L.R. No. 4480/164 NGONG whose registered proprietors are the Defendants being husband and wife. According to the Plaintiff, the Defendants encroached, trespassed upon his land, damaged his perimeter wall and erected structures therein when they commenced excavation of their land in the year 2009. The Plaintiff alleges that the Defendants failed to conduct an Environment Impact Assessment and comply with the Building code which demands that a notice be put on site showing the nature of construction and the professionals involved.
3. According to the Plaintiff, the Defendants ignored the Ngong Public Health Officer directive in March 2011 directing them to cease construction on L.R. No. 4480/164 NGONG for failure to comply with the law. It is alleged that the Defendants' actions made the Plaintiff close his business on 1st July 2011 as he was ordered by the Ngong Public Health Officer to demolish his building and reconstruct it for public safety reasons. Loss and damages particulars as pleaded by the Plaintiff include; weakened foundation, collapse of the perimeter fence/wall, cracks to the floor of the buildings, cost of demolishing and reconstructing the structure and loss of business due to closure and during the demolition and reconstruction process.
4. It is the Plaintiff's case that the Defendants have persistently trespassed upon his property and similarly intend to repeat the said actions. It is further asserted that the Defendants failed, neglected and refused to cease interfering with the Plaintiff's property despite being served with demand and notice of intention to sue them
5. The 1st and 2nd Defendants responded to the Plaintiff's claim by way of a statement of Defence and Counterclaim dated 27th March 2023 where they asserted that prior to construction of their 4-storey building on L.R. No. 4480/164 NGONG, they undertook an

Environmental Impact Assessment. Consequently, they were issued with a license by NEMA permitting them to proceed with the development. The Defendants aver that their development plans were not only approved by experts and engineers before construction commenced but that they also complied with all the laws.

6. The defendants contend that during construction, water from the Plaintiff's plot flowed into their plot and filled the 24 feet holes dug on their property. When the Ngong public health officers visited the site after the Defendants reported the matter, it was established that the accumulation of water was caused by an exposed septic PVC drainage pipe which run from the Plaintiff's plot, L.R. No. 4480/163 through to L.R. No. 4480/164.
7. According to the Defendants, the construction was stopped following a directive issued by the Ministry of Health and Sanitation upon recommendation by Ol Kejuado County Council. They further avow that the Plaintiff encroached on L.R. No. 4480/164 by 30cm as evidenced by the Survey report dated 30th June 2021. The said survey report was done after the Defendants requested the Ol Kejuado County Council to appoint a surveyor to survey and establish the actual boundaries of the two parcels.
8. Through their counterclaim, the Defendants seek income amounting to Ksh.118,800,000/= projected to have been lost over 7.5 years. They allege that the delay in constructing their property was occasioned by Plaintiff notwithstanding the fact that they had acquired all approvals for purposes of construction. Accordingly, they pray for judgment against the Plaintiff for the following orders;-

(a) A permanent injunction restraining the Plaintiff, his servant, assigns.

Employees or anyone themselves, their servant, and or agents be restrained from entering into, trespassing and alienating L.R.No.4480/164 in any way with the said parcel.

- (b) *A prohibitory order prohibiting the Plaintiff from in any way encroaching L.R. No. 4480/164 or discharging effluent or hazardous waste from his plot LR. L.R. No. 4480/163.*
- (c) *That the Plaintiff is liable for nuisance and trespass to property under strict liability.*
- (d) *An award of special damages for losses as a result of wasting away, rusting of materials, and theft of construction materials, acquisition of required approvals from NEMA, approved construction plans and wages paid to workers.*
- (e) *A mandatory injunction directing the Plaintiff to redirect all the affluent away from the Defendants premises.*
- (f) *A permanent injunction restraining the Plaintiff whether acting directly or through agents, employees, officers or proxies from undertaking any activity that will be in contravention*
- (g) *The Respondent prays that the Plaintiff's suit is dismissed with costs and judgment entered on the Defence and Counterclaim as prayed.*

