REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 11 OF 2017

(formerly Nrb. 1090/2014)

GUJRAL SANDEEP SINGH RAGBIR……..…….PLAINTIFF

VERSUS

MINISTER FOR PUBLIC WORKS, ROAD & TRANSPORT,

COUNTY GOVERNMENT OF KAJIADO……1st DEFENDANT

COUNTY GOVERNMENTOF KAJIADO……..…….2nd DEFENDANT

JUDGMENT

By a Plaint dated 11th August, 2014, the Plaintiff is seeking for judgement against the Defendants as follows:

a) A permanent injunction restraining the Defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, demolishing and or in any manner whatsoever interfering with the Plaintiff's stores, perimeter wall, restaurant and other structures erected on the property known as title number Noonkopir Trading Centre/195.

b) A declaration that the property known as title number Noonkopir Trading Centre/195 in Kajiado County belongs to the Plaintiff.

c) Special damages (to be stated)

d) General Damages

e) Costs of this suit

The Defendants entered appearance and filed amended Defence on 22nd April, 2015 where it admitted that the Plaintiff was the owner of the suit land but averred that demolitions were conducted with respect to premises constructed on the Old Kajiado Road and beyond the boundaries of the allotted land. It contended that the Plaintiff cannot claim to have valid approved permits and title to land that was clearly delimited and marked as a road. Further that the notice impending the demolition was issued, with the first notice being issued on 7th February, 2014, which was subsequently extended to allow for stakeholder consultations on the demolitions. The extension and the dates for public forums were published vide an advertisement in the Standard Newspaper on the 20th March, 2014. The Defendants insist the public forums were concluded on 24th April, 2014 and a consensus reached during such meeting and it was

agreed that demolitions to proceed. Further written and published reasons for the demolition of the structures were issued vide an advertisement in the Standard Newspaper on 20th March, 2014. The Defendants denied that the Plaintiff suffered any damages and claims he was the author of his own misfortune as he put up illegal structures on an area demarcated as a road. The Defendants reiterated that the demolitions were legal, since ample notice, legal and procedural requirements were adhered to and the Plaintiff failed to abide with the procedures and notices.

The matter proceeded to full hearing on various dates since the parties failed to agree on an independent surveyor's report.

Evidence of Plaintiff

PW1: SANDEEP SINGH GUJRAL

PW1 in his examination in chief stated that he is a mechanical engineer and a business man. He confirmed having signed the witness statement dated 10th April, 2015 and filed on 27th April, 2015, which he sought to rely on.

He relied on the bundle of documents filed on 27th April, 2015 and confirmed he is the registered owner of plot no. 195 Noonkopir Trading Centre which is about 1.246 hectares that translates to approximately 3 acres. He was issued with a Certificate of Lease on 31st January, 2012 with a lease for a period of 99 years. He confirmed that previously, the suit property belonged to his father who was called RAGBIR SINGH GUJRAL who had been issued with a Certificate of Lease, with a lease term of 99 years beginning from 1st March, 1985. He produced the Certificate of Lease as exhibit '1'. He said on 8th August, 2014, he was informed by his watchman that a bulldozer from the County Government had come to demolish his property and that people were marking the property with red paint as from 6.00 a.m. He stated that he went to the site and found the bulldozer had already demolished the perimeter wall, the offices, shelves, kiosks and shops at the rear of the property, with the petrol stations, workshop, and factory all being destroyed.

He insisted he was not served with any notice of intention to demolish his property. He took photos of the demolition, which he produced as exhibit 'P2'. Further, that he got a court order dated the 12th August, 2014 to stop the demolition. He got an independent surveyor Mr. J.D. Obel of Geometics Services Limited who surveyed the suit land and prepared a report, which was marked as "MF1 3". He further stated that the Surveyor went through all the beacons and confirmed he was within his boundaries. He reiterated that there is no road that passes through the suit land as indicated in the maps from Ministry of Lands, Ministry of Roads and the Office of Survey of Kenya. Further that he got certified copies of maps from the Survey of Kenya to prove this. He asked a Valuer called Mr. Kariuki to assess the extent of damage, which was determined at Kshs. 258 Million. He produced the report prepared by the Valuer which was marked as "MFI 4". As the property owner, he insisted he ought to have been served with a notice of intended demolition. He contends he was not aware of any notice and his property was not gazetted for demolition. He reaffirms that he wants his land back and the County Government restricted from interfering with it. He also wants the court to declare there is no government road passing through his land and the title to the suit land belongs to him as its legal owner. He further stated that he wants the County Government to remove all the illegal structures surrounding his property. He said he has been threatened, cannot use his land and is hence going to waste. Further, they have removed the sewerage system and septic tank from his land. He claimed damages amounting to Ksh. 258 Million and the costs of the suit.

