



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 474 OF 2009

CONSOLIDATED WITH ELC CASE NO. 475 OF 2009

ROY PROPERTIES LIMITED.....1ST PLAINTIFF

ROY TRANSMOTORS LIMITED.....2ND PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. Roy Properties Limited filed **ELC Case No. 474 of 2009** and Roy Transmotors Limited filed **ELC Case No. 475 of 2009** following the demolition of the building on the parcel of land known as L.R. No. 20174 under grant number 64789 measuring 0.7566 hectares (ha) (“the Suit Property”). The Plaintiffs claim that the Suit Property was owned by Roy Transmotors Limited who transferred it to Roy Properties Limited. The two cases were consolidated. For ease of reference, Roy Properties Limited will be referred to as the 1st Plaintiff while Roy Transmotors will be referred to as the 2nd Plaintiff in this judgement.

2. The 1st and 2nd Plaintiffs claimed that officials from the Ministry of Roads and Public Works wrongfully entered the Suit Property on 1/11/2008 and destroyed the 1st Plaintiff’s buildings erected on the Suit Property. The Plaintiffs claimed that they had constructed a four storeyed commercial building on the land valued at Kshs. 400,000,000/=. The 1st Plaintiff contended that the destruction of the Suit Property was done in contravention of a court order issued on 22/5/2008 in which leave to commence judicial review proceedings had been granted to the 1st Plaintiff and the leave was to operate as a stay of enforcement of the demolition orders.

3. The Plaintiffs claimed that they had suffered loss and damage and have been put to great trouble and expense as a result of the destruction of the Suit Property and the vandalism of their assets. Further, the 1st Plaintiff claimed that it had entered into lease agreements with various parties over portions of the building on the Suit Property and that it lost rental income in the sum of Kshs. 501,605,556/= following the demolition of its property. The 1st Plaintiff claimed that it has been deprived of the use and enjoyment of the Suit property since 2008 for which compensation should be made by the Defendant. The 1st Plaintiff contended that the Ministry of Roads and Public Works illegally acquired the Suit Property without compensating the Plaintiffs.

4. In the Amended Plaint dated 3/8/2017 filed in **ELC Case Number 474 of 2009**, the 1st Plaintiff seeks a declaration that it is the legitimate owner of the Suit Property and that the invasion of the Suit Property by the Ministry of Roads and Public Work officials was unlawful. The 1st Plaintiff seeks a permanent injunction to restrain the Ministry of Roads and Public Works from interfering with its rights and quiet possession of the unused portion of the Suit Property; and compensation for the portion of the Suit Property which it claims was unlawfully excised by the Ministry of Roads and Public Works. In the alternative, the 1st Plaintiff seeks to have the Ministry of Roads and Public Works compelled to surrender the parcel of land neighboring the Suit Property which remains unused to date. The Plaintiff also seeks to have the Ministry of Roads and Public Works compelled to compensate the Plaintiff for the value of the Suit Property as if it had been compulsorily acquired. In addition, the Plaintiff seeks general damages, special damages of Kshs. 1,350,000/=-, loss of the building of Kshs. 400,000,000/=-, loss of future rental income of Kshs. 501,605,556/=-, exemplary damages for disregard of court order prohibiting the demolition together with interest and the costs of the suit.

5. The 2nd Plaintiff seeks general damages, loss of future earnings, exemplary damages for the wanton disregard of the court orders prohibiting the enforcement of the demolition order, special damages of Kshs. 37,428,172.00, costs and interest in the plaint filed in court on 23/9/2009 in **ELC Case Number 475 of 2009**.

6. The Defendant filed his Amended Defence and Counterclaim on 16/7/2010 in **ELC Case Number 474 of 2009** and denied the 1st

Plaintiff's claim or that the Suit Property was allocated to the 2nd Plaintiff. The Defendant averred that this parcel of land does not exist on the ground as it formed part of the parcel of land known as L.R. No. 1012/27 which was acquired by the Ministry of Roads and Public Works in 1962 for the construction of a traffic interchange at Kasarani on the Nairobi-Thika Dual Carriage Way. The Defendant contended that the Suit Property was curved out of L.R. No. 1012/27 which was compulsorily acquired by the Government through the Ministry of Roads and Public Works from Salopia Limited, which was fully compensated for the acquisition of its land.

7. The Defendant maintained that the Suit Property was not available for sale or allocation and could not have been lawfully allocated to the 2nd Plaintiff. The Defendant added that the 2nd Plaintiff illegally and fraudulently acquired the Suit Property and was a party to the fraud since it was aware that the Suit Property was a road reserve and was therefore not available for allocation or sale. The Defendant pleaded that the 2nd Plaintiff acted fraudulently as follows: making representations to the Commissioner of Lands that the Suit Property was available for allocation yet it was well aware that the land had been reserved for construction of a traffic interchange; applying for allocation of the Suit Property knowing it was a road reserve; and colluding with the officers from the Ministry of Lands to register the 2nd Plaintiff as the owner of the Suit Property when it was aware that the land was not available for alienation.

8. The Defendant averred that in 2003, officers from the Ministry of Roads and Public Works commenced the process of surveying and marking all properties that were lying on road reserves. In the course of that exercise, the Defendant claimed that the 1st Plaintiff was duly notified that the Suit Property was land reserved for the construction of a traffic interchange at Kasarani commonly known as the Roysambu Roundabout. The Defendant maintained that the general public was notified to remove structures encroaching on road reserves because the Ministry of Roads and Public Works was preparing to open all bypasses and link roads to expand the existing road network.

9. The Defendant counterclaimed a declaration that the Suit Property which is registered in the 1st Plaintiff's name was public utility land and sought cancellation of the 1st Plaintiff's title over the Suit Property and the costs incurred in demolishing the 1st Plaintiff's illegal structures on the suit land.

10. The Defendant filed his defence on 13/1/2010 in **ELC Case Number 475** of 2009 and denied the 2nd Plaintiff's claim. The Defendant claimed that the Plaintiffs were trespassers on the Suit Property which was compulsorily acquired and for which compensation duly paid in 1962 to the owners of the land then. The Defendant averred that the Chief Engineer of Roads took possession of the acquired land and was to hold it in trust for the public until funds became available for the road expansion. The Defendant maintained that the Suit Property was not available for alienation to private individuals as it was acquired for public use.