Analysis of Evidence

9. Peter John Thuo Nganga, the plaintiff herein, testified as PW1. He began his testimony by adopting his witness statement as his evidence in chief and producing the accompanying documents as exhibits in support of his case. He pleaded with the court to grant him the order sought in his amended Plaint given that the Defendants interfered with the wall of his building.
10. During cross examination, PW1 explained that he was directed to close down his bar business in 2011 as a result of the collapse of his perimeter wall, whose foundation he claims, was interfered with by the Defendants. When he was referred to a closure notice

by the Ministry of Health and Sanitation dated 1st July 2011, relating to his building, he admitted that the notice mentioned that the closure was because of non-compliance with the Building code and Regulations. He further averred that he was not aware that the Defendants requested the county works officer to conduct a site visit on account of a sewer discharge. Despite his admission that the court ordered a survey to be undertaken, it was his testimony that he was not informed about the outcome of the survey exercise. He averred that neither he nor his wife were present during the survey exercise because they were not invited. He maintained that he has never encroached onto the Defendants' Plot.

11. PW1 stated that he repaired the damage occasioned on his building before reopening his business. However, in 2022, the business was closed down after it burned. 2 years later, he reopened it after undertaking further repairs. PW1 averred that the septic tank serving his business, which was located next to the Defendants' property, was not damaged and that he was not aware of any complaint of sewerage leakage.
12. He informed the court that he was not aware if the Defendants had acquired any building approvals. He insisted that his perimeter wall foundation was damaged as a result of the Defendants' negligence during the excavation works. In his testimony, he stated that the Defendants' actions rendered the structure of his building—though separate from the perimeter wall—unstable. PW1 further testified that when the public health officer visited his premises at his request, no directive was issued requiring him to close his business.
13. Upon re-examination, PW1 reiterated that he was neither invited to the site visit nor shown the alleged survey report or a copy of it. He stated that his building, which was constructed in 1980 after obtaining approved building plans, was entirely within the boundaries of his plot. He further informed the Court that he had been shown the beacons

demarcating his plot, whose size corresponds with the measurements indicated in the title document.

14. Lois Nalang'o Ngossor, the 1st defendant herein, testified as DW1. She adopted her witness statement as her evidence in chief and produced the documents listed on the Defendants' list and bundles of documents as exhibits in support of her case. DW1 then implored the court to dismiss the Plaintiff's claims and allow the Defendants counterclaim as prayed.
15. During cross-examination, DW1 testified that the Defendants acquired their plot in 1974. She stated that she was the first to lodge a complaint with the public health authorities after being prevented from carrying out construction on their parcel of land. According to her testimony, during a verification exercise, the County Surveyor confirmed that the Plaintiff had erected a building that encroached onto a portion of their plot. This finding, she added, was corroborated by their surveyor's report, which similarly indicated that the Plaintiff had encroached onto their property.
16. DW1 testified that before commencing construction, they had obtained all the necessary approvals, including a NEMA licence. However, they were later served with a notice to stop the construction on the grounds that they lacked approved building plans and that their works had interfered with the foundation of the neighbouring building. She stated that their contractor did not commit any error, nor was she aware of them having caused any damage to the neighbour's foundation. She further told the Court that water from the Plaintiff's compound flowed into their parcel. DW1 admitted that they had not quantified their claim, although they sought compensation for the losses they had allegedly incurred.
17. Upon re-examination, DW1 testified that before the Plaintiff filed the present suit, she had lodged a complaint with the County Government alleging that the Plaintiff had encroached onto their plot. She reiterated that they had obtained all the requisite

approvals before commencing construction on their property. Nonetheless, despite having secured all the necessary permits, they were served with a notice from the department of Public Health and Sanitation dated 17th March 2011, directing them to stop the construction. According to her testimony, they were unaware whether the Plaintiff had obtained any approved building plans or of the alleged collapse of the Plaintiff's wall. She further stated that they claimed a sum of Kshs. 118,800,000/= as compensation, asserting that they had potential clients who were ready to occupy the premises upon completion.

18. Evans Orina Moses, the Ministry of Lands' Surveyor based at Ngong, testified as DW2 and produced a survey report dated 30th June 2021. DW2 elucidated that the report was prepared pursuant to a direction of the court issued on 18th January 2021, that a site visit be conducted to determine the boundary between L.R. No. 4480/163 and L.R. No. 4480/164. According to the report, parcel 164 was encroached upon by 30cm when the owner of parcel 163 constructed a building therein. He stated that although they faced challenges during the exercise because of sewerage spillage whose source could not be ascertained, the exercise was fully undertaken. By his own admission, he disclosed that the Plaintiff was absent during the exercise despite being notified through his lawyer.
19. During cross-examination, DW2 reiterated that the Plaintiff was not present during the site visit despite being notified that the survey exercise would take place. He further explained that the office of the Director of Surveys is legally mandated to fix boundaries and that the boundary of the two parcels was a fixed boundary. However, it was his testimony that the report was not endorsed by the Registrar.
20. Upon re-examination, DW2 maintained that all parties had been duly notified and invited to attend the survey exercise. He clarified that the fixing of survey boundaries is a task carried out exclusively by a licensed surveyor. It was his evidence that the fixed survey