During cross examination, PW1 confirmed he was born in Kajiado County where he went to school and his parents were teachers. He knew Kajiado County government is tasked with the responsibility to manage the town including the annexed roads. He confirmed that on 8th August, 2014 his property was demolished. Further, that it was only marked in red on the day of demolition. He contended that he was told afterwards that the County Government had put up notices in the newspaper but he does not have a copy of the list of demolitions. He stated that when he got to the suit property he found the bulldozer was

trying to make a road. He averred that the Surveyor told him his property was within the beacons which had been removed, although some were still there at the corner. He insisted the Defendants never convened a meeting to discuss the boundary dispute nor did they advertise for demolition of his property. He said he incurred losses amounting to Ksh. 258 million which was assessed by a Valuer. He wants the County Government to remove all illegal structures around the suit property but did not plead this in the Plaint. He confirmed he was aware the government and the County Government have a right to acquire property.

During re-examination PW1 confirmed he learnt about the notices after demolition was done. He reiterated that as far as all the government ministries were concerned his property is not on a road reserve and this was confirmed by the Surveyor. He insisted he was not personally served with the notice for intention to demolish. He contended that the wall had been built from 1984. He got approval for constructing the wall and this was done in 1987 and re approved in 2013.

PW 2: JOHN P. OBEL

PW2 stated during examination in chief that he is a licensed Surveyor trading under Geomatic Services Limited. He confirmed having been a Surveyor since 1964 and worked for the Ministry of Lands up to 1997 before starting private practice where his practicing number is 123 as registered by the Land Surveyors Board of Kenya. He averred that on 19th August, 2014 he was instructed by the Plaintiff to prepare a Survey Report which he produced in evidence as exhibit 'P 3'. PW2 said he used the official maps showing the land described as Noonkopir Trading Centre No. 195 and identified the beacons nearer the Great North Road Corner Tarmac Road. Further that at the back of the land, all the beacons had been demolished. He contended that he used the Cadastral map showing the land together with the maps of the area to re-establish the beacons with the said map being marked as Folio No. 172/Kajiado No. 3 (No. 1 Survey Report). He explained that Cadastral Map is an approximate survey map defining a piece of land to which title has been issued.

He reiterated that he obtained the certified true copy of the map from the Director of Surveys in the Ministry of Lands on 19th August, 2014, since he is the official custodian of all the maps in the country. The map shows the Plaintiff's land as surveyed in 1985 by a government surveyor which established all the beacons defining the piece of land. He said the suit plot was well surveyed in 1985 and it is properly authenticated by the Director of Surveys who is the authority mandated to do so in Kenya, under the Survey Act. He explained that a Registry Index Map (No. 1.3 in the Surveyor's Report) is a Master map of Noonkopir Trading Centre showing all the surveyed pieces of land in the Trading Center. It is a compilation of all the surveyed lands. It is the basis to registration and issuance of title. The map is known as SK 50. He got a copy of the map on 19/8/2014 from the Director of Surveys Kenya. It covers the plaintiff's property No. 195. It shows the road terminating at the southern part of the Plaintiff's property.

He further stated that the map which is a sealed copy is used to support the Certificate of Lease issued to the owner or allotee by the Registrar of Titles and that the registry index map has three (3) sheets to cover the town area of Noonkopir. He referred to Sheet No. 1 and said the series of maps are known as 148/4/25 with each town having a series of registry index. The map shows there is no road passing through the plaintiff's property but terminates at the southern end of the said property. No person has authority to produce maps except the Director of Surveys. He explained that PDP means Part Development Plan. It is usually produced by the department of Physical Planning in the Ministry of Lands to define a piece of land being allotted.

The letter of allotment for plot 195 Noonkopir Trading Centre was addressed to Mr. R.J. Gujral on 11th March, 1985. Part Development Plan was attached to it to define where the surveyed plot at Noonkopir Trading Center was located. The plaintiff's property is prominently shown on the Part Development Plan as a profound industrial plot. With a 12 meter road running from the south towards the north and terminating at the southern end of the plot.

He reaffirmed that the plot number came when the survey was done. It is Part Development Plan which

the Government Surveyor issued to put the proposed industrial plot on the ground. The Part Development Plan was approved by the Commissioner of Lands on 22th February, 1985 after having been prepared by Director of Physical Planning on 2nd October, 1984. It has a department reference No. NRB 1719/84/1. It is known as approved development plan No. 2 of Noonkopir Trading Center. He got a certified true copy of the plan from Director of Physical Planning on 15/9/2014. The basis of the survey plan report in 1985 was prepared based on the Part Development Plan which was duly approved by various government authorities. It is after the survey that plot No. 195 was created by the Director of Surveys.