11. The 1st and 2nd Plaintiffs' director, Mr. Mukhtar Omar gave evidence alongside seven other witnesses who testified on behalf of the Plaintiff. Mr. Omar stated that the Government of Kenya allotted the Suit Property to Mr. P. M. Kamau (Mr. Kamau) vide a letter of allotment dated 16/12/1993. Mr. Kamau notified the Commissioner of Lands that he wished to transfer his rights and interest in the letter of allotment to the 2nd Plaintiff. He produced a copy of the sale agreement vide which Mr. Kamau transferred his interest in the letter of allotment to the 2nd Plaintiff together with copies of the transfer. Mr. Omar stated that he applied for extension of the Suit Property which was then described as B-C-R Plot Ruaraka on 17/5/1994.

12. The Commissioner of Lands acceded to his request vide the letter dated 17/6/1994 and the land was surveyed and registered as L.R. No. 20174. On 6/3/1995, the Ministry of Public Works and Housing wrote to the 2nd Plaintiff pointing out that the company had constructed an access road from its premises onto the Nairobi-Thika Road without obtaining approval from the Ministry. He stated that the Ministry advised the 2nd Plaintiff to close that entrance and open another one onto Kamiti Road. He stated that between April 1995 and November 1997, the 2nd Plaintiff applied for and obtained approval to construct a multi-million building worth Kshs. 350,000,000 on the Suit Property. Mr. Omar averred that he applied to Kenya Power and Company Limited for re-routing of the high voltage lines that were on the Suit Property.

13. The 2nd Plaintiff transferred the Suit Property to the 1st Plaintiff on 30/8/2007. He produced copies of the transfer, correspondence exchanged with Kenya Power and Lighting Company and the applications for approval made to the City Council of Nairobi ("the City Council"). He also produced copies of the correspondence exchanged between the Plaintiffs and the Ministry of Roads and Public Works, and the Ministry of Lands. He produced a copy of the grant over the Suit Property which confirms that the 2nd Plaintiff transferred the Suit Property to the 1st Plaintiff on 30/8/2007 for the consideration of Kshs. 15,000,000/=.

14. He stated that the 1st Plaintiff entered into a lease agreement with the 2nd Plaintiff in which the 2nd Plaintiff was to lease part of the Suit Property for 10 years from 1/9/2007 at a monthly rent of Kshs. 150,000/=. The 1st Plaintiff also entered into two other lease agreements. The first one was with Naivas Limited for the lease part of the Suit Property for 6 years at a monthly rent of Kshs. 1,800,000/= and the second lease was with Leo Investment Limited to lease part of the building on the suit land at a monthly rent of Kshs. 1,800,000/=.

15. The witness stated that the Plaintiffs sought the approval of the City Council to adjust the development plans. He produced a copy of the letter dated 15/5/2008 from the City Council addressed to the Chief Engineer of Roads seeking comments before approving the proposed developments. The letter mentioned that owing to the proposed upgrading of Thika Road, the City Council did not know how the 1st Plaintiff's proposed development would impact on the proposed widening of Thika Road.

16. Mr. Omar stated that on or about May 2008, the Ministry of Roads and Public Works sent its agent to visit the Suit Property who earmarked the development on the Suit Property for demolition claiming that it was a road reserve. The 1st Plaintiff filed **Nairobi Judicial Review Miscellaneous Application Number 41 of 2008** and obtained an interim injunction on 21/5/2008 barring the Ministry of Public Works and Roads from interfering with the 1st Plaintiff's quiet enjoyment of the Suit Property. He emphasised that the Suit Property was not among the parcels of land published in the Kenya Gazette of 11/7/2008 by the Commissioner of Lands as parcels of land which were to be acquired for the expansion of the Nairobi-Thika Road project. He stated that contrary to this position and in breach of the court order, on the morning of 1/11/2008, bulldozers from the Ministry of Works descended upon the Suit Property and demolished all the structures on the suit land together with the assets lying on it. The Plaintiffs commenced contempt of court proceedings in which he stated that the court cited the

Permanent Secretary in Ministry of Roads and Public Works for contempt of court and ordered him to pay a fine of 100,000/= in default of which he would be committed to jail. The order has never been executed.

17. Mr. Omar stated that by first issuing a title deed over the Suit Property to the 2nd Plaintiff and subsequently to the 1st Plaintiff, the Government vested upon the registered owner indefeasible rights over the Suit Property which could only be defeated through a lawful procedure. He maintained that the Government's Survey Department surveyed the allotted land before a title was issued to the 2nd Plaintiff and would have discovered if at all the Suit Property were a road reserve.

18. On the contention by the Defendant that the Suit Property was acquired by the Ministry of Roads in 1962, he stated that the documents annexed by the Defendant show the acquisition in respect of L.R. No. 9345/1 which belonged to Power Properties Limited and L.R. No. 8345/3 as being earlier transactions that took place before the re-planning of the original plots. He maintained that after re-planning, the suit land was available for allocation for commercial purposes by the Commissioner of Lands as he did to Mr. Kamau, the first allottee, who sold the Suit Property to the 2nd Plaintiff. He added that it was only the Commissioner of Lands who could determine whether a piece of land was available for alienation and whether or not it was public land.

19. He stated that the 1st Plaintiff had suffered loss and damage and was seeking compensation in the sum of Kshs. 670,000,000/= being the value of the land and buildings as at 15/6/2017. He gave particulars of the loss of rental income in respect of Naivas Limited as Kshs. 331,648,380/=; in respect of the 2nd Plaintiff Kshs. 15,900,000/= and in respect of Leo Investment Limited Kshs. 154,057,176/= all totaling up to Kshs. 501,605,556/=. He sought special damages of Kshs. 1,350,000/= being payments made to various experts to prepare the expert reports.