for the two parcels, whose titles were registered under the Registration of Titles Act (RTA), had been conducted in the 1980s. He further stated that, at the time of the site visit, the wall constructed within the boundaries of parcel No. 163 measured approximately 30 centimeters in width.

Analysis of Submissions

21. The Plaintiff's written submissions are anchored on the torts of negligence, trespass, and nuisance, arising from the Defendants' excavation and construction works on the adjoining property, L.R. No. 4480/164, which allegedly caused damage to the Plaintiff's property on L.R. No. 4480/163, and interfered with his business operations at Njamba Square.
22. The Plaintiff maintains that he is the lawful owner of the said parcel, having operated a bar and restaurant there since 1986, and that his structure, which had remained sound since 1984, was compromised in 2009 when the Defendants undertook excavation along the common boundary wall. He attributes the resultant structural damage to the Defendants' negligent excavation below the foundation level relying on his unrebutted engineering report, the Defendants' own Site Inspection Report dated 6th January 2010, and the Notice to Stop Construction (Dexh-8), all of which confirm that excavation works interfered with the Plaintiff's foundation. Further reliance is placed on the Public Health Officer's Report dated 8th June 2011, which found that the Plaintiff's premises were in imminent danger of collapsing due to the undermined foundation caused by the neighbouring construction.
23. The Plaintiff asserts that the Defendants' actions amounted to professional negligence and statutory violation, as the excavation was commenced without the requisite approvals.

The NEMA licence (Dexh-4) was obtained only in June 2014, five years after the works began and well after the suit was filed, implying retrospective compliance. Citing *Donoghue v Stevenson* [1932] AC 562, the Plaintiff invokes the neighbour principle, contending that the Defendants owed him a duty of care to undertake hazardous construction works responsibly, avoiding foreseeable harm to adjacent property. He also relies on the *Local Government (Adoptive By-Laws) (Building) Order, 1968* (now repealed) to emphasize the statutory requirement for approved plans prior to construction, arguing that failure to obtain such approvals constituted a breach of both statutory duty and ordinary care.

24. In rebutting the Defendants' Counterclaim, the Plaintiff disputes the allegation of encroachment, arguing that both L.R. Nos. 4480/163 and 4480/164 are registered under the Registration of Titles Act (RTA), which prescribes fixed boundaries under Section 18 of the Land Registration Act, 2012. He relies on the testimony of DW2, the Ministry of Lands Surveyor, who confirmed that the Plaintiff's building lies within the confines of L.R. No. 4480/163 and that the perimeter wall generally follows the original boundary line. The Plaintiff contends that this evidence satisfies the burden of proof under Sections 107 and 108 of the Evidence Act, Cap 80, showing that no encroachment occurred. Even if the alleged deviation of 20cm to 30cm existed, he argues that it is negligible and falls within the principle of *de minimis non curat lex*, meaning the law does not concern itself with trivialities. To support this argument, he cites *Azzuri Limited v Pink Properties Limited* [2018] eKLR, where a similar minor intrusion was deemed inconsequential. The Plaintiff further invokes the doctrine of *ex turpi causa non oritur actio*, asserting that the Defendants, having committed the initial wrong through negligent excavation and trespass, cannot benefit from their own unlawful acts by advancing a counterclaim based on those very actions.