PW2 averred that parcel No. 57 was part of the Kitengela Registries section and this is what produced Noonkopir Trading Center. The survey confirmed that all the development within plot no. 195 was within the registered map defining the property. It also confirmed that there was no encroachment into any road reserves. The survey also confirmed there was no road passing through parcel No. 195 that required to be opened. He said the Government is at liberty to acquire any land for any purpose as envisaged in the Land Acquisition Act for purposes of compensation at the current market rate. Further the Government has to give due Notice, undertake valuations for purposes of compensation, and owner is at liberty to appoint their own Valuer. It is an offence under the Survey Act for anybody to destroy official beacons defining land boundaries. He averred that he had seen the report prepared by the County Surveyor but under the law, the County Surveyor is not mandated to do title survey for issuance of titles to land. The County Government Surveyor does survey work for the County requirement only. Survey for title purposes are under the National Government.

He informed court that the Survey Act defines persons allowed to undertake title surveys or issuance of title to land. It is either a Government Surveyor or a Licensed Surveyor. Both surveyors are defined under the Survey Act. He referred to a report prepared by Charles Angira dated 12th November, 2014 and said the map attached to the County Surveyor's Report is not certified, and they did not know the source. He explained that the said map is called an INSET which is not the main map but a summary, and is not an authority on titles or boundaries. He insisted the Plaintiff's property is not based on the wrong map or survey but on approved Part Development Plan prepared in 1980's duly signed and authorized by competent authority allowed under the law.

During cross-examination PW 2 stated that he is well versed with his field of practice. Further, that if the survey is based on the wrong map, the Director of Survey must check, authenticate and confirm. He reiterated that the Director of Surveys sealed all the authenticated maps. Further that the survey that was done to create parcel no. 195 was based on a Part Development Plan but there are two Part Development Plans, which were produced. An earlier one shows 0.8 hectares (2 acres) and it was replaced by another Part Development Plan to 1.246 hectares (3 acres). He confirmed that two different Part Development Plans were prepared to increase area for industrial plot. A fresh letter of allotment was issued on 9th August, 1985 to increase acreage to 1.246 hectares to legalize it. He clarified that the proposed increase from 0.8 hectares to 1.246 hectares was not intentioned to increase the size of the allotted plot and close an earlier road. He reaffirmed that there was an earlier letter of allotment dated 11th March, 1985 of 0.8 hectares and it had a Part Development Plan attached to it where the shape is the same. In the earlier Part Development Plan (appendix 3) the road is from the south to the north and ending at the southern end of plot number 195 and does not go through. The road was serving the plot. He reaffirmed that the plot is not allowed to have direct access to the major road which condition is available on the term of the lease as this is the general rule. He stated that in his opinion, suit property is supposed to be accessed from the back. He referred to Registry Index Map that summarizes the surveyed property in town. Further, that SK 50 shows the main road (Appendix 2 of the Surveyor's Report). He averred that the main Athi River - Namanga Road is to the West while plot no. 195 is at the right hand side. Further that at the end of plot 195, there is plot 206 to the south of it, where a road reserve has been opened up by the County Government. He contended that this later proved an adjacent plot No. 206 was a road reserve. Further that if an error is found on the map and it can be proved, this can be corrected by the Director of Surveys with a new edition of the map being produced on amendment. He claimed that some beacons were tampered with when a new road was being opened and it was physically removed by the grader but he does not have photos. He reiterated that they were on the ground to re-establish the beacons and indicated the same on his report. He advised that the County Surveyor does not have authority to do title surveys but this can only be done by a Government Surveyor or Licensed Surveyor under the Act.

During re-examination, he reaffirmed that at appendix 11, the road is ending at the Southern End of plot 195 and the map was approved in 1979. Further that there was no road passing through the property. He explained the procedure to amend the map and added that if there is an error on the map, it has to be proved, with the Director of Surveys being satisfied that there was an error, so that it can be amended. He confirmed that the error was discovered later and he saw the road being opened and graded by the County Government after the incidence of demolitions. He claimed the people on the ground would have to be notified if there was a road reserve; and if they can prove that the plot was grabbed, they can notify the Director of Surveys to correct map and cancel the title number encroaching on the road, after which the map would be amended. He reiterated that there is no amended map affecting parcel number 195 and the said parcel is intact as it was in 1985 when it was first surveyed. Further that from the Part Development Plan of 1985 there was no road passing through parcel no. 195. He confirmed that Part Development Plan was the source of title no. 195 measuring 1.246 hectares.