20. The Plaintiffs commissioned Opiyo and Associates to survey the Suit Property with a view to establishing the size of the suit land which was used up by in the construction of the road and ascertain whether there was need to demolish the 1st Plaintiff's buildings on the Suit Property. He stated that the surveyor established that the portion taken up by the road did not extend up to the area where the buildings were situated which according to the Plaintiffs' demonstrated malice on the part of the Ministry of Roads and Public Works. He added that the Nairobi-Thika Superhighway Project had been completed and that the road does not pass through the Suit Property despite its building being forcefully demolished to pave way for the project, save for a 3-metre intrusion upon the Suit Property. He stated that after the eviction of the Plaintiffs from the suit land, squatters and hawkers invaded it and vandalized the Plaintiffs' property. The 1st Plaintiff sought an order to have the Ministry of Roads surrender the Suit Property to the 1st Plaintiff. Mr. Mukhtar noted that the portion of the land which adjoins the Suit Property and which is held by the Ministry was not utilised for the expansion of Nairobi-Thika Road and urged that the Defendant should be compelled to release this parcel of land to the 1st Plaintiff.

21. Mr. Mukhtar Omar's evidence in respect of the claim in **ELC No. 475 of 2009** was that the 2nd Plaintiff entered into a lease agreement with the 1st Plaintiff for a period of 10 years at a monthly rent of Kshs. 150,000/=. He stated that the 2nd Plaintiff took possession of the premises and shifted its headquarters to the Suit Property. He claimed that the 2nd Plaintiff purchased telecommunication equipment, furniture and fittings, motor vehicles spare parts, heavy tracks and lorries and machinery which were on the land at the time of demolition. Mr. Omar stated that he negotiated transport agreements and high credit rating with reputable financial institutions. He stated that he had concluded transport agreements with Chevron Uganda Limited, Chevron Kenya Limited, Total Marketing Kenya Limited, Kobil Petroleum Limited, Brookside Dairy Limited, Pearl Oil (U) Limited and Gapco Uganda Limited. He stated that the 2nd Plaintiff had active contracts with these companies and was supplying to them products and goods before and at the time of the demolition. He stated that the 2nd Plaintiff suffered loss and damage to its assets when officers from the Ministry of Roads and Works descended upon the Suit Property on 1/11/2008 and demolished the structures on it. He stated that the 2nd Plaintiff's business came to an abrupt halt thereby frustrating those contracts leading to the loss of earnings and credit rating with the banks.

22. Mr. Mukhtar stated that he instructed his officers and other professionals to assess the damage and loss occasioned to the assets and business transactions of the 2nd Plaintiff. The loss was assessed at Kshs. 37,428,172/= made up as follows: loss of telecommunication equipment – Kshs. 1,006,000/=; loss and damage to furniture and fittings – Kshs. 7,236,000/=; loss of motor vehicle spare parts – Kshs. 7,770,789/=; vandalism of motor vehicles – Kshs 10,815,383/=; and loss and damage to workshop machinery Kshs. 37,428,172/=. He stated that the 2nd Plaintiff lost income in the sum of Kshs. 390,028,029/=. He stated that the 2nd Plaintiff was relying on the reports supplied by the experts he instructed to assess the loss and damage.

23. Mr. Omar clarified that he was a director in both the 1st and 2nd Plaintiffs and that the 1st Plaintiff was the property holding company while the 2nd Plaintiff carried out the transport business. He confirmed that the Government did not allocate the Suit Property to the 2nd Plaintiff. He had not come across a part development plan which should have been attached to the letter of allotment. He did not know whether Mr. P. M. Kamau, the original allottee of the suit land, accepted the offer of allotment within the stipulated 30 days. He stated that they took possession of the land after purchasing it from Mr. P. M. Kamau. It was Mr. Kamau who appointed the surveyor who surveyed the suit land. The 2nd Plaintiff paid Kshs. 2,500,000/= for the plot and also made payments for other outgoings.

24. After the deed plan was issued, he realised that the land was blocked and wrote to the Commissioner of Lands seeking an extension of the plot on 17/5/1994, on the same day they bought the suit plot from Mr. Kamau. He did not know whether a part development plan was prepared for the extension of the plot. He stated that the 2nd Plaintiff was not issued a title for L.R. No. 209/12156. He stated that the 2nd Plaintiff neither sought nor obtained the consent of the Commissioner of Lands to build on the suit land as required by Special Condition Number 1 of the grant, which provided that no buildings would be erected on the land or alterations made to any building except in conformity with the plans and specifications approved by the Commissioner of Lands and the local authority. The Commissioner of Lands could only have given his approval if he were satisfied that the proposals were such as would develop the land adequately and satisfactorily.

25. On the issue of letting out the Suit Property, Mr. Omar stated that Naivas Limited took possession of the leased premises and that at the time of demolition their items were damaged. He stated that Naivas Limited wrote to the 1st Plaintiff on 19/5/2008 suspending the lease after

moving into the suit land on 1/4/2008. He stated that the 1st Plaintiff had to reimburse Naivas Limited the sum of Kshs. 18,000,000/= which the supermarket had paid but did not produce evidence of the refund. He stated that the 1st Plaintiff had continued paying land rent and rates in respect of the Suit Property even after the demolition.

26. He relied on the letter dated 21/7/2008 from the Commissioner of Lands addressed to the Provincial Commissioner in which the Commissioner of Lands stated that according to his records, the Suit Property was part of the road reserve which was re-planned for business cum residential use in 1993. He maintained that the 2nd Plaintiff had carried out due diligence before it purchased the Suit Property. He surmised that the 1st Plaintiff's title had never been revoked by the Government.

27. Patrick Opiyo, a licensed surveyor and a partner in the firm of Opiyo and Associates gave evidence. He stated that in June 2008 Mr. Mukhtar Omar instructed him to undertake a survey of L.R. No. 20174 situated in Roysambu area. He stated that he went through various maps and title documents besides visiting the site of the demolished buildings and established that the Ministry of Roads and Public Works only needed about 3.52 meters of the Suit Property along the Thika Super Highway. Further, he concluded that the buildings which were demolished by the Ministry of Roads were not on the area needed for road expansion and the demolition was therefore unnecessary. He produced the survey report which he prepared and clarified that the road construction only took up 0.2120 ha of the Suit Property leaving an unutilised portion measuring 0.5446 ha. On cross-examination the surveyor conceded that the part development plan was not attached to his report, which he attributed to an oversight on his part.

