REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 537 OF 2010

MWAAFA COURT LIMITED …….. PLAINTIFF

= VERSUS =

KENYA NATIONAL HIGHWAYS AUTHORITY ……. 1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL …….. 2ND DEFENDANT

= AND =

GEORGE OLOO ADUWI ……..…… 2ND INTERESTED PARTY

OLIVIA AKINYI MIDWA ……..…….. 3RD INTERESTED PARTY

ROSE WAMBUI WANJEMA …….. 4TH INTERESTED PARTY

STANLEY KITHIA MIRITI ……. 5TH INTERESTED PARTY

GAD NDEGWA KAMAU &
MARY MUTIO NDEGWA …… 6TH INTERESTED PARTY

PAUL CHEGE MBUGUA &
MARY JENNIFER CHEGE …….. 7TH INTERESTED PARTY

JUDGMENT

1. The plaintiff is a limited liability company engaged in the business of home development, sale and construction. It is the owner of 42 three-bedroom apartments and 18 two-bedroom apartments known as Park Gardens Court, erected on L.R. No. 209/11629 Langata. The 2nd to 7th

interested parties had purchased apartments from the plaintiff situated on the suit property.

2. It averred that on 8/10/2010, the 1st defendant trespassed on the property and proceeded to earmark it with the letter 'X' denoting demolition of the property on an unfounded allegation that the property was erected on a road reserve commonly known as the Southern Bypass.

3. The Plaintiff pleads that as of 8/10/2010, the construction of the suit premises was complete, and they had sale agreements for 26 apartments. The sale of the remaining 34 housing units would have been completed in 6 months' time from 8/10/2010. It asserted that the 1st defendant's actions adversely affected the plaintiff's business and caused it immense loss, panic to the plaintiff, and the interested parties who were the plaintiff's client.

4. On the cost of the project; according to the plaintiff, the cost of the land, construction and the interest on the loan it took amounted to Kshs.25,765,000/-. It paid Kshs.793,000/- towards appraisal fees, Kshs.355,000/- on the financier's advocate fee and expended a further Kshs.9,552,311/- on professional fees. It paid a 2.5% commission to the agent on the 35 units sold and provided an estimated commission for the remaining units. The cost of the construction for the clubhouse was pleaded at Kshs.3,351,668/-. Therefore, the total cost of the project was Kshs.145,723,866/-.

5. The Plaintiff stated that the sale of the 35 units amounted to a net earning of Kshs.204,350,000/-, and the remainder of the units were estimated to yield Kshs.211,000,000/-. At the clubhouse, they expected a net profit of Kshs.223,738,200/-. As of 1/1/2026, the plaintiff would have expected the reinvestment value of the sale proceeds to be Kshs.2,586,413,592/-.

6. The plaintiff contends that the property is not on the road reserve and the defendant's actions amounted to trespass. They therefore seek the following orders:

   a) A permanent injunction restraining the defendants, their agents and servants from trespassing, alienating, destroying and/or demolishing the property known as L.R. No 209/11629 and the housing apartments erected thereon.

   b) General damages for loss of reputation.

   c) Special damages of Kshs 2,704,771,764/- as at 31st December 2014.

   d) 659,422/-

   e) Interest on special damages at commercial rates of 33.3% per annum from the date of filing suit until payment in full.

   f) Cost of this suit and interest.

   g) Any other and/or further relief that this Honourable Court may deem fit to grant.

7. The 1st defendant, who is established under the Kenya Roads Act, 2007, on its part denied the plaintiff's claim. It averred that on 6th June 2003, vide Gazette Notice No. 3632, the Ministry of Roads, Public Works and Housing issued a notice to the general public for the removal of illegal structures on road reserves and thereafter issued demolition notices in the Kenya Times newspaper. According to the survey map from the Ministry of Public Works of 1989, the entire block was designated as a road reserve, and the entire property was non-existent.

8. The 1st defendant earmarked the suit property as having encroached the transport corridor reserved for development of the Mombasa Road – Langata – Kikuyu Railway line and the Trans African Highway (Nairobi Southern Bypass) because the Nairobi structure plan (Ref 42-28-85-9) by the Department of Physical Planning (Ministry of Land, Housing and Urban Development) demarcated the extent of Julia Ojiambo/southlands/Ngei estate boundary being the only permitted residential development within the area.