25. With respect to the damages sought in the Counterclaim, the Plaintiff challenges the Defendants' claim of Kshs. 118,800,000/= as speculative and unproven. He submits that special damages must be specifically pleaded and strictly proved, and that the Defendants' reliance on projected income and Bills of Quantities for a proposed commercial development fails to meet this legal threshold. In support, he cites *County Government of Meru v M'Muktha (Civil Appeal No. 28 of 2019) [2024] KECA 1616*, where the Court of Appeal rejected a similar claim for loss of user based on hypothetical projections for a hotel development that never existed.
26. In conclusion, the Plaintiff prays for special damages of Kshs. 5,200,000/= for restoration of his building, noting that the value assessed in 2011 has since appreciated due to inflation, as well as general damages for loss of business. He relies on *Florence Mbuvi v Faustina Holdings Ltd & Another (ELC No. 398 of 2017)*, where the Court awarded Kshs. 3,500,000/= in general damages for comparable harm arising from negligent neighbouring construction. The Plaintiff also prays for costs of the suit, submitting that costs should follow the event. He ultimately urges the Court to find that the Defendants' excavation and construction were negligently undertaken, that their Counterclaim is without merit, and to enter judgment in his favour for damages and costs as pleaded.
27. The defendants filed written submissions discrediting the Plaintiff's claim of negligence while simultaneously reinforcing their Counterclaim based on the doctrines of contributory cause, trespass, and illegality. The Defendants' position is anchored on the assertion that the Plaintiff, being the original wrongdoer, cannot be permitted to benefit from his own unlawful acts, thereby invoking the equitable and common law maxims *Ex turpi causa non oritur actio* (no action arises from an immoral cause) and *Ex dolo malo non oritur actio* (no action arises from deceit). They also rely on the maxim *Potior est*

conditio defendantis (the stronger position is that of the defendant) to argue that where both parties bear some fault, the Defendant's position prevails.

28. The Defendants contend that the Plaintiff has failed to establish negligence or direct causation on the part of the Defendants. They submit that the damage to the Plaintiff's structure was self-inflicted and arose from his own defective construction and poor sewage management. In this regard, reliance is placed on the expert testimony of the County Surveyor, Evans Orina Moses (DW2), whose report confirmed that the Plaintiff's building encroached approximately 30cm into L.R. No. 4480/164 and that the Plaintiff's property was releasing raw sewage and effluent, causing dampness and compromising the structural integrity of the house. The Defendants thus assert that the alleged damage was occasioned by the Plaintiff's own negligence in maintaining his property and managing waste, and not by the Defendants' excavation or construction activities. They further argue that the Plaintiff's structure, being a simple iron-sheet house with a slab floor, could not reasonably attract a claim of Kshs. 5,200,000/= in restoration costs, which they describe as grossly exaggerated and unsubstantiated.

29. In reinforcing the principle that an illegality cannot form the basis of a valid cause of action, the Defendants rely on the case of *In re Estate of Cyrus Kingori Ngotho (Deceased)* [2021] KEHC 6959 (KLR), where the court held that no party can derive benefit or compensation from an act founded on illegality. On that premise, they argue that the Plaintiff, having unlawfully encroached on the Defendants' registered property and failed in his duty of care regarding sewage management, is disentitled to relief. The Defendants accordingly submit that the doctrine of *Ex turpi causa* fully applies to bar the Plaintiff's claim.

30. On the issue of trespass, the Defendants maintain that the Plaintiff's encroachment upon L.R. No. 4480/164 constitutes an actionable wrong, rendering the present suit unsustainable. They rely on the survey report produced as Defence Exhibit 6, which confirmed a 20cm encroachment by the Plaintiff's building onto the Defendants' parcel. They further contend that after the Plaintiff's original structure was destroyed by fire, he rebuilt it with new approvals and moved it back within his parcel's lawful boundaries—an act that, according to the Defendants, constitutes an unequivocal admission of the earlier encroachment. The Defendants dismiss the Plaintiff's reliance on the principle *de minimis non curat lex*, contending that continuous physical intrusion onto their land cannot be treated as trivial, since it infringes their right to quiet enjoyment and obstructs development of their commercial plot. To buttress this position, they rely on *Hosea Nyandika Mosagwe & 2 Others v County Government of Nyamira [2016] KEHC 4931 (KLR)*, where the court held that once trespass is established, the aggrieved party need not prove specific damage to be entitled to general damages.

31. As regards their Counterclaim, the Defendants submit that they have sufficiently demonstrated loss arising from the Plaintiff's wrongful encroachment and the injunctive orders that have since stalled the intended development of a commercial mall on their property. They argue that the losses suffered are not speculative but are substantiated through sketch plans of the proposed development and a Quantity Surveyor's report quantifying the commercial loss incurred. In this context, the Defendants rely on *Equity Bank Ltd v Gerald Wang'ombe Thuni [2015] KEHC 2474 (KLR)*, which reiterates the principle that special damages must be specifically pleaded and strictly proved. They assert that the documentary and expert evidence on record satisfies this legal threshold. Consequently, they pray for dismissal of the Plaintiff's suit with costs, entry of judgment in their favour on the Counterclaim, general damages for trespass and economic loss, and

an order directing the removal of the encroaching structure and vacant possession of L.R. No. 4480/164.

