



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 783 OF 2007

FLORENCE MBAI t/a FOUNTAIN OF LIFE CHILDREN'S HOME.....1ST PLAINTIFF

**FOUNTAIN OF LIFE DELIVERANCE FELLOWSHIP
CENTRE**

SUING THROUGH FLORENCE MBAI AS THE CHAIRLADY.....2ND PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGMENT

Introduction

The suit herein was commenced by way of a Complaint dated 20th November 2007 seeking damages of Kshs 19, 179,150/- and interest thereon against the Defendant as well as costs of the suit. A similar suit being HCCC No. 6 of 2007 was also filed in which 60 Plaintiffs who are minors suing through Florence Mbai as their guardian and the director of Fountain of Hope Children's Home sued the City Council of Nairobi and Ibrahim Ali. Through an amended Complaint dated 1st October 2007, the said Plaintiffs sought punitive and exemplary damages against the said Defendants as well as such other order as the court may deem just and expedite to safeguard the rights of the Plaintiffs' under the Children Act.

The Plaintiffs herein also instituted CMCC No. 14181 of 2006 seeking an order of permanent injunction to restrain the Defendant from dealing with plot numbers "E" and "F" otherwise known as LR Nos. 209/14213 and 209/14329 respectively. Through a Notice of Motion dated 16th September 2009 filed in Misc. Application No. 652 of 2009, the Plaintiffs were granted an order to withdraw CMCC No. 14181 of 2006 and transfer the same to the High Court on grounds that they wished to have the Complaint amended to claim for Kshs 30,000,000/- as value of the said plots, which claim exceeded the subordinate court's pecuniary jurisdiction.

On 15th February 2011, the court directed that the instant suit be consolidated with CMCC No. 14181 of 2006 and HCCC No. 6 of 2007, with the instant suit being the main suit.

The Plaintiffs' Case

The Plaintiffs' claim is that on 28th October 1997, the Defendant allocated them unmarked plots numbers "E" and "F" in Pumwani Nairobi which were subsequently allocated LR Numbers 209/14213 and

209/14329 respectively (“the suit property”). The Plaintiffs contend that at all material times, they had been running a Children Center taking care of orphans and vulnerable children in the society and a church on the suit property.

The Plaintiffs have alleged that they have been in peaceful and uninterrupted occupation of the suit property which they had extensively developed by erecting buildings to accommodate the destitute children. Their case is that on 20th December 2006, the Defendant without any prior notice or colour of right entered the suit premises through its officers and a gang of men unknown to the Plaintiffs and brought down all the structures therein using a bull dozer.

The Plaintiffs have averred that following the Defendant's action, their property in the suit land was damaged, lost and/or looted occasioning them severe losses which they claim compensation from the Defendant. They also contended that pursuant to the Defendant's actions, their rights were violated.

The 1st Plaintiff (PW1) filed a witness statement dated 14th December 2011 and testified orally in Court. She stated that she runs a children home known as Fountain of Life Children's home on Kangundo Road-Saika. Her evidence was that she and her late husband founded the Fountain of Life Children Center in 2001 at Pumwani and further, that the Fountain of Life Members Society was founded on 1997 and registered as a society on 29th June 1999. PW1 produced a certificate of registration of the society dated 29th June 1999 as the Plaintiffs' Exhibit 1.

PW1 averred that the suit property was located at Eastleigh, Pumwani on plot “E” and “F” of LR 29 Pumwani and that the same was given to them by the Ministry of Lands. Her evidence was that one plot was given to the Fountain of Life Church and that the other plot was given to the Fountain of Life Children's Home. She produced before the Court a letter of allotment dated 28th October 1997 addressed to the Fountain of Life Fellowship Centre with respect to plot no. “F” as the Plaintiffs' Exhibit 2 . A letter of allotment dated 28th October 1997 for plot no. “E” was also produced as the Plaintiffs' Exhibit 3.

While stating that they developed the suit property after the allocation, PW1 averred that they bought a tent which could host 3000 people which was put on the plot. She stated that they constructed a school, dormitory, dining hall, toilets and a fence and also dug a borehole on the plot for the children in the children's home. It was the evidence of PW1 that the City Council was aware of their activities on the suit property and an inspection report dated 28th November 2006 from the City Council of Nairobi Public Health Department was produced as the Plaintiffs' Exhibit 4.