9. They contend that the Nairobi structure plan (Ref 42-28-85-9) has never been amended, and the parcel L.R. No 209/11629 was not in existence in 1957. A confirmation letter from the Director of Physical Planning and Development revealed that the suit property encroached on a road reserve and that the plaintiff must have acquired it by perpetuating illegalities.

10. In an attempt to have the matter resolved, the plaintiff, through its officers, presented to the 1st defendant's Director General a map of 1979 purportedly showing the property whose title was first issued in 1st July 1991. The defendant avers that a map of January 1979 cannot contain a property whose title was issued in 1991.

11. In its counterclaim, the defendant reiterated the contents of its defence and further pleaded that the title allegedly issued to the plaintiff, Title No. LR. NO. 209/11629 is void for all purposes. They seek the title no. LR. NO. 209/11629 be cancelled; the suit by the plaintiff and the 2nd to 7th interested parties be dismissed; and the court issues an order for demolition of the suit property.

THE EVIDENCE

12. Johnson Ngarari Mwaura (PW1) testified that he is an architect and adopted his witness statement and produced as exhibits the documents in the list dated 27th November, 2015, save for the survey and valuation reports.

13. PW1 stated he was the director in the plaintiff company, and his testimony gave the background of how they acquired the suit land. He said that in 2007, they conducted an official search and noted that the property, which was then registered in the name of Talent Academy Limited, did not have any encumbrances, other than the long-term lease to Redeemed Gospel Church Inc.

14. Subsequently, they entered into a sale agreement and the property was transferred and registered in the name of the plaintiff. They sought a change of use from a single dwelling to a residential multi-dwelling. They prepared building plans and received approvals from all relevant bodies for the construction of 60 apartments. They constructed the apartments and sold several of them.

15. However, on 8/10/2010, the 1st Defendant's officers, accompanied by armed police officers without notice, marked the basements and balconies of the various apartments. They did not take any of the plaintiff's questions but referred them to the Ministry of Roads. However, at the Ministry, the Plaintiff did not get any information regarding the trespass. PW1 then proceeded to the offices of the 1st Defendant and met with the Director General, Engineer Kidenda, who accompanied the Surveyor, Mr Gachoki, to retrieve relevant maps. The maps revealed that the suit property is 276 metres from the road reserve.

16. Although PW1 sent the 1st defendant the documents in the plaintiff's possession, and after several correspondences, the plaintiff did not receive a satisfactory response from them. The plaintiff decided to file this suit where inter alia it sought and was granted temporary orders against the demolition of the property. However, several buyers who had committed to buying apartments had pulled out of their transactions and

demanded a refund of their money. As a result of the defendant's actions, the plaintiff suffered a huge loss.

17. On cross-examination, PW1 testified that he could not recall how he knew the suit property was on sale. He conducted a search during the time he was negotiating for the purchase of the property in 2007. He did not produce the search, but he recalled that he conducted due diligence and met the vendor. There was a lease registered in favour of Redeemed Gospel Church before the property was transferred to the plaintiff.

18. He testified that only 20 apartments had been sold, but in his statement, he tabulated the number of people who bought the apartments as 35, and recognised that he had not amended the statement. He explained that following the incident, a number of people withdrew from the transaction. At the moment, some of the apartments are rented while others are empty. He could not give the particulars of the tenants, as tenants come and go. The apartments haven't been demolished because of the injunction in place. The witness stated that in the reamended plaint, they pleaded that they paid Kshs.8,400,000/- for the land and also set out the cost of construction and the interest on the loan. PW1 affirmed he did not produce evidence to prove the interests, the appraisal fee, etc., claimed. Further, they have not produced evidence of units which have not been sold and are unoccupied.