32. In sum the defendant's argument is that the Plaintiff, having built unlawfully on the Defendants' land and failed to manage sewage on his property, cannot turn around and seek equitable relief. The court is therefore urged to uphold the principle that one who comes to equity must come with clean hands and dismiss the Plaintiff's claim in its entirety.

33. The Plaintiff then filed Supplementary Submissions which primarily sought to neutralize the Defendants' late-raised defense of contributory negligence, emphasizing both procedural and evidential deficiencies in its assertion. Procedurally, the Plaintiff contends that contributory negligence was never pleaded in the Statement of Defence, nor framed as an issue for determination at the trial, and was instead introduced for the first time in the Defendants' written submissions. In this regard, the Plaintiff relies on established principles of pleadings, submitting that parties are bound by their pleadings and that courts are limited to determining issues arising from them. Authority is drawn from *Standard Chartered Bank v Masinde (Civil Appeal 139 of 2023) [2025] KEHC 7181 (KLR)*, where the Court held that a relief outside the pleadings is untenable, and *IEBC v Stephen Mule & 3 Others, Civil Appeal 219 of 2013*, which emphasized that going beyond pleaded grounds constitutes reversible error. The Plaintiff underscores that written submissions cannot substitute evidence or pleadings, and any attempt to rely on an unpleaded defense violates procedural fairness.

34. On evidential grounds, the Plaintiff challenges the competence of the Surveyor's testimony, which the Defendants relied upon to link alleged sewage or water mismanagement by the Plaintiff to structural damage. The Plaintiff submits that under

Section 48 of the Evidence Act (Cap 80), opinions on matters of science or art must be given by persons specially skilled in that field. Since the Defendants failed to produce an engineer or any expert report with technical expertise in structural integrity or causation, the Surveyor's opinion carries no probative value in establishing contributory negligence. The Plaintiff reinforces this position with authorities such as *Lincoln Kivuti Karingi & Another v Michael Njuguna [2021] (Makindu)*, where contributory negligence was rejected in the absence of a contrary technical report, and *Anna Wairimu v Jane W. Mwangi [2018] KEELC 1027*, where the Court relied solely on professional engineering reports to hold the Defendant liable for damage to an adjoining building. The Plaintiff further submits that under Section 108 of the Evidence Act, the burden of proof of contributory negligence rests squarely on the Defendants, who failed to provide any concrete evidence demonstrating how the Plaintiff's conduct materially contributed to the alleged harm. In the absence of an engineer's report or technical analysis addressing lateral support or causation, the claim of contributory negligence is unsustainable both legally and factually.

35. The Plaintiff implores the Court to disregard the Defendants' allegations of contributory negligence in their entirety, on the grounds that they are unpleaded, procedurally unfair, and unsupported by admissible expert evidence, thereby affirming that liability for the damage rests wholly with the Defendants.

Issues for Determination

36. Having carefully considered the pleadings before me, the evidence adduced, as well as the rival submissions of the parties, the Court finds that the central issues for determination in this matter are threefold as follows:

i. ***Whether the plaintiff is entitled to the reliefs as sought in the amended plaint.***

ii. Whether the defendants are entitled to the reliefs sought in their counterclaim.

iii. What orders as to cost should issue.

Analysis and Determination

i. Whether the plaintiff is entitled to the reliefs as sought in the amended plaint.

37. The Plaintiff seeks, inter alia, an injunction restraining the Defendants, their servants, workmen, and agents from interfering with his property on L.R. No. 4480/163, special damages for restoration of the building in the sum of Kshs. 5,200,000/-, and general damages for loss of business. The Court must consider these reliefs in light of the allegations of negligence, nuisance, and trespass against the Defendants.

38. The Plaintiff's claim is founded on the tort of negligence and therefore the court's task is to determine whether the Defendants owed the Plaintiff a duty of care, breached that duty by their excavation and construction works, whether that breach caused the Plaintiff any loss, and whether the said loss was foreseeable.