28. He sought time to produce documents. The hearing was adjourned and he gave further evidence on 17/1/2019. He produced copies of drawings for the proposed acquisition of part of the suit land for purposes of the road; a pictorial and imagery diagram of the suit land; a part development plan dated 20/11/1993; a survey plan prepared in 1963 depicting the suit land; and a copy of survey plan F/R No. 264/22 prepared in August 1994. He did not attach the second part development plan mentioned in his report and the letters referred to in his report. He did not produce survey plan number F/R 258/117 which he mentioned in his report. Further, he did not produce the approved road construction plans that he referred to in his report. He confirmed that he had not written to the Ministry of Roads to ascertain that the size of land that would be required for the road was what he mentioned in his report. He maintained that the road does not pass through the Suit Property.

29. Peter Wakahora Kanyugo gave evidence. He stated that he is a valuer and carried out the open market valuation of the developments on the Suit Property. He stated that the Plaintiffs' officers gave him the relevant documents for use in the valuation. The developments on the Suit Property comprised a commercial development with four storeys on the Western Wing and two storeys to the Eastern Wing with a lettable area of 33,027 square feet and a further 14,306 square feet for the proposed additional floor space. He produced a copy of his valuation report prepared in June 2008 which gave the value of the buildings on the Suit Property as being Kshs. 400,000,000/= as at June 2017 and the market value of the land as Kshs. 270,000,000/=. He charged the Plaintiff Kshs. 1,310,220/= for the valuation services and produced a copy of his invoice. He stated that when he visited the Suit Property, the supermarket fittings were being fixed.

30. On cross-examination he conceded that his report did not show how he arrived at the value of the land. He confirmed that his valuation fees were paid by the 1st Plaintiff but did not produce evidence of the payment. He stated that he carried out the second valuation of the Suit Property in 2017 after the demolition and that he found hawkers on the land. He clarified that the difference in valuation was based on the addition of the two floors which would have brought the value to Kshs. 51,113,160/= as opposed to Kshs. 35,669,163/= which was the floor space that existed at the time. He gave the value of Kshs. 930,000,000/= made up of 630,000,000/= being the value of the buildings and Kshs. 300,000,000/= as the land value as at 15/6/2017.

31. Stanley Muchoki Gathuka gave evidence. He was employed as the head of finance at by the 2nd Plaintiff. He stated that being well versed with accounting, the 1st Plaintiff gave him the leases for Naivas Supermarket Limited, Leo Investment Limited and the 2nd Plaintiff with a request to compute the loss of rental income for the remainder of the lease period with the possibility of the leases being renewed. He computed the loss in respect of Naivas Supermarket Limited at Kshs. 331,648,380/=; Kshs. 15,900,000/= in respect of the 2nd Plaintiff and Kshs. 154,057,176/= in respect of Leo Investment Limited. He produced copies of the leases dated 1/9/2007 between 1st and 2nd Plaintiffs, the one with Naivas Limited dated 1/4/2008 and the lease with Leo Investments Limited which was dated 14/4/2008. He also produced a copy of the letter dated 19/5/2008 from Naivas Limited suspending the lease on the basis that the demised premises were said to be on a road reserve and were due for demolition in September 2008. The leases produced in evidence were not registered.

32. On Cross-examination he stated that the leases which he based his projection of the loss of income on were registered but the ones he produced in evidence were not registered. He did not have documents in court to confirm that Naivas paid rent to the 1st Plaintiff.

33. He also produced an inventory of the spares said to have been lost during the demolition. The inventory shows that the spares in stock before the demolition were worth Kshs. 14,480,155/= while the spares salvaged during the demolition were worth Kshs. 6,709,365/= hence the value of the lost spares was Kshs. 7,770,790/=.

34. Mr. Mehboob Habiburehman Jin gave evidence. He was retained by the 1st Plaintiff to conduct an audit on the loss and damage occasioned to its property as a result of the demolition. He was made to understand that at the time of the demolition there were tenants in the Suit Property whose leases were terminated by the demolition. He computed the loss of rental income from Naivas Limited, the 2nd Defendant and Leo Investments as being Kshs. 501,605,556.00.

35. He produced copies of the 2nd Plaintiff's returns filed together with the profit and loss account for this company. He relied on the audited accounts showing that the 2nd Plaintiff paid taxes to the Kenya Revenue Authority in the preparation of his report on the assessment of damages. He did not produce the tax returns. He conceded that the summary of damages was based on the valuation report and that he calculated the loss of rental income based on the leases. He maintained that he had seen the leases and that they were registered. He agreed that the evidence of payment of rent was not included in the Plaintiffs' bundle of documents. He did not visit the demised premises before the demolition and relied on the materials provided by the Plaintiffs in assessing the losses.

36. Maurice Oyugi gave evidence. He was instructed by the 2nd Plaintiff to carry out an assessment of the loss and damage occasioned to its telecommunication equipment during the demolition on the Suit Property conducted by the Ministry of Roads and Public Works. He carried out the assessment and found that equipment worth Kshs. 1,006,500/= was damaged during the demolition of the Suit Property. He stated that Lillo Electronics Limited, which was his employer had installed the electronic equipment in the 2nd Plaintiffs' premises. He did not have any record of the equipment installed. He used the stock sheet giving the unit prices based on the market prices prevailing then. He included items which were in the rubble after the destruction. He stated that he came across pieces of broken equipment but did not include the salvaged items in his inventory.

37. John Waweru Njoroge gave evidence. He stated that the 2nd Plaintiff instructed his company Accident Assessors to assess the loss occasioned to its motor vehicles in November 2008. On his inquiry as to the circumstances of the loss, the 2nd Plaintiff informed him that the vehicles were at its yard at the Roysambu roundabout on Thika Road where they were undergoing repairs to the gearbox and engines which had been dismantled. He was informed that there was theft by members of public who gained access into the compound and vandalized the vehicles when the perimeter wall was demolished. He gave the summary of loss in respect of nine motor vehicles as Kshs. 10,815,382/= and attached photographs of parts of motor vehicles to his report.