19. Livingstone Kamade Gitau (Pw2) testified that he is a licensed surveyor. He graduated with a BSC in Engineering in 1973. In 1988, he graduated with an MSC in Engineering (Transport, Planning and Management) from Leeds University. He visited the land and prepared the report dated 10/6/2010. On site, he noted that the Southern Bypass was built on the railway corridor and that a road was constructed on the bypass. He stated that there was a big space between the Bypass and the suit property. That the property is 129 meters from the transport corridor and 196 metres to the beginning of the Southern Bypass.

20. On cross-examination, PW2 stated that the reserve for the corridor measured 120 m (60 m for the road and 60 m for the railway). Development may occur along the boundary of the reserve; in this case, the NHC houses and the Christian Academy are situated along the corridor boundary. He also testified that he was unable to determine whether the building on the suit property had received approval.

21. He testified that his report is limited to the visit done and the measurements taken. The drawing does not indicate the coordinates because they are used for titles. They used beacons TR4 and TR8 as reference points.

22. Rose Wambui Wanyama, the 4th Interested party, testified that she is a retired banker and has resided in the Apartment, A6, since 2010 in the suit property. The apartment was bought after obtaining a loan from ABSA

and after conducting due diligence by her advocate. At the due diligence stage, there was no encumbrance on the property, and she saw approved development plans. She purchased the property from the plaintiff for a consideration of Kshs.5 million in June 2008. The lease was registered on 29th July 2010.

23. It is her evidence that the claim that the property is on a road reserve came after she purchased the property, and the Yaya-Langata Road, which is a dual carriageway, was completed while she was in the apartment. She saw X marks on the suit property and was not aware of any notice that had been issued.

24. Mary N. Ndegwa, the 6th Interested Party, said that in 2009, they agreed to the purchase of Apartment A7. In March 2010, they agreed to purchase A-11 and completed payments. Before the purchases, they did due diligence through their advocates. Their leases were registered. She testified that she supports the plaintiff's claim and asked the court to protect their interests. They were not aware that the property was in a road reserve and are innocent purchasers. She learnt much later about the Gazette Notice of 17/7/2017, which recommended the revocation of the suit title.

25. Milka Muendo (DW1) testified that she is a land surveyor and works with the 1st defendant as the Assistant Director of Survey and Mapping. She testified that the ministry gave notices to those encroaching, requiring them to remove the offensive structures. The corridor was reserved under

Structure Plan No. 42/28/85/9. The suit property did not exist when the structure plan was prepared. The suit property is on the land reserved for the southern corridor.

26. On cross-examination, she explained that the gazette notice was conveying the issue of encroachment and classified roads, and it gave a road reserve of 60 meters. The suit title was registered on 11/3/1993 and transferred to the plaintiff on 17/8/2007, which was after the gazette notice. The 1st defendant is not liable to any damages claimed by the plaintiff. It is her testimony that the 1st defendant was not a part of the approval agencies for the development. She testified that she is familiar with the road designs, which were completed in 1989 and 1990. Later in September 2010, there was a plan and an elevation of the Nairobi Southern Road project. By 2010, the suit property was already in existence.

27. She testified further on cross-examination that the gazette notice of 6/6/2003 did not name the road being encroached and did not list it as one of the encroached plots. The suit property was also not listed in the newspaper advertisement. According to the PDP (by the 2nd Defendant's Bundle dated 30/6/2022), the suit property is marked E and is marked for proposed residential plots.

28. DW1 identified the suit property on the structure plan, which she testified that it sat on the railway reserve. However, she noted that the structure

plan was not signed by the commissioner of lands. She also conceded to the fact that you cannot use the structure plan to alienate land, as it only guides the development in the area. However, she insisted that there cannot be an allotment without a PDP. She referred to the letter dated 3/12/2013, which stated that the suit property does not encroach on the highway.

29. Timothy Waiya Mwangi (DW2) testified that he is the deputy director of Physical Planning at the Ministry of Lands. He adopted his witness statement as his evidence in chief. He testified that the suit property encroached on the Southern bypass. He testified that the PDP was certified by the Director of Physical Planning and approved by the Commissioner of Lands. The suit property was marked 'E' on the PDP. He confirmed that plots 'A-E' did not encroach. He testified that although the structure plan was not approved by the Commissioner of Lands, the Director of Physical Planning can use the unapproved plan.