PW3: DAVID CHEGE KARIUKI stated in his examination in chief that he is a registered and Licensed Valuer practicing under Tuliflocks Limited where he is the principal Valuer and director. He got his license to practice in 1989 and has been in practice to date. His license number is 002068 (2015). He was instructed by Mr. Gujral Singh to undertake a valuation and he produced the Valuation Report dated 7th January, 2015 as exhibit "P4". He averred that he wished to take the court through the process of valuation which amounted to Ksh. 258 million. He inspected the damaged area, took measurements of the destroyed area, took pictures, which he attached to the valuation report. He looked at the damage plus the whole property and came up with the best method to determine the value, and what damage would mean to the property. Further that I n valuation they have the comparison method where they look at the comparable properties within the neighborhood and prices. They look at reconstruction costs that would be incurred in the replenishment and purpose of valuation. This assists to determine the method to determine value. He said they saw the demolished security wall which had exposed the yard and made community dump garbage thereon. He saw destruction of offices and stores of the go-down and took photos. He noted a septic hole that had been excavated and was made to understand it was the Plaintiff's development.

He noted the petrol station's rear security wall had been pulled down as well as a timber yard. In his opinion, the best method to use was ***investment approach method*** taking into account the costs of income of the property. On deciding on the income he said he was given information on Oil Libya that had offered to rent the petrol station. He saw an offer by NAIVAS which had proposed to develop a supermarket. Oil Libya had offered a rental income of Ksh. 600,000/= per month. He confirmed the figure with the management of Oil Libya itself. In determining the value he used the Oil Libya figure, using the investment approach method, where he took the annual rent income and multiplied by the year and multiply plus an interest rate of 15% per annum. That gave them a figure of Ksh. 108 Million. Further looking at the go downs and timber yards he compared them with Oil Libya figure and estimated the rest of portion to value at Ksh. 150 Million.

If this was totaled up, it gave the value of Ksh. 258 million. He reiterated that this was the income loss to the Plaintiff due to the damage done to the security wall, and Ksh. 258 million is reasonable compensation to the Plaintiff for the damage done to his property.

During cross examination, PW3 took the court through the process of valuation, and stated that the subdivided portion of land at page 8 of his report is a comparable method. He said they were not valuing land but loss of income from property. But if they were valuing land, the cost at page 8 would apply. Further that they based their investment approach method on offer of business that the plaintiff had received.

He stated that the land is a leasehold, which title comes with terms and conditions. The leasehold term indicated that the leasee cannot part with possession by way of charge, sublet, transfers etc except with prior consent in writing from the County Government. He referred to No. 9 of appendix 6 of the Surveyor's report and confirmed it was true Plaintiff was to get consent from the County Government but did not know whether the same was acquired. Further that the consent can be given by the County Government or denied.

He stated that it is an interest that has been registered by the investor, which is subject to consent by the Local Authority/ County Government. He reiterated that he did not see any approval from the County Government regarding Oil Libya's offer. Further, that he is not aware if the Plaintiff applied to the County Government for consent. He confirmed demolitions were done in 2014 August, and confirmed the offers from Oil Libya and NAIVAS were real. He further went to Oil Libya but do not have a document to confirm offers were real. Lastly, he carried out due diligence required from a professional.

He confirmed authenticating the letters from Oil Libya but said they are not in his report and neither did he enclose the interest from Nakumatt. He denied synchronizing his report to the plaintiff, but confirms he was given information purposely to use and that is what he has stated. He contended that the figure of Ksh. 600,000/= is anticipated investment but there were no contracts the Plaintiff had entered into. He stated that he did not work from the rent because TOSHA PETROL STATION was running on ground and not paying rent due to the demolition of security wall. Further, that he did not know any rentals from TOSHA before the demolition of the security wall. He contended that he approached his valuation from the investment method and looking for what plaintiff would loose.

He confirmed he did not include what any tenant (TOSHA) was paying for rent. Further, that letter from Oil Libya is dated 30th January, 2013 where Oil Libya was offering to take over TOSHA. He averred that he did not see mischief to fail to tell court what TOSHA was paying and used the investment method to determine what the plaintiff was losing. He reiterated that he has justified the sum of Ksh. 258 million and said the Plaintiff is not using the land and there is already a dump site in one part of the property next to the go-down. Further that he has defined waste that the owner is not using. He reaffirmed that NAIVAS was joint venture development and not value oriented. As for Oil Libya, he used to determine the rent that would be accruable and there were no offers but negotiations and no agreements yet.

During re-examination PW3 said he used the joint investment method and letter from Oil Libya as an offer and the letter of offer is an interest. He confirmed being given the letter by plaintiff and went to Oil Libya procurement department and confirmed their interest. He averred that physical investigation is also due diligence.

The Plaintiff thereafter closed his case.