38. He dealt with Stanley who worked for the 2nd Plaintiff. He confirmed that not having seen the motor vehicles before, he was not in a position to comment on the status of the vehicles before the demolition. He had not come across any report of theft made to the police. He stated that the vehicles were missing some of the parts and he was informed that they had been vandalized. He received various documents from the Plaintiffs such as the requisitions for parts ordered which was what he used to assess the cost of the vandalized items. He did not know whether the vehicles were ever repaired. He relied on the documents supplied by the Plaintiffs when preparing his report and made reference to the missing parts based on information he received from the Plaintiffs who instructed him to assess the cost of the repairs. He obtained his own quotations to determine the cost of replacement. He identified the vehicles based on copies of the logbooks which he had.

39. Peter Obondo Kahi gave evidence. He confirmed that the 2nd Plaintiff was one of the clients of PKF Consulting Limited. He was instructed by the Plaintiffs' director to prepare a claim assessment report arising from the damage of the Plaintiffs' premises. He based his review on the analysis of the financial projection for the period 2011 to 2016 and also took into account the assessment prepared by Nalin Shah in 2010. He produced his report dated 29/6/2017. His report was based on estimates and that he used the historical performance of the 2nd Plaintiff prior to the demolition, to project the financial position for 2011 to 2016. He did not visit the Suit Property before or after the demolition.

40. He conceded that his report was based on information given to him which he was unable to verify since it was after the event had occurred. He clarified that his was not an audit report and that he had reviewed the assessment of figures provided by the Plaintiffs. He arrived at the conclusion that the Plaintiffs should have filed suit to claim Kshs. 561,822,805.00 for their loss of profits. He made certain assumptions when computing the claim for loss of profits. He reviewed previous audits to project the 2nd Plaintiff's future profits and used the list of assets and tax returns when preparing his report. He stated that he examined the assets that were there before the demolition and also relied on the valuation and other reports provided by the 2nd Plaintiff. He recommended that the 2nd Plaintiff ought to file suit to recover Kshs. 561,822,805/= which in his assessment was a conservative estimate of the loss suffered by the 2nd Plaintiff.

41. Thomas Githira Gacoki and Gordon Ochieng gave evidence for the defence. Thomas Gacoki stated that he was the manager in charge of surveys at the Kenya National Highways Authority. He stated that the Suit Property was created from L.R. No. 8345/5 and L.R. No. 9345/1 measuring 4 acres and 1.142 acres respectively which were acquired by the Government in 1962 for the expansion of the Nairobi-Thika Road.

42. He produced copies of the correspondence exchanged between the Commissioner of Lands and the Director of Surveys in 1962 and 1963. The Director of Surveys wrote to the Commissioner of Lands on 17/7/1963 in reference to the acquisition of L.R. No. 9345/1 -Thika Road- Kamiti Road junction. The letter stated that plan number 80941 (100/75) showing the 1.142 acres acquired for road purposes had been passed and the deed plans for the surrender would be available on the indent. The letter dated 26/7/1962 from the Commissioner of Lands to the Chief Engineer of Roads stated that an agreement had been reached as to the compensation to be paid to various owners of land on the Nairobi-Thika Road including L.R. No. 8345/3 whose owner was Power Properties Limited. The letter sought payment of the compensation funds.

43. The witness annexed a payment voucher for Kshs. 4480 to Power Properties Limited prepared in 1962. The letter dated 3/8/1965 from the Commissioner of Lands to the City Treasury of the City Council with respect to L.R./N. 9345/1 informed the City Treasurer that this parcel of land was acquired for a road reserve and was to be exempted from the payment of rates. He produced deed plan number 79322 showing the dimensions of L.R. No. 8345/45. He also produced a copy of the protocol of agreement between the Republic of Kenya and the African Development Bank in respect of the Nairobi-Thika Highway Improvement Project. He produced a copy of the letter dated 17/10/1962 from the Commissioner of Lands to the Director of Surveys in relation to L.R. No. 8345/3 which forwarded the Ministry of Works' drawings depicting the 1.12 acres that had been acquired for road purposes. He also produced a sketch showing the land that was acquired in 1962 for road purposes in relation to the site occupied by the Suit Property. He produced a copy of survey plan F/R No. 264/22 showing the location of the Suit Property. The survey plan indicates that the Suit Property was created from L.R. No. 9345/1 and Government land. The survey plan was prepared and authenticated on 22/8/1994. He also produced an unclear copy of the survey plan prepared in May 1963 showing L.R. No. 9345/1 straddling L.R. No. 9345 to the right and government land to its left. He also produced aerial maps of the Thika Superhighway prepared on 15/12/2003, 22/3/2009 and 29/12/2017. Survey plan F/R 77/109 dated 5/2/1957 which he produced shows that L.R. No. 8345/4 was the last plot at the intersection between the two roads. He produced a copy of deed plan number 81234 showing the location of L.R. No. 9345/1 as well as deed plan number 79322 for L.R. No. 8345/5 dated 20/3/1962. He produced the computations for the land prepared by the surveyor.

44. On cross-examination, the witness conceded that the amalgamation of parcels of land is undertaken by Government agencies and that survey plan are prepared by surveyors. Further, that the whole process of surveying land is in the hands of the Government and not the owner of the land. He stated that to create the Suit Property, L.R. No. 9345/1 was taken in full and part of L.R. No. 8345/5 when the plots were amalgamated. He maintained that the Suit Property was a road reserve.

45. Gordon Ochieng, a Senior Assistant Director of Land Administration in the Department of Lands, Ministry of Lands and Physical Planning stated that the Suit Property originally formed part of L.R. No. 9345 which belonged to Kenya Power and Lighting Company. The Government acquired a portion of this land in 1962 for the expansion of Nairobi-Thika Road. L.R. No. 9345/1 was acquired for the road expansion and the remainder of the land after the resurvey became 9345/2. He confirmed that a letter of allotment under reference 34480/IV/10 which was dated 16/12/1993 was issued to Mr. P. M. Kamau for an unsurveyed plot. P. M. Kamau accepted the offer for allotment and made payment on 17/5/1994. Mr Kamau applied for consent to transfer the land as an unsurveyed plot which was approved by Commissioner of Lands on 17/5/1994. The land was transferred to the 2nd Plaintiff on 17/5/1994 in consideration of Kshs. 1,600,000/= which was however raised to Kshs. 2,200,000/= for purposes of stamp duty.