30. Wilfred Muchai (DW3) testified that he works at the Ministry of Lands, Public Works and Housing, at the Directorate of Survey and Mapping, as Deputy Director of Surveys. He testified that the Suit property does not encroach on the Southern bypass. In the plan, No. 1 in the bundle dated 23/4/2025, the beacon defining the particular corridor are N13, R14X, R13X all the way to the curve (R28, 27, 30 & 32). The reserve of the railway and road reserve is 120 metres from that curve. The radial

distance of the curve is 630,667m, but they do not have a title for the reserve.

31. At the close of the hearing, directions were taken for the filing of written submissions. On the first date fixed for judgment of 5th March 2026, none of the parties had filed their respective submissions. Judgment was not ready and a new date set for 19th March, 2026 with leave to parties to file the submissions. The Plaintiff filed their submissions on 5th March, 2026 while the 1st Defendant filed theirs very late on 16th March, 2026. I have taken time to read and consider both.

ANALYSIS AND DETERMINATION

32. The Plaintiff called two witnesses to prove its case as per the summary of the evidence given hereinabove. Two of the interested parties also testified in support of the Plaintiff's case. The 1st and 2nd Defendants also relied on the evidence of three witnesses. In their amended statement of Defences filed on 22nd January 2016 and 24.12.2015 respectively, the 1st and 2nd Defendants denied the claim.

33. In the written statement of DW1, the 1st Defendant stated notices were issued to those who had encroached. In cross-exam, she admitted that the gazette notice relied on did not list the suit property L.R. 209/11629, Langata as among those encroaching on the road corridor. Mr Wilfred Muchae Kabue who testified as DW3 affirmed that the Plaintiff's suit

property, L.R. No 209/11629 (I.R. 58292), had not encroached on the Southern bypass corridor.

34. The Plaintiff decided to submit on the question of encroachment which was the gist of this case since the Defendants declined the recording of a consent. However, the Attorney General appearing for the 2nd Defendant did not file submissions and they relied on the evidence of DW3 who through his testimony confirmed the suit land did not encroach. The 1st Defendant picking que from this witness also in their submission only addressed the question of special damages.

35. Therefore, for completeness of record, I make an order that the Plaintiff proved its suit land Nairobi L.R. 209/11629, does not encroach on the Southern by pass road or corridor.

36. What remains for determination is the second limb of the claim, seeking special damages in the sum of Kshs.2,704,771,764.00. It provided a breakdown of how this amount was arrived at under paragraph 7 of the plaint and paragraphs 49 (a) to (f) of the submissions.

37. Under paragraph (a) of the submissions, the loss is referred to as the cost of the project, which includes the cost of the land, the cost of construction, and the interest on the loan. At the time this suit was filed, the construction was complete, as evidenced by the certificate of occupation and the sale agreements executed with purchasers, found at

items 21 and 44-68 of the Plaintiff's list of documents dated 25th November, 2013.

38. The Plaintiff is still in possession of the land and the developments therein. However, the Plaintiff claims that the action of the 1st Defendant caused an interruption to its (Plaintiff's) business. He therefore provided a breakdown of the total construction cost (for this project), his contribution, and the total profits earned. In summary, his contribution was Kshs.66,183,866, and the profit earned was Kshs.223,738,200 over a two-year circle.

39. The Plaintiff argues that since his contribution of Kshs.66,183,866 earned 34 times his investment, the new figure of Kshs.223,738,200 would equally generate 3.4 times the profit over a two-year circle and by the end of the fourth two-year circle 9as at January 2015), it would have garnered Kshs.2,704,771,761, which is the sum claimed in the Plaint.

40. The 1st Defendant admitted that the issue of encroachment was resolved through the testimony of the Deputy Director of Survey. Therefore, they only submitted on what they call the astronomical claim of damages of Kshs.2,704,772,764.00. They submitted on the law that special damages must be specifically pleaded and proved. That the Plaintiff's breakdown of "costs of project" and "interest on loans" does not constitute proof of loss. These are capital investments and operational costs that the Plaintiff would have incurred regardless of the 1st Defendant's actions. The

Plaintiff still retains the suit property and the Park Garden Court development; therefore, claiming the entire cost of the project while retaining the asset amounts to double recovery and unjust enrichment.