Defense Evidence

DW 1 Joshua Lemaikai stated during his examination in chief that he works for the Kajiado County as the County Surveyor which he joined in January 2016. He said before he joined the County Government he was with Kenya Wild Life Service. He confirmed replacing Charles Angira who was the County Surveyor who no longer works for the County. He said on 8th August, 2014 the County Government of Kajiado undertook a demolition of all structures on the road reserves with several demolitions being done within Isinya, Noonkopir (Kitengela) Loitoktok and Sultan Hamud. Further that the reasons for the demolition was a public complaint by people who had encroached on road reserve therefore blocking access to several properties leading to congestion in the townships. He insisted the records available shows that there were several notices in the daily newspaper and public participation organized. He confirmed the first notice was issued on 7th February 2014 in the Standard Newspaper and an extension done for public participation and stakeholder meeting. Further a second notice was done on 8th July, 2014 Stakeholder meetings were undertaken in the respective centers in different venues. He reiterated that the final notice issued was dated 8th July, 2014 after the stakeholders meeting was held.

He reaffirmed that respective County Executive Committees (CEC) takes it through public participation after which Notices are issued for pre meeting in case it is an encroachment. The Public participation forums are held and final notices given before demolitions to allow the encroacher time to demolish by himself or after expiry of dates County Government can move in to undertake the same. He contended that as per the records available the processes were adhered to in the instant case. Further that he is aware of a Surveyor's report done in respect of the suit land, which was authored by his predecessor Charles Angira. He produced the report as Defendant's exhibit "D1".

He stated that the report was done on 12th November, 2014 for purposes of the court case. The issue considered was to open up the old Namanga Road which was encroached upon. He explained that amongst plans used to identify road was Registry Index Map (RIM) for Kajiado/ Kaputiei North. An RIM defaulting parcel number 57 which is a township parcel and parcel no. 79, 80, 83, 85, 90, 94, 96,62 which were adjacent parcels. Another plan used was a further subdivision of parcel no. 77 to several plots, which shows parcel No. 77 to go down the road well due to the enlargement of the scale, which also shows the adjacent parcel no. 57 that produced block 1/195. The map shows the road adjacent to parcel no. 195 up to where the road touches the tarmacked Namanga Road. In the RIM CRIM Sheet No. 17 from Kajiado/ Kaputiei North, it forms part of the report. He confirmed that from the map, there was demolition on the road reserve but not the property.

Further that the road from the RIM is indicated from where parcel no. 57 begins. The whole road is running behind the township area on the eastern direction. From beginning of parcel no. 57 where old road and the current road meet. He is aware of the letters of allotment issued to the plaintiff on 11th March, 1985 giving acreage of property at 0.8 hectares and another allotment on 9th August, 1985 revoking the earlier allotment and increasing acreage from 0.8 hectares to 1.24 hectares. In the first allotment letter dated 11th March1985, the allotee Gujral was allotted 0.8 hectares surveyed and a Part Development Plan attached showing the bigger Namanga Road. A Survey was done depicted by FR 172/3 which shows that after survey the area increased by 0.446 hectares which is mysterious because plan 172/3 did not show any road anywhere; while the Part Development Plan used indicated several roads but the surveyor chose to ignore it, which ended up in the increase of area.

The second allotment letter was issued after survey, which was only done 14 days before production of lease document prepared on 22nd August 1985. While carrying the increase in average a slight check on road reserve gives a slight increase in acreage. The allotted property on 11thMarch, 1985 is 0.8 hectares the second allotment letter gave an area of 1.246 hectares. The difference behind 0.8 hectares and 1.246 hectares is actually 0.446 hectares. The whole road reserve is 0.4 hectares slightly above the increased area. Second allotment issued on 9th August, 1985 and Certificate of Lease given on 22nd August, 1985. He reiterated that it depends on how fast the lawyer/client processes the lease.

He explained that in a fixed boundary survey, an increase of a whole acre may not be practical except on general boundaries. Further, the survey 172/3 did not demonstrate the presence of both roads. Roads extracted out on RIM and the road used is main Namanga - Nairobi Road. He insisted demolitions were only done on road reserve and never touched on the property; and there were several road reserves which were blocked including a road blocked by parcel no. 206 adjacent to said property. Old Namanga road proceeds past parcel no. 206 until the new Namanga Road. He confirmed there were newspaper notices and produced two notices as exhibit “D2”

During cross examination DW1 stated that he is a government surveyor under the County Government of Kajiado; and he is a government Surveyor as appointed by Director of Surveys. Further that he has authority from Director of Surveys but did not have it with him.