39. In common law jurisdictions, it is settled that the elements of the tort of negligence are: a person must owe a duty to the victim in question; the individual who owes the duty must violate the promise or obligation; an injury then must arise because of that specific violation; and the injury must have been reasonably foreseeable as a result of the person's negligent actions. The case of ***Donoghue v Stevenson [1932] ALL ER 1*** established the modern law of negligence, laying the foundations of the duty of care. The Kenyan case of ***Kanjabi Wariari v Dennis Mutwiri Muriuki & another [2022] eKLR***, is also relevant. The Court therein held as follows;

“The Court has analyzed the pleadings and evidence before the trial Court, and has considered the grounds of appeal filed herein and the appellant's written submissions. As I have already noted, the appellant's case (as was before the trial Court) was premised on the tort of negligence. That being the case, the appellant had a duty to prove that the accident was caused by the negligence of the respondents herein. In so doing, the appellant had a duty to prove the elements of negligence. The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage.”

40. Applying the test to the present facts, the Defendants clearly owed the Plaintiff a duty to conduct their excavation and construction so as not to damage the neighbouring premises on L.R. No. 4480/163. Excavation adjacent to a neighbour's foundation is an activity which, as a matter of ordinary experience, carries obvious risk to adjoining structures, and the legal relationship is sufficiently proximate to give rise to a duty of care. The Plaintiff's unrebutted engineering evidence, the site inspection records and the Public Health Officer's notice to stop construction, link the Defendants' excavation with the undermining and damage to the Plaintiff's perimeter wall and foundation, and with consequential risk to the building and business. The site inspection report (Defendants' exhibit) records that the contractor “excavated along the perimeter wall bordering Plot No. 163 to a depth below the strip foundation causing the floor slab and hardcore to collapse”, while the Public Health Officer's report recorded that the Plaintiff's premises was in “imminent danger of collapsing” because its foundation was “undermined by construction works ... by the owner of the neighbouring premises.” Those statements

supply strong evidential support for the causal link between the excavation and the damage caused to the Plaintiff's premises.

41. The parties' own documentary record further explains why the Defendants were ordered to stop construction. The Notice to Stop Construction (Dexh-8) states in clear terms that the works were improperly interfering with neighbouring foundation and that approved plans were absent from the site. The notice, quoted verbatim from the material before the Court, reads: "The construction has tampered with the existing neighbour's foundation." and further records that "There are no plans on the site (approved) for the site people." Those are administrative findings which, when read with the engineering and site inspection evidence, justify the pause of works and the imposition of the stop order; they also corroborate the Plaintiff's case that the excavation had reached below the level of the strip foundation and had undermined the neighbouring structure.

42. The Defendants sought to resist liability by alleging contributory causes, including that the Plaintiff's structure was defective and that effluent/sewage contributed to the damage. However, the Defendants did not plead contributory negligence as a defence at trial and, critically, they did not produce expert engineering evidence capable of linking any alleged seepage to the structural failure in the technical terms required by the law. Section 48 of the Evidence Act (Cap 80) prescribes the admissibility of expert opinion and provides that:

"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."

43. In the absence of a competent engineering report from the Defendants to show how any alleged effluent or the Plaintiff's building fabric caused the damage, the Court cannot accept assertions of contributory causation advanced in the written submissions of the Defendants alone.
44. The Defendants moreover did not demonstrate compliance with statutory requirements before the works commenced. The NEMA licence relied upon by the Defendants bears the date of June 2014 and was therefore obtained well after the excavation works complained of in 2009–2011; the presence of the health authority stop notice and the site inspection findings strongly weigh against a finding that the Defendants had at all times complied with the applicable building and environmental controls. The Local Government (Adoptive By-Laws) (Building) Order, 1968 (though repealed) requires proper procedure and approvals to be observed for building works, and non-compliance with statutory controls is an important factor in assessing breach. The administrative findings therefore support the conclusion that the Defendants failed to take precautions a reasonable builder would have taken and that they breached the duty of care owed to the Plaintiff as the owner of the adjacent plot.
45. On causation, the causal connection between excavation below the strip foundation and collapse/undermining of the perimeter wall and floor slab is not fanciful but established on the balance of probabilities. The Plaintiff's engineering report is cogent and un rebutted, the site inspection recorded excavation to a depth below the strip foundation causing collapse, and the public health officer's report expressly links the neighbouring construction to the undermining of the Plaintiff's foundation. The question of causation was addressed in the case of *Elijah Ole Kool v George Ikonya Thuo*[2001] eKLR, where A. Visram J observed that;