PW1 contended that she was also given a certificate to run the children home by the Children's Department. According to her, the provincial administration was also aware of their activities and a letter dated 19th August 2005 where the provincial administration recommended that relief food be given to the Children Center was produced as the Plaintiffs' Exhibit 5. She also produced a letter dated 26th May 2005 where her late husband requested for relief food from the District Officer Central Division as the Plaintiffs' Exhibit 6.

In further evidence PW1 informed the Court that her husband passed away in 2006 by which time they had constructed a school on the plot, a borehole had been sunk, a dormitory had been constructed for the boys and that there was a fully functioning church on the tent. PW1 averred that they also had an administration block and a wall on the two plots. It was her evidence that they were fully occupied by the year 2006 and that they had also applied for registration of the Children Home.

A certificate of registration of a charitable children's institution issued to Fountain of Life Children's Home dated 14th December 2006 was produced as the Plaintiffs' Exhibit 7. PW1 also produced letters dated 8th February 2006 and 18th February 2006 issued by the Water Resources Management Authority in respect to drilling of the borehole as the Plaintiffs' Exhibit 8 and 9 respectively. An invoice dated 6th February 2006 for Kshs 1,348, 200/- from Agro Irrigation & Pump Services Ltd who sunk the borehole was produced as the Plaintiffs' Exhibit 10.

Further, PW1 contended that they also engaged Biselex Kenya Ltd who installed the pump for pumping the water from the borehole and a daily worksheet dated 18th April 2006 from the said company as well as a quotation dated 20th April 2006 were produced as the Plaintiffs' Exhibits 11 and 12 respectively. PW1 also produced a delivery note for the equipment dated 2nd May 2006 as the Plaintiffs' Exhibit 13. She stated that after completion of the work, the company issued them with an invoice dated 31st October 2006 for Kshs 535, 093/- which was produced as the Plaintiffs' Exhibit 14. PW1 also produced a further delivery note dated 13th November 2006 as the Plaintiffs' Exhibit 15.

It was the evidence of PW1 that while she was in her home in Kimathi Estate on 19th December 2006, she received a call from the home father and the watchman at the Children's Home at around midnight informing her that there were people demolishing the property. She averred that she went there and found people demolishing and that she managed to identify a few.

According to PW1, the person who was leading in the demolition had a torch and was a City Council askari in uniform. This witness stated that there was light in the opposite building and reiterated that people wearing the City Council of Nairobi grey uniform were operating the bulldozer. PW1 contended there were also lorries and pickups from the City Council of Nairobi which had ferried the people.

In further testimony, PW1 averred that some people in the lorry were called upon to pull the bulldozer which got stuck in a trench. She stated that they demolished the gate, fence, classroom, dormitories, office block and the church tent with all the chairs, furniture and equipment therein. She averred that they also brought down the store with all the food and material therein. According to this witness, everything on the plot was demolished including the structure that had the pulpit and materials for the borehole. It was her evidence that save for a few materials they were able to salvage from a cabinet in the office, everything else was destroyed, looted or stolen.

PW1 stated that at the time of demolition, they had 60 boys aged between 4-14 years in the dormitories who were all removed before demolition of the dormitory. She stated that the children were the Plaintiffs in HCCC No. 6 of 2007. According to PW1, about 30 boys were accommodated by church members while she and a neighbour accommodated the other 30. She contended that the boys attended the school that was demolished, fed in the dining hall and attended the church on the suit property which were all destroyed.

While informing the court that it was raining at the time of the demolition, PW1 averred that the children suffered psychological trauma having lost all their properties. She stated that since her husband had passed on 5 months prior to the demolition, the children did not attend school as they looked for a place to relocate. It was her evidence that after 3 months, they found a church in Buru Buru where they were accommodated and attended school. PW1 averred that the church and the children center were inter-related since the church managed the center and played a role in its upkeep.

PW1 informed the Court that she was the chairperson of the fellowship center in 2006 and she produced annual returns dated 28th July 2007 as Plaintiff Exhibit 17. She contended that they incurred a loss of about 20 million following the demolition. Her evidence was that they could however, not produce any evidence since all the documents were lost in the demolition.

She urged the Court to compensate them for their loss since the City Council of Nairobi demolished their property without notice and further, that the rights of the children at the center were violated. PW1 averred that they eventually got a plot at Kangundo Road where they run the church and the center. Her evidence was that they never returned to the land at Pumwani and further, that someone else has built structures thereon.