He reiterated that the notices were issued on 7th February, 2014 and a second one on 20th March, 2014. Further that in the notices they mentioned people who have encroached on the road reserve and not specific property. He said Notices were given out and Public Participation Forum called after marking but could not recall the dates of specific meetings. He knew the meetings were done after the notices but before the extension. He explained that the suit land is a fixed survey and that a fixed survey is an accuracy of the highest order.

The fixed survey shows co-ordinates F1 172. The survey whether fixed or general has to show a road. Fixed survey comes from Director of Survey. The fixed survey shows where property No. 195 is. Further that Allotment letters are backed up by Part Development Plan which he had a chance to see. He confirmed that the Part Development Plan shows the road. However, from the Part Development Plan a road does not exist passing through the suit property. While in the second allotment letter of 9th August 1985 it does not mention survey as it had done in first allotment or unsurveyed. From the Part

Development Plan approved on 2nd October 1984; the road was not drawn but has on its own along the boundary of the property. The road stops after going through the road on the other side. He reiterated that the road does not pass through the property but it is adjacent. The width of the road is 12 meters wide as per the Part Development Plan. Property no 57 is the one which created Noonkopir Trading Center which is part of 195. He contended he was seeing the map (1979) for the first time. Further that the Plaintiff property is within parcel no 57 and there is no road passing through it. He referred to RIM SK 50-appendix 2 of Plaintiff's Exhibit and confirmed he could see parcel 195 and that they were trying to open up several roads. Further, that the road was closed after survey of parcel no 195 that led to the increase of the area by one acre. He further stated that all maps are from the Director of surveys and the road is supposed to end where it meets the other road; but from the survey done for parcel no. 195 it closed the road, that led to the increase of parcel no. 195. It now shows road stops at the plot no. 195 while Kaputiei North is on eastward. He confirmed 57 created Noonkopir Trading Centre while Kaputiei North was created from Trust Land. He confirmed that Map sheet no. 17 originates from the Kajiado Survey Offices and it is approved and authenticated by Director of Surveys.

He reiterated that Plaintiff Property is a fixed survey and could not remember when the marking was done, neither was he aware of any removal/tampering with the beacons.

In reexamination DW1 explained that in the map of 1979 – Title No. 195 was hived from 57 and at that time, the buffer separating the two plots was not there. The buffer is normally created to separate township and individual land. The said buffer uses a road. In sheet no. 17 Kaputiei North – the buffer should go all the way to meet the main road or otherwise it dies naturally. He explained that RIM was prepared to hasten registration of individual ranches and individual land and general boundaries while the Part Development Plan is prepared to enable fixed boundary survey to be undertaken and approvals are done. If Part Development Plan is prepared wrongly, then the whole consecutive process is false but at times it is rectified during survey.

The Defendant thereafter closed their case.

Both parties filed written submissions which I have considered.

Analysis and Determination

After perusal of the pleadings, witness statements including the documents filed herein and upon hearing the testimony of PW1, PW2, PW3 and DW1 I find that the following are the issues for determination:

- Whether the Plaintiff is the legal proprietor of the suit property known as title number Noonkopir Trading Centre/195 in Kajiado County;
- Whether the Plaintiff encroached on the road reserve running on the southern end of the suit land;
- Whether the Plaintiff was provided with ample notice before demolition was effected;
- Whether the Defendants and or their agents/servants should be permanently restrained from the Plaintiff's enjoyment and quiet possession of the suit land;
- Whether the Plaintiff is entitled to Special damages;
- Whether the Plaintiff is entitled to General Damages; and
- Who will pay costs of the suit.

Whether the Plaintiff is the legal proprietor of the suit property known as title number Noonkopir Trading Centre/195 in Kajiado County.

It is not in dispute that the Plaintiff's father was issued with Letter of Allotment dated 11th March, 1985 with an acreage of 0.8 hectares. Further that a second letter of allotment was issued on 9th August 1985 revoking the earlier one while increasing the acreage from 0.8 hectares to 1.24 hectares. DW2 stated that the increase was mysterious as the first letter of allotment was accompanied by a Part Development Plan which showed Namanga Road and in the second allotment no road is shown anywhere. He contended that while the Part Development Plan used indicated several roads but the surveyor chose to ignore it

culminating in an increase in area. The Plaintiff insists the whole suit land is his but the Defendants contend that there is a road reserve on the Southern boundary of the Plaintiff's land. PW2 explained that the Plaintiff's land is a fixed survey which fact was not disputed by the Defendants and if indeed there was an error then it is only the Director of Surveys mandated to rectify it in accordance with the Survey Act. I however note that since 1985 there was no rectification of the alleged error and the map produced by PW2 which is from the Director of Surveys still indicates there was no road reserve. DW1 on the other hand insists that the road was contained in the PDP and that was the reason for the demolition of part of the perimeter wall on the Plaintiff's land. I note a Certificate of Lease was issued to the Plaintiff in 1985 and the suit was filed after 29 years but the said Lease had not been amended. It is trite law that a PDP cannot be superior to a map from the Director of Surveys. I note that in this instance the burden of proof was upon the Defendants to prove that the Plaintiff either acquired his land illegally, encroached on the road reserve and they have approached the Director of Surveys to rectify this position. However, from the evidence presented by the Defence, this is not so.