41. The 1st Defendant contended that the Plaintiff's claim for profits for re-investments that never happened is the definition of remoteness of damage. It also cited the authority of **Multiserve Oasis Company Limited v. Kenya Ports Authority (2020) KEHC 7243 (KLR)**, which emphasized that a defendant must know precisely what specific claims are made to be in a position to rebut them. They assert that they cannot be held liable for the Plaintiff's failure to launch subsequent hypothetical projects over a 15-year period.

42. Regarding the two-year cycles that this court took as the period the Plaintiff uses to complete each project, the claim for loss of four cycles is explained based on calculations from the date of the original plaint filed in 2010. By January 2015, three complete two-year cycles had passed. The fourth cycle was just beginning when the plaint was re-amended.

43. The Plaintiff was under a duty to prove that its return on investment was not remote as submitted by the 1st Defendant. It pleaded under paragraph 2 of the amended plaint that it was involved in the **business of home development, sale, and construction**. However, no evidence was led or documents produced to show that, prior to the project at issue in this litigation, the Plaintiff had completed similar projects within a two-year

cycle and that the returns on investment yielded 3.4 times the profits, or any profits.

44. The second limb to be proved is the question of whether the Plaintiff indeed suffered lost profits in the sum of Kshs.2,704,771,764.00. Although the Plaintiff pleaded that only 26 units had been sold as at the time the suit was filed. Pw 1 admitted during cross-exam that 35 units were already sold and what remained was 25 housing units. Of these remaining units, the Plaintiff affirmed renting them out on monthly rents though the witness could not state the names of the tenants because the occupancy keep changing with time.

45. In calculating the monies that could have been re-invested had all the houses been sold, the Plaintiff did not exclude monies received from the sale of the 35 housing units. From the evidence adduced by the Plaintiff, not the entire sum of the Plaintiff's contribution could be said to have been affected by the actions of the 1st Defendant. The copies of the agreements of sale produced at numbers 44-68 show that the transactions took place before this suit was filed. The monies generated from these sales, together with rental income from the unsold houses, constituted money immediately available for re-investing with the two-year cycles

46. The Plaintiff does not distinguish between this overall figure of Kshs.66,183,866 and whether part of it was recovered from the sales of the 35 units versus the expected proceeds from the delayed sales

(comprising the 25 units). It is my considered opinion that this distinction was necessary; for instance, it implies the Plaintiff had some funds available to purchase land for the next project. Once the land is purchased, it could use the title as collateral to obtain additional funding, as in the current project.

47. The Plaintiff submitted that it was entitled to the compensation sought in accrued returns tied up in developments, which stood at **Kshs2.7 BILLION**. This figure, according to the Plaintiff, flowed from the detailed costs, sales, profit and the reinvestment breakdown presented before this court. In support of this argument. In support it relied on the case of **Multiserve Oasis Company Limited versus the Kenya Ports Authority and another (2020) KEHC 7243 (KLR),** which cited with approval the case of **Kimani vs Attorney General Civil Appeal No. 6 of 1969 (1969) EA 502**. The Court held as follows:-

> **"A claim for loss of profits is clearly "special damages" though in certain circumstances it could be included within a claim for general damages. This claim, however, relates to a special loss of profits consequent on the loss of use of the article for a specific period prior to the date of the plaint which is clearly special damages which must be pleaded and proved. The reason for this rule is that a defendant must be given an opportunity of knowing precisely what specific claims are**

made and thus be in a position to call evidence to show that the claim in respect of the details is not correct."

48. Also, the Court of Appeal in **Idi Ayub Omar Shabani v City Council of Nairobi and Another Civil Appeal 52 of 1984**, quoted the following passage from Lord Goddard, LCJ's judgment in *Bohham-Carter v Hyde Park Hotel Ltd* (1948) 64 Times Law Reports, 117 at p 178:-

> **"Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying 'This is what I have lost, I ask you to give me these damages.' They have to prove it. The evidence in this case with respect to damages is extremely unsatisfactory."**

49. These decisions affirm the established legal principle that special damages must be specifically pleaded and proved. The Plaintiff complied with the first part since it specifically pleaded the specials under paragraph 7 of the re-amended plaint. However, the points I have highlighted above reveal flaws in the standard of proof for the lost profits. This is because the calculation was global and failed to consider the amounts the Plaintiff had already received from sales.