During cross-examination, PW1 made reference to the special condition 4 in the letter of allotment for plot "F" produced as Plaintiff Exhibit 2 on the use of the land and averred that they had a church on the plot. She contended that the plot was not being used for bible distribution or as accommodation for a caretaker. PW1 stated that plot "E" was being used for a children's center. She made reference to

condition 2 and stated that they only built temporary structures and therefore, that they did not need to submit any building plans. She contended that that they were waiting for the title deed in order to construct permanent buildings.

While making reference to a letter from the Public Health Department produced as the Plaintiffs' Exhibit 4, PW1 stated that buildings are inspected by the City Planning Department which only inspects permanent and not temporary buildings. PW1 reiterated that when she arrived at the suit property on the day of demolition, the children were outside the dormitory. She contended that some of the structures were brought down in her presence and that she saw the City Council Askaris in uniform who did not offer any explanation why the demolition was taking place.

According to this witness, the demolition went on throughout the night and that looting happened after demolition. The evidence of PW1 was that even after reporting the matter at Kasarani Police Station, the police were unable to stop the looting since there were many people and the police could not distinguish who the looters were. She stated that the water tank was destroyed and that the borehole was still on the land. She however could not tell whether the borehole was still being used since she never went back since she feared for her life.

PW1 made reference to her Complaint in respect to particulars of damaged properties and stated that the church which was in the tent was destroyed together with plastic chairs and benches which were in the tent. She stated that the dormitory at the time was occupied by 60 children although it could accommodate up to 100 children. PW1 averred that the quantity of 6 boxes indicated in the Complaint was a mistake since every child had a metal box and therefore, that there were 60 metal boxes in the dormitory.

In further testimony, PW1 averred that the office block which had three big rooms was constructed with iron sheets and timber. She contended that there was a computer at the reception which was from America and further, that the reception was also destroyed during the demolition. Her evidence was that there was a separate administration block which also had a reception room. She made reference to Plaintiff Exhibit 4 and contended that whereas the sanitary inspection report was done on 28th November 2006, the demolition took place on 19th December 2006.

PW1 stated that the inspection report indicated that there was a general office, staffroom, 6 classrooms, 1 dormitory and 8 pit latrines. She reiterated that the structures on the Complaint were on the compound and that the sanitary inspection report only highlighted the classrooms and boarding facilities and did not include the tent and the office which were on the plot. PW1 stated that the drilling of the borehole was paid for by a donor and was completed around April 2006.

PW1 was referred to the Plaintiffs' Exhibit 15 which was a delivery note from Biselex Company Ltd dated 13th November 2006 and stated that although she could not remember the exact date when the pump was installed, it was after the death of her husband. She contended that the Fellowship Center which was registered as a society had a treasurer and a secretary. She stated that although she had no written authorization, the Fellowship Center had authorized her to file the suit.

It was the evidence of PW1 that although the City Council did not claim they own the land, they were sued because they saw them demolishing the structures. She averred that she was not aware of any enforcement notice ordering the demolition.

During re-examination, PW1 stated that the water tank which was destroyed and damaged was part of the borehole structure. She reiterated the inspection report did not include all the structures on the property since it was only in respect to the school on plot No. "E" so that the school could commence operation. The evidence of PW1 was that she did not have control over the center and the property and further, that the other officials of the Fellowship Center were aware that she was filing suit and were agreeable to it.

The Plaintiffs called James Muchangi Maina (PW2) as their second witness. His witness statement dated 4th June 2012 was adopted as his evidence on chief. PW2 stated that he was the 55th Plaintiff in HCCC

No. 6 of 2007. He informed the court that it was on 19th December 2006 when he heard a loud and unusual bang at their gate at midnight. He informed the court that together with their house father and some boys, they woke up to find out what was happening and saw the gate coming down as a bulldozer and several Nairobi City Council lorries full of men armed with weapons and some pickup trucks invaded their compound.

PW2 stated that none of the men spoke to them while their group leader who had a very powerful torch showed the bulldozer what to demolish. He contended that after demolishing the classes, borehole and the kitchen, the ring reader told them to awake all the children in the dormitory or that he would let the bulldozer do that for them. PW2 stated that together with the house father and the big boys, they rushed to the dormitory and woke up the children who were frightened and crying. PW1 contended that one of the boys who said he would call the press was arrested, handcuffed and taken to a white lorry which bore the Nairobi City Council logo.

It was the evidence of PW2 that after the demolition of the store where the food stuffs and church instruments were stored, armed men from the Nairobi City Council took advantage of the mayhem and made away with the remaining foodstuff and some of the church instruments. He stated that boys slept out in the cold on that night without knowing what was happening. Further, he contended that they did not go to school for several days after the invasion.