PW2 confirmed to Court that the Plaintiff's property is a fixed survey and he holds a Certificate of Lease, which has not been challenged. However, there was a site visit conducted and the County Surveyor prepared a report in November , 2014 and stated that the title to the Plaintiff's property had been drawn using wrong maps and that there was indeed a road passing along the Plaintiff's land that should join the Old Namanga - Athi River Road. Even though the County Surveyor indicated so in his report, the maps have not been rectified nor the Certificate of Lease amended.

Section 24 (b) of the Land Registration Act provides as follows: **'the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.'**

These provisions empower the Plaintiff by virtue of being registered owner of the suit land with vested rights and privileges therein and which no person should interfere with it.

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that **' the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'**.

In the circumstances above and relying on this case, I find that the Plaintiff is indeed the absolute proprietor of parcel number Noonkopir Trading Centre/ 195 and he is entitled to the protection of the law.

Whether the Plaintiff has encroached on a road reserve

It is not disputed that the Plaintiff's father was issued with the first letter of allotment and thereafter the same was withdrawn and a second one re issued which increased the acreage.

The Defendant however contend that the Plaintiff built on a road reserve and relied on the case of **Cycad Properties Limited & Anor Vs. Attorney General & 4 others [2013] eKLR,** it was held that:' **the burden on the Petitioners in a matter such as this is to demonstrate a violation of their constitutional rights. To do this, they would have to show entitlement to the 20 metres road reserve, and this, in my view, they have not been able to do. The Respondents are not, from their submissions before me, challenging the Petitioner's title entirely. Their argument is that to the extent that it has encroached on 20 metres of the road reserve, it is unlawful. '**

I note there was an increase in acreage of the Plaintiff's land which is not well explained by PW1 and PW2 except for the fact that this was as a result of the second letter of allotment. I however note that it is the Local Authority, which issued the Letters of Allotment and increased the acreage and not the Plaintiff, on which basis the Certificate of Lease was issued by the Commissioner of Lands. I find that it is strange that the Local Authority can now claim that the increase was an error almost 30 years down the line. In so far as DW1 contended that the increase in acreage was mysterious, especially bearing the fact that the

initial allotment was accompanied by a PDP which showed a road reserve but which later disappeared, the County Government has not demonstrated as to whether it has liaised with the Director of Surveys to correct the anomaly. In so far as an issue of an access road is a matter of public interest, it is important for the same to be rectified as envisaged within the Survey Act first instead of punishing an innocent party who was legally issued with a Letter of Allotment and thereafter a Certificate of Lease. Further, the County Government insist that as per their PDP the Plaintiff has encroached on the road reserve but the said road is not indicated within the map held by the Director Surveys who is the custodian of all the maps in the country. It is against the foregoing that I find that there is no evidence to prove the Plaintiff's parcel of land indeed encroached on the road reserve.

Whether the Plaintiff was provided with ample notice before demolition was effected.

The Plaintiff denied being issued with the notice of the intended demolition. The Plaintiff as PW1 stated in Court that he only learnt of the demolition through his caretaker who informed him that there were bulldozers demolishing the wall and marking it in red. The Defendants insist the Plaintiff was provided with ample notices and there was even a public participation forum before the demolition was effected. DW1 produced two newspaper notices as exhibit 'D2'. A cursory look at the two notices dated 20th March, 2014 and 8th July, 2014, indicate that the same was not directed to a particular person nor stated a parcel of land.

Section 95 of the County Government Act provides as follows:

> **(1) A County government shall establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county, which may include—**
>
> > **(a) television stations;**
> >
> > **(b) information communication technology centres;**
> >
> > **(c) websites;**
> >
> > **(d) community radio stations;**
> >
> > **(e) public meetings; and**
> >
> > **(f) traditional media.**
>
> **(2) The county government shall encourage and facilitate other means of mass communication including traditional media.**

Apart from the General Newspaper Adverts, DW1 did not inform Court on whether they adhered to any of the above provisions to serve the Plaintiff with the Notice of Intended Demolition. The Defendants did not provide evidence of issuance of personal notice to the Plaintiff nor sticking the notice on the suit premises which is established. Section **152 (1) (a) of the Land Act provides that "Any person who, without, express or implied, lawful authority or without any right or license, under customary or statutory land law so to do occupies or erects any building on any public land ;**

(2) If, with respect to public land the Commission is of the opinion that a person is in unlawful occupation of public land, the Commission may serve that person

It is in the said circumstances, that I find that the Plaintiff was indeed not given ample notice of the impending demolition before the same was effected.