46. On the same day, the 2nd Plaintiff requested the Commissioner of Lands for additional land on the ground that the land it sought to be added formed the main frontage to the 2nd Plaintiff's land and the intended development would fail if it were not granted the additional land. The Commissioner of Lands approved that application on the same day on 17/5/1994. Mr. Ochieng stated that this was highly irregular since a part development plan and a resurvey of the land should have been done first. He stated that upon revaluation of the additional land, the 2nd Plaintiff paid the requisite fees and caused the land to be resurveyed resulting in the creation of the Suit Property measuring 0.7566 ha. A grant was prepared and issued to the 2nd Plaintiff over this land on 6/1/1995. The 2nd Plaintiff transferred the land to the 1st Plaintiff on 30/8/2007.

47. Mr. Ochieng stated that the Suit Property was acquired by the Government for purposes of widening the road hence the land was not available for alienation. He stated that the totality of the events starting with the allocation of the land to the issuance of the grant was riddled with irregularities including the following: payment for the allotment was made six months later; the transfer of the property was executed by the vendor and the Commissioner of Lands on the same date when payment was made for the allotment on 17/5/1994; which is the same day the application for additional land was made. He maintained that the original allottee acquired the land for speculation purposes which is why he did not make payment of the stand premium within 30 days. He stated that the speed with which the payments were processed, the consent to transfer obtained and the transfer of documents effected was evidence of collusion between the original allottee, Mr. P. M Kamau and the 2nd Plaintiff.

48. On cross-examination Mr. Ochieng conceded that the alienation of land and the process of registration take place in the Ministry of Lands and was undertaken by government agencies. He conceded that even though Mr. P. M. Kamau made payment for the allotment six months later, the Government nevertheless accepted the payment and also accepted payment of stamp duty when the transfer to the 2nd Plaintiff was registered. He conceded that the deed plans were prepared by the Director of Surveys and the registration of titles was done by the Commissioner of Lands. To the best of his knowledge no lands officer had ever been charged in court over the processing of the 2nd Plaintiff's title. He conceded that there was no objection at the time from the Physical Planning Department or the Commissioner of Lands that the Suit Property was a road reserve. Mr. Ochieng stated that the Commissioner of Lands should have notified the Plaintiff that the Suit Property was not available for alienation. He conceded that the Commissioner of Lands then, Mr. Wilson Gacanja was guilty of fraud and deceit in the alienation of the Suit Property. The Physical Planning Department was equally guilty as was the Director of Surveys. These offices ought to have known that the Suit Property was required for road expansion. He agreed that the Director of Surveys failed to note this reservation on the land. He concluded that the Government was responsible for the mess the Plaintiffs found themselves in with the collusion with its officers.

49. He maintained that the Defendant had counterclaimed for the revocation of the 1st Plaintiff's title and that the Ministry of Roads was never notified that its land reserved for road expansion was being alienated. The witness was emphatic that the failure to object to the alienation of the Suit Property did not stop the suit land from being a road reserve. He stated that the processes that took place in relation to registration of the Suit Property on 17/5/1994 ordinarily do not take place in a single day and that the 2nd Plaintiff must have been involved in the collusion. He also maintained that it was necessary to create a part development plan for the Suit Property at the time it was being allocated and added that the land was already surveyed as L.R. No. 9345/1 when it was acquired for the expansion of the road.

50. Parties filed submissions which the court has considered. The 2nd Plaintiff maintained that it was validly registered as the lessee of the Suit Property and was not aware of the existence of any other parcel of land similar to the Suit Property. It submitted that the Government of Kenya allotted the suit land to Mr. P. M. Kamau on 16/12/1993 who transferred his interest in the letter of allotment to the 2nd Plaintiff on 17/5/1995. The 2nd Plaintiff applied for extension of the land and the application did not receive any objection following which the land was re-surveyed.

51. The Plaintiffs submitted that in utter breach and brazen contempt of court orders, the Ministry of Roads and Public Works demolished the structures and assets on the Suit Property on 1/12/2008 occasioning the Plaintiffs a huge loss and damage to their investment. The 1st Plaintiff relied on the lease agreements it had entered into with Naivas Limited, Leo Investment Limited and the 2nd Plaintiff in urging the court to grant the sums sought on account of loss of future earnings. The 1st Plaintiff urged the court to award it damages for the loss of its assets during the demolition. The Plaintiffs relied on the case of **Chemei Investments Limited v the Attorney General and Others Nairobi Petition Number 94 of 2005** in which the court held that the registration of title to land is absolute and indefeasible to the extent that the title was created in accordance with the applicable law and where it is demonstrated to a degree higher than the balance of probability that the registration was not procured through persons who were part of a cartel. It also made reference to the decision in **Mureithi and 2 Others (For Mbari ya Murathimi clan) v Attorney General and 8 others [2006] 1 KLR 443** in which the learned judge pondered over how courts were going to deal with land grabbers who wave titles for grabbed land and loudly plead indefeasibility of title.

52. The 1st Plaintiff maintained that its title was not tainted with fraud or illegality and that no proof had been given of fraud in the acquisition of its title. The 1st Plaintiff submitted that it had legitimate expectation that its title would be protected by the Government and maintained that its title had not been cancelled, revoked or otherwise taken away through a legal process. It also maintained that it sought and obtained permission and authority from all the relevant officials to amalgamate the land which led to creation of the Suit Property and that it constructed on the Suit Property in accordance with the approved plans.

53. Further, the Plaintiffs submitted that the title over the Suit Property was issued by or under the authority of the appropriate government departments in exchange for consideration and conditions which they met and so the Defendant cannot be heard to deny the validity of that title. The Plaintiffs further urged that following the re-planning and re-survey exercise undertaken by the government without its participation, all the public roads and road reserves around the Suit Property were clearly and publicly demarcated and the relevant public records were kept and could be availed in the normal manner. The Plaintiffs submitted that none of the public roads or road reserves extended to or covered the Suit Property and that the due diligence the Plaintiffs conducted prior to constructing on the Suit Property confirmed this position. The Plaintiffs added that they were entitled to equal protection of the law as against the Defendant if the court were to find that the same government which gave the Suit Property to the 2nd Plaintiff gave the same land to another of its ministries for the construction of the road.