“Although the Plaintiff may be able to trace even a consequential connection between an injury and the negligence of the Defendant, the law does necessarily attach liability to the Defendant who has been negligent. In Walker v. Goe [1859], 4 H. & N. 350, it was held that there can be no liability unless the damage is the “proximate” result of the negligence. It, therefore, remains upon the Plaintiff to prove both that the Defendant was negligent and that his negligence caused or materially contributed to the damage (see Graig v. Gragaw Corpn. [1919] 35 T.L.R. 214, at p. 215 per LORD BUCKMASTER). The Learned Authors of Volume 28 of HALSBURY'S LAWS OF ENGLAND (3rd Edition) say as follows at page 28:

“Negligence is an effective cause of an injury which either is intended, or, judged broadly on common principles, is a direct consequence. When negligence has been established, liability follows for all the consequences which are in fact the direct outcome of it, whether or not the damage is a consequence that might reasonably be foreseen.”

46. Turning to remedies and quantum, the Plaintiff pleaded special damages for restoration in the sum of Kshs. 5,200,000/=. It is settled in our law that special damages are strictly pleaded and strictly proved. The court in Equity Bank Ltd v Gerald Wang'ombe Thuni [2015] KEHC 2474 (KLR), cited with approval the case of Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288 where at page 291, the Court expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus:-

“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”

47. In the absence of proof, the Court cannot award the pleaded special sum. The present case is one such instance: no receipts, payment vouchers or contemporaneous invoices are produced to substantiate the claimed sum of Kshs. 5,200,000/=. The Plaintiff’s counsel relied on engineering estimates and Bills of Quantities but the trial record lacks documentary proof of actual expenditure or payment and there is no corroborative evidence (such as receipts) sufficient to meet the strict standard for special damages.
48. Nevertheless the Plaintiff has proved on a balance of probabilities that he suffered loss and inconvenience, closure of business and damage to his premises by reason of the Defendants’ negligent excavation, and the law recognizes that where pecuniary loss and non-pecuniary loss flow from tortious conduct, an award of general damages for loss of amenity, inconvenience and injury to business can be made even where special damages fail for want of proof. The Court may therefore award general damages that reasonably compensate the Plaintiff for the interference with his business and for the distress, disruption and loss of amenity occasioned by the damage, reconstruction and closure.
49. Having considered the duration of the disruption, the evidence of forced closure and demolition, and the impact on the Plaintiff’s business at Njamba Square, the Court finds it just and reasonable to award general damages. In ***Githiomi v Maina (Civil Appeal 111 of 2019) [2025] KECA 175 (KLR) (6 February 2025)***, the Court held that **“the court proceeded to award the respondent the sum of Kshs. 300,000 as general damages for loss of business and breach of contract of 3 months.”**

50. In the present case, the disruption spanned several years, including forced closure and reconstruction of the Plaintiff's property, significantly impairing business operations. In view of the extended duration and sustained interference, the Court considers an award of **Kshs. 2,500,000**, fair and reasonable as general damages with interest at court rates from the date of this judgment until payment in full.

ii. Whether the defendants are entitled to the reliefs sought in their counterclaim.

51. The Defendants in their Counter-Claim seek, inter alia, a permanent injunction restraining the Plaintiff and his agents from entering, trespassing or alienating **L.R. No. 4480/164**, a prohibitory injunction preventing the Plaintiff from encroaching on L.R. No. 4480/164 or discharging effluent/hazardous waste from his parcel L.R. No. 4480/163, special damages for physical losses (rusting of materials, theft of construction materials, approvals, wages), a mandatory injunction directing the Plaintiff to redirect effluent, and a permanent injunction restraining any further contravention by the Plaintiff. They further pray that the Plaintiff's suit be dismissed with costs and judgment entered on the Counter-Claim. In addressing these prayers the Court must examine; whether the Defendants have proved the foundational facts supporting trespass and nuisance and whether their claims for special damages are strictly and specifically pleaded and proved.

52. Given these assertions, what then constitutes Trespass? The offence of trespass in respect to private property is established in Section 3(1) of the Trespass Act No. 48 of 1962 which provides as follows;

“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.”

53. Recently, the Court of Appeal in Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment) made the following pronouncement on the definition of trespass;

“Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land.”