50. Additionally, there is a lack of evidence showing that the Plaintiff previously carried out similar projects within each two-year cycle and the yield was 3.4 times the investment to justify the multiplication on the

same terms consecutively. The question of proof of previous work to justify the profit claimed was raised by Justice P.J.O. Otieno in the **Multiserve Oasis Company Ltd** *supra*, where at paragraph 56 he stated thus:

> **"The Plaintiff, in response to this court's question on how it arrived at the pleaded lost profit, stated that there was no formula he used to arrive at the profit. The Plaintiff failed to give any contract it had signed with its customer in preparation for the assorted readymade garments, and the Plaintiff also failed to attach its previous trade record in order to give a projection of the profit it would have made based on the profit it had made before. Consequently, it is the finding of this Court that the Plaintiff failed to proof loss of profit and as a result, the same is not awardable."** (underline mine for emphasis).

51. It is further my considered opinion that if the loss of profit was proved (which is not the case) as pleaded, it could only cover one cycle not several (four) cycles. I hold that loss for the subsequent years would be in the form of interest. My position is guided by the Court of Appeal decision in **Kimani v. Attorney General, Civil Appeal No. 6 of 1969 (1969) EA 502.** In that case, the judge awarded the respondent damages for the value of the land at the date of dispossession, along with a figure for loss of annual profits after dispossession. The Appellant appealed

against the award of the latter figure, and the Court of Appeal for East Africa held as follows;

> **"i. The respondent should not have been awarded both the value of the land at the date of its loss and damage for loss of its use thereafter.**
>
> **ii. Since the respondent did not receive the value of the land on dispossession, he should be awarded interest at 8% from the date of dispossession until judgment.**
>
> **iii. a specific loss of profits consequent upon the loss of use of an article for a specific period prior to the date of the plaint is special damages which must be pleaded and proved."**

52. The Plaintiff also sought general damages for loss of reputation. The court takes judicial notice that once the property was **marked X**, it caused fear in both the Plaintiff and its clients – those who had purchased and prospective buyers. Although the 1st Defendant argues that **the X** was placed while exercising its mandate to protect road reserves, they should have removed it as soon as the survey was completed.

53. The 1st Defendant proceeded to submit that an award of general damages should be moderate and reasonable. It relied on the decision of Tayab v. Kananu [1983] eKLR. The Court stated,

"I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd v Shephard [1964] AC 326 at 345:

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

54. The 1st Defendant does not go further to suggest what it considers as moderate and reasonable. Although the suit property was not demolished, I am persuaded that once the mark X was put, the Plaintiff could not freely deal. PW1 narrated the steps it took, including visits to various government offices to present documents demonstrating it had not encroached. Neither of the Defendants listened, forcing them to file this case. Therefore, for the inconveniences suffered, I find they are entitled to compensation. After taking note of the time it has taken to conclude this

matter and the effect of the inflationary trends, I assess general damages payable to the Plaintiff at Kshs.20,000,000 as moderate and reasonable.

55. In conclusion, I find the Plaintiff's case succeeds in terms of prayers A, B and F of the Plaint. Accordingly, I enter judgment in their favour against the Defendants jointly and severally for orders;

a) A permanent injunction is hereby issued restraining the defendants, their agents and servants from trespassing, alienating, destroying and/or demolishing the property known as L.R. No 209/11629 and the housing apartments erected thereon.

b) General damages for loss of reputation assessed at Kshs 20,000,000 payable within 30 days hereof. In default, the Plaintiff is at liberty to execute.

c) The 1st Defendant's counterclaim is dismissed with no order as to costs

d) Cost of the suit and interest on (b) at the court rate from the date of this judgment.

Dated, Signed and Delivered at Kisii, virtually this 19th of March, 2026.

A. OMOLLO

JUDGE