54. The Plaintiffs urged that they had proved that they were entitled to compensation in the sum of Kshs. 400,000,000/= for the value of the buildings, Kshs. 501,605,556/= on account of loss of future earnings, and special damages in the sum of Kshs. 37,428,172/= in addition to Kshs. 1,350,000/=. The Plaintiffs submitted that an award of Kshs. 50,000,000/= as general damages would be fair and reasonable in addition to the value of the Suit Property and other damages they seek.

55. The Defendant filed submissions and maintained that at the time the suit land was allocated to P.M. Kamau, there was no need to prepare a part development plan which is usually the basis for allocation of unsurveyed land because the Suit Property had already been surveyed way back in 1963 and given L.R. numbers. 9345/1 and 9345/2. The Defendant relied on Section 21 (2) of the Survey Act which states that neither the government nor any public officer is liable for any defective survey or any work performed by a licensed surveyor even if the plans relating to the survey work have been authenticated in accordance with the requirements of registration under any written law.

56. The Defendant relied on the case of **Niaz Mohammed v Commissioner of Lands and 4 others [1996] eKLR** in which Waki J. (as he then was) held that upon compulsory acquisition of land and vesting of that land in the Government, the land must be used for the lawful purpose for which it was intended and the unutilised portions would remain a road reserve.

57. The Defendant also relied on the case of **Kenya National Highway Authority v Salien Masood Mughal and 5 others [2017] eKLR** in which the court found that land acquired for public purpose could not be used for another purpose not being a public purpose.

58. The Defendant also relied on the Supreme Court decision in **Town Council of Awendo v Nelson O. Onyango and 13 others; Abdul Malik Mohammed and 178 others (Interested Parties) [2019] eKLR** where the court held that the public purposes for which the land was compulsorily acquired may be spent but the unutilised portions remained public land and could only be applied for a public purpose or utilised to promote the public interest even if that interest was not what was originally envisaged. The Supreme Court further stated that the unutilised portions could be allocated to private entities including those from whom the land was acquired at a price as long as the land would be put to such use that would promote public interest.

59. The Defendant urged that the Suit Property having been acquired by the Government for the Kasarani traffic interchange and that it being public land it was incapable of alienation. The Defendant emphasised that it was not possible in our lands registration system for the approvals, payments, requests, transfer and registration of the Suit Property to all have been done the same day on 17/5/1994.

60. The Defendant submitted that the process of registration of the Suit Property on 17/5/1994 was illegal. Further that P. M. Kamau, who is alleged to have been the driver of the Commissioner of Lands, Mr. Wilson Gacanja, did not accept the offer of allotment and sought to transfer the plot even before accepting the offer of allotment. In addition, payment of the sum stipulated in the letter of allotment was not made within 30 days and that there was no part development plan attached to the letter of allotment.

61. The Defendant relied on the case of **Munyu Maina v Hiram Gathiha Maina, Nyeri Civil Appeal No. 239 of 2009** where the court stated that it is not sufficient for the registered proprietor to produce the instrument of title as proof of ownership when the root of his title is under challenge, the registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title. The Defendant maintained that the 2nd Plaintiff did not conduct due diligence before acquiring the Suit Property and that it failed to comply with conditions number 1, 2 and 9 of the grant.

62. On the damages sought by the Plaintiffs, the Defendant submitted that none of the leases produced by the Plaintiffs were registered and that the unregistered documents could not found a claim for damages. The Defendant argued that the transfer of the Suit Property from the 2nd to the 1st Plaintiff was not genuine and was intended to regularise the illegal title held by the 1st Plaintiff. The Defendant added that no award of damages should be made to the Plaintiffs since the 1st Plaintiff's title over the Suit Property was void for illegality and that a claim arising from a property that was illegally acquired cannot stand in law for otherwise the court would be aiding an illegality. The Defendant maintained that the 2nd Plaintiff's role in processing payment for the acceptance of the allotment, requesting for approvals, transfer and payment of stamp duty and the request for allocation of an extra piece of land which was approved on 17/5/1994 was evidence of complicit land registration officials in registering the Suit Property knowing well that it was illegal. The Defendant maintained that any claim for compensation for any activity carried out by the government in relation to the Suit Property was devoid of merit as the courts cannot enforce an illegality.

63. The Attorney General submitted that the surveyor in his evidence referred to F/R No. 258/117 which he stated that J. O. Owuor relied on to survey the Suit Property but did not produce it. The Defendant submitted that the Plaintiffs' witnesses failed to explain the parameters used to arrive at the claim for Kshs. 350,000,000/= for existing buildings and Kshs. 450,000,000/= for buildings upon completion of the two additional floors. The Defendant maintained that P. W. Kanyugo who testified for the Plaintiffs was not a structural engineer and his evidence should be disregarded.

64. The issues for determination in this suit can be summed up as whether the 1st Plaintiff has a valid title to the Suit Property and secondly who between the Plaintiffs and the Defendant is entitled to the reliefs it seeks. To determine the issue as to whether or not the Plaintiffs acquired valid title to the Suit Property, it is necessary to look into the history of how the suit land came to be. The Defendant maintained

that the Suit Property was excised out of L.R. No. 9345 and was compulsorily acquired from the Kenya Power Company in 1962 for the expansion of the Nairobi-Thika Highway. L.R. No. 9345/1 and part of L.R. No. 8345/5 were amalgamated to create the Suit Property. This fact was not controverted by the Plaintiffs which therefore confirms that the suit land was surveyed in 1962 and the reservation for the construction of the road made in 1962.

65. The court thinks it extremely likely that P.M. Kamau and officers from the office of the Commissioner of Lands worked in cohorts to issue the letter of allotment to P.M. Kamau on 16/12/1993 over what they termed as unsurveyed B.C.R plot in Ruaraka when the land had already been surveyed and acquired for the expansion of Nairobi-Thika Road. No evidence was adduced to show that P. M. Kamau from whom the 2nd Plaintiff acquired the suit land applied to be allocated the land. No part development plan was attached to the letter of allotment to show the location of the plot that was being allotted to Mr. Kamau. It is not disputed that P.M. Kamau neither made payment of stand premium and the other charges indicated in the letter of allotment within 30 days, nor did he accept the offer of allocation of the land.