On the issue of damages

The Plaintiff claimed his wall was demolished and the business which included a petrol station, restaurant and go down destroyed. The Plaintiff undertook the services of PW3 a Valuer to assess the level of damage and quantify it. PW3 stated in court that he used the investment approach method to assess the level of damage and quantified it to amount to Kshs. 258 million. He relied on negotiations the Plaintiff was having with Oil Libya and NAIVAS and said the negotiations failed due to the demolitions and the Plaintiff lost income. He however admitted during cross examination that these were ongoing negotiations and there were no agreements signed yet. Further he confirmed that for the Plaintiff as a Leaseholder to engage with a third party on business, he had to obtain consent from the County Government. However, I note no consent from the County Government was produced in Court and neither was PW3 aware of any in existence. In so far as I find that the demolitions were unlawful since no proper notice was given, no tangible evidence has been provided by the Plaintiff to prove that the damages culminated in the loss of income amounting to Kshs. 258 million. Further, I am unable to find the correlation between the demolition and loss of business. Letters produced from NAIVAS and OIL LIBYA are all expressions of interest but not signed contract. Further, I note the OIL LIBYA letter was dated March 2013 and yet the demolitions were conducted in August 2014. The Plaintiff did not furnish court with any evidence of commitment from OIL LIBYA after the letter dated March 2013. As for NAIVAS, I note the letter is dated July 2014, a few weeks before the demolition. In the said letter, they did not indicate how much rental income they intended to offer the Plaintiff. It is against the foregoing that I find that the Plaintiff has not proved the claim for special damages.

However, in terms of general damages, I find that failure by the Defendants to serve the Plaintiff personally with the notice of impending demolitions, and based on the pictures presented by the Plaintiff on the demolitions, I find that he is indeed entitled to damages for trespass which I assess at Kshs. 1 million. Further based on the evidence above, I find that the Plaintiff is also entitled to exemplary damages.

In the case of **Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR,** Justice Sila Munyao held as follows:**’ In my view, this is a fit case for the award of exemplary damages. In the case of Rookes v Barnard (1964) 1 All ER 367, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. Rookes v Barnard, received the stamp of approval of the East African Court of Appeal in the case of Obongo v Kisumu Council (1971) EA 91. In the matter, Spry V.P stated as follows at page 95 :-"I am therefore of the opinion that this court should regard Rookes v Barnard as authoritatively settling out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967." Apart from the case of Obongo v Kisumu Council, the case of Rookes v Barnard has been applied in Kenya in various decisions. These include the cases of C A M v Royal Media Services Limited [2013] eKLR, C.A at Nairobi Civil Appeal No. Civil Appeal No. 283 of 2005, Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR, Court of Appeal at Kisumu Civil Appeal No. 84 of 2009; and, Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR, High Court at Mombasa, Civil Suit No. 290 of 2000. The basis for awarding exemplary damages is to punish the defendant for its conduct. A wrong doer must not be allowed to benefit from his conduct. If this were not so, a wrongdoer could chose to commit a wrong, being alive to the reality that taking into consideration the amount to be awarded in damages, he would still be better off if he proceeds to commit the wrong. Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building.’**

In relying on this case, I find that the Plaintiff is indeed entitled to exemplary damages from the Defendants who demolished his wall and destroyed the properties on the suit land exposing it to members of the public who are now using it as a dumpsite with the Plaintiff being unable to utilize it to its optimum. I proceed to award the Plaintiff exemplary damages of Kshs. 9 million.

Costs

Costs generally follow the event, and in this instant case I do award the plaintiff the costs of this suit.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to enter judgment in his favour and make the following final orders :-

a) That judgement is hereby entered for the plaintiff against the defendants in the sum of Kshs. 10, 000,000/= comprising of Kshs. 1,000,000/= as general damages for trespass and Kshs. 9,000,000/= as exemplary damages.

b) That a declaration is hereby issued, that as against the defendant, the plaintiff is the owner of the land parcel Noonkopir Trading Centre / 195.

c) A permanent injunction be and is hereby issued restraining the Defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, demolition and or in any manner whatsoever interfering with the Plaintiff's stores, perimeter wall, restaurant and other structures erected on the property known as title number Noonkopir Trading Centre/195.

d) The costs of the suit are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 23rd day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Oduor holding brief for Ajaa for Plaintiff

N/A for Defendant