54. The burden of proof lies on the claimant. Section 107 of the Evidence Act (Cap 80) provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

55. Likewise, Section 108 of the Evidence Act provides that;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

56. The Defendants therefore have the onus to prove, on a balance of probabilities that the Plaintiff unlawfully entered or remained on or encroached into their land.

57. The Defendants’ first foundational claim is encroachment onto L.R. No. 4480/164 by the Plaintiff. They rely on a survey report dated 30 June 2021 stating that parcel 164 was encroached by about 200 mm/20 cm when the owner of parcel 163 constructed a building therein. However on the evidence the Court observes that the deviation of 20 cm is

minimal. The legal doctrine *de minimis non curat lex* (the law does not concern itself with trifles) applies.

58. In the case of ***Azzuri Limited v Pink Properties Limited [2017] KEELC 2604 (KLR)***, the Environment and land court in Malindi was in agreement with a surveyor's assertion that an encroachment of 1.3m by 1.6m is considered negligible.

59. This court opines that the minor boundary deviation, particularly in view of the longstanding occupation without objection, may be regarded as negligible. The Defendants nevertheless seek to treat the 20cm as actionable trespass and rely on the maxim of strict liability for nuisance/trespass yet the evidence shows the Plaintiff's building was erected in 1980, has been operating since 1986 without prior objection from neighbours or authorities, and the Defendants themselves commenced excavation in 2009 which caused damage to the Plaintiff's boundary wall and structure. The Court finds that on the facts of this case, the alleged 20 cm encroachment, if it existed, is *de minimis* and cannot sustain a claim of trespass. The Court therefore rejects the claim of trespass based on such negligible encroachment.

60. The Defendants further allege nuisance against the Plaintiff. They contend that the Plaintiff discharged effluent onto their land or caused hazardous waste to harm their premises. The court opines that the Defendants themselves were ordered to stop their construction by the public health office and other authorities because of *their* lack of approvals and interference with the neighbour's foundation. The Notice to Stop Construction (Dexh-8) states verbatim: "The construction has tampered with the existing neighbour's foundation." and "There are no plans on the site (approved) for the site people." These findings are against the Defendants; not the Plaintiff. The Defendants cannot claim nuisance when they themselves were declared to be at fault and have not

shown that the Plaintiff caused any actionable nuisance. The court's stand guided by the maxim, *Ex turpi causa non oritur actio* is "from a dishonorable cause, an action does not arise". Accordingly their claim for nuisance fails. It therefore follows that the defendants are not entitled to the reliefs as sought in the counterclaim.

iii. What orders as to cost should issue.

61. Having carefully considered the pleadings, evidence, and submissions of the parties, it is clear that the Plaintiff has largely succeeded in establishing liability against the Defendants for negligence and the resulting damage to his property and business. The Defendants' counterclaim has been wholly dismissed for lack of merit, being founded on speculative losses, negligible encroachment, and unsubstantiated claims of nuisance and trespass. In the circumstances, the Court finds it just and equitable that the Plaintiff be awarded **costs of the suit and the counter-claim as against the Defendants**. This follows the well-settled principle that costs ordinarily follow the event, as depicted in Section 27 of the Civil Procedure Act; "**Costs follow the event, and a successful party is entitled to an award of costs unless special circumstances justify otherwise.**"

62. Accordingly, this court makes the following orders:

- a) The Plaintiff's claim is **allowed in the following terms**.
- b) The Defendants, their servants, workmen, agents, or any persons acting through them are **permanently restrained** from further damaging or interfering with the Plaintiff's property, use, and enjoyment of L.R.No.4480/163 NGONG.
- b) The Plaintiff is awarded **general damages** in the sum of **Kshs. 2,500,000/=** for loss of business and disruption occasioned by the Defendants' negligent acts, with **interest at court rates from the date of judgment until payment in full**.

c) The Defendants' **counterclaim is dismissed in its entirety.**

d) The Plaintiff shall have the costs of the suit and the counterclaim against the Defendants.

e) Any other reliefs sought by the parties and not specifically granted herein are **refused.**

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 13th Day of November 2025.

**M.D. MWANGI
JUDGE**

In the virtual presence of:

Mr. Masira for the Plaintiff

Mr. Gesore for the Defendants

Court Assistant: Mpyoe

**M.D. MWANGI
JUDGE**