66. The court agrees with the Defendant that in the normal course of business, it is extremely unlikely that one can pay for an allotment, get approval to transfer the land, have it transferred the same day and still go further to apply for additional land and get all these accomplished in one day. These would take several months to accomplish. The Lands office is not known for such extraordinary efficiency and alacrity in dealing with land transactions. The speed with which all these myriad transactions were all undertaken on 17/5/1994 speaks to a fraudulent scheme in which the 2nd Plaintiff and the lands officials participated. The 2nd Plaintiff did not give evidence of how and when it discovered that the additional land it applied for on 17/5/1994 was available for amalgamation with the land it was buying from Mr. Kamau.

67. The location of the allotted land coupled with the necessity to apply for additional land leads one to believe that the 2nd Plaintiff should have discerned from the location of the land in question that it had been reserved for the expansion of Thika road. The fact that the 2nd Plaintiff was made to change the entrance to the Suit Property from Thika Road to Kamiti Road ought to have led the 2nd Plaintiff to realise that the land it had acquired was a road reserve.

68. The Plaintiffs' director produced copies of letters which show that the Plaintiffs were aware that the suit land was part of a road reserve. These include the letter from the Ministry of Public Works and Housing dated 6/3/1995 which informed the 2nd Plaintiff that it had constructed an illegal access to its premises from Thika Road and had also encroached on the road reserve by erecting thereon a wall in contravention of the Traffic Act; the letter dated 15/5/2008 from the City Council to the Chief Engineer (Roads) which expressed concern over how the proposed developments to the Suit Property would impact on the proposed widening of Thika Road: the 1st Plaintiff's letter dated 21/4/2008 seeking clarification on why the wall around the Suit Property had been marked XXX and abbreviated MOW and whether part of it would be taken up and how it would be compensated; and the letters dated 21/7/2008 from the Ministry of Lands and those dated 15/7/2008 and 7/8/2008 which all alluded to the fact that the suit land formed part of a road reserve.

69. The Plaintiffs relied on the letter dated 21/7/2008 from the Commissioner of Lands addressed to the Provincial Commissioner which stated that according to the records, the Suit Property was part of the road reserve which was re-planned for business-cum-residential use in 1993. The letter confirmed that the suit land was part of a road reserve. No evidence of this re-planning was given at the hearing.

70. In its appeal to be allocated the remainder of the suit land, the 1st Plaintiff urged that only a small part of the land was used up by the road. The court notes that the surveyor who testified on the Plaintiffs' behalf confirmed that 3.52 meters of the Suit Property was used up in the road construction. The fact that after the demolition, a portion of the suit land was used in the construction of the road confirms that having been acquired for road expansion, the suit land should never have been allocated to Mr. Kamau who transferred it to the 2nd Plaintiff. The surveyor did not lead evidence of how much land would be required for the road reserve and there is no justification made for giving the remainder of the land to the 1st Plaintiffs as it seeks.

71. Having been compulsorily acquired for road expansion and compensation having been paid in 1962, the suit land was not available for alienation to Mr. Kamau. The Plaintiffs sought compensation and urged that they need to be compensated for the Suit Property. This begs the question; can the government compulsorily acquire and pay compensation for the same piece of land more than once? The court thinks it would not be proper or prudent to do so. Not only would it be contrary to public interest, but it would also go against the principle of efficient, effective and economic use of the country's limited public resources.

72. If the suit land was already surveyed and reserved for the expansion of Nairobi-Thika Highway in 1962, was it still available for alienation by the Commissioner of Lands? The repealed Government Lands Act (GLA) governed the allocation of public land. Under Section 3 of GLA, the Commissioner of Lands, under certain powers delegated by the President could allocate unalienated government land in specified instances which in the court's view excluded land already set apart for public use. The Suit Property which was acquired in 1962 for the expansion of the road was not available for allocation to private individuals based on Section 85 of GLA which stipulated that roads and land reserved for roads were to remain free and uninterrupted. The Suit Property formed part of the road and was not available for alienation to private individuals. The 2nd Plaintiff did not acquire a valid title over the Suit Property and hence did not transfer a good title to the 1st Plaintiff.

73. Should the court issue the orders sought by the Plaintiffs? Having found that the Suit Property was illegally acquired by the Plaintiffs, the court is of the view that the 2nd Plaintiff can only recover the sum of Kshs. 134,405/= it paid as stand premium for the Suit Property on 17/5/1994. The court declines to grant the 1st Plaintiff the sum of Kshs. 400,000,000/= sought as compensation for the replacement of the building which was demolished.

74. The Plaintiffs did not produce evidence of the rent paid by Naivas Supermarket or the other prospective tenants who were to take up space in the 1st Plaintiff's building. The leases produced by the 1st Plaintiff were not registered. The letter dated 19/5/2008 from Naivas Supermarket notified the Plaintiff that it was suspending the lease due to the claim that the premises were on a road reserve. The court declines to award the Plaintiffs the sum sought for loss of future earnings as these were not proved.

75. The Plaintiffs in ELC Case Numbers 475 and 476 have failed to prove their cases on a balance of probabilities. The court dismisses the two claims. The Plaintiffs' recourse lies in pursuing their claim against P. M. Kamau who sold part of the Suit Property to the 2nd Plaintiff and the lands and survey officials who resurveyed the suit land and processed the title in the name of the 2nd Plaintiff.

76. The court awards the Plaintiffs nominal damages of Kshs. 2,000,000/= against the Defendant for the demolition of the Suit Property together with the sum of Kshs. 134,405/= being the sum the 2nd Plaintiff paid for the allocation of the Suit Property.

77. The court grants prayers (a) and (b) of the Defendant's counterclaim but declines to grant prayer (c) of the counterclaim which the Defendant failed to prove.

78. Each party will bear its costs of the suit and of the counterclaim.

Dated and delivered at Nairobi this 31st day of October 2019.

K.BOR

JUDGE

In the presence of: -

Mr. Justus Obuya for the Plaintiffs

Mr. Allan Kamau for the Defendant

Mr. V. Owuor- Court Assistant