While stating that they lost their shelter and were taken in by some good Samaritans while the 1st Plaintiff who was their patron looked for alternative accommodation, PW2 stated that he was emotionally and physically disturbed and could not sleep well for several days. He contended that their rights as children were violated by the Nairobi City Council and further, that they never returned to Pumwani and went to reside elsewhere.

In cross-examination, PW2 stated that in 2006, he was 15 years old and was residing at the Fountain of Life Children Center. He averred that they were sleeping when the demolition was carried out on 19th December 2006 and further, that when they were woken up, they went out where it was raining. He stated that there was electricity but could not tell how long the demolition took place. He averred that they stayed outside until morning by which time the bulldozer had left and people were looting.

PW2 reiterated that the people who were demolishing were in the City Council's uniform and were brought by the City Council of Nairobi lorry. His evidence was that while everything on the plots was demolished, some of the people were looting the material and made away with iron sheets and timber in the morning. PW2 stated that they tried to protect some of the iron sheets in the morning before they were taken in by some church members at 11.00am. He averred that there were foodstuffs and the church's public address system in the store. PW2 stated that the water tank and the building housing it were destroyed as well. There was no re-examination for this witness.

The Plaintiffs last witness was Lamech Mutinda Mwanthi (PW3). He contended that his name was listed in the Plaintiffs' Exhibit 17 which was an annual return as the vice secretary of the Fountain of Life Fellowship Center. He informed the court that he and the other official had discussed this case and had given the 1st Plaintiff permission to proceed with the case. His witness statement dated 4th June 2013 was adopted as his evidence in chief.

PW3 stated that on 19th December 2006, he was attending a leadership training that was being hosted at South C Nairobi when at around midnight, he received a call from the house father at Fountain of Life Children's Home near Pumwani. He stated that he was informed that the City Council bulldozer was in their property and had began demolishing the structures in the compound. PW3 averred that he immediately left the hotel and headed to Pumwani where he found mayhem as the bulldozer was still demolishing. He informed the court that the children were scared and crying while other people were looting property from the buildings that had been demolished.

PW3 stated that he mobilized the children from the property and stood aside as they watched while the

church and the school were being destroyed. He averred that they stayed by the road side till morning when he left to go meet their lawyer. PW2 stated that the church officials tried to plead to the people demolishing to stop in vain. He stated that a lot of property listed in the Plaintiff was destroyed in the course of the demolition. According to PW3, they were effectively evicted from the premises in Pumwani without notice and further, that the church and children's home suffered loss and damage as a result of the demolition.

In cross-examination, PW3 contended that there was no written authorization to the 1st Plaintiff to file the suit as it was a crisis situation and that they began communicating with their lawyer the day after the demolition. PW3 reiterated that on 19th December 2006, he was in South C at PCEA guest house when he was called at midnight by the house father and drove to the suit property. He informed the Court that he was able to witness the demolition and that the children were outside.

It was the evidence of PW3 that there was commotion in the church which attracted the neighbours, church members and looters. He averred that the City Council officials seemed to have been directing the operation and that he identified them from the vehicles belonging to the City Council and further, that the drivers told him that they were from the City Council. He contended that some of the people had the City Council's grey uniform and were working as a team with those who were demolishing. According to PW3, they left at about 3am after the demolition. He averred that there was electricity on the neighbouring property and on their property which went off at some time. PW3 also stated that the person who was demolishing had a flashlight.

While testifying that they were demolishing all the structures systemically, PW3 averred that they did not take anything from the dormitory since everything was destroyed. He contended that in some buildings like the store and office block, they were taking things before demolishing. It was the evidence of PW3 that they reported the demolition to the police who were not helpful since they were also supervising the demolition.

According to PW3, they did not require building plans as most of the structures were temporary and that the only permanent buildings were the toilets, bathrooms and water tank house. He admitted that they did not have approvals to construct the structures and averred that they were waiting for the title deeds. PW3 stated that he became aware of the enforcement notice later and further, averred that he was not aware of any criminal case that ordered the demolition.

In re-examination, PW3 stated that he could not remember who the enforcement notice was addressed to.

The Defendants' Case

The Defendant in a Defence dated 6th December 2006 denied the Plaintiffs' case and averred that the Plaintiffs had at all material times erected buildings without its necessary authorization and approval as set out in the Physical Planning Act. The Defendant contended that it removed the buildings pursuant to an order of a competent court in City Court Criminal Case No. 1967 of 2006. The Defendant denied that the Plaintiffs property was damaged, lost and or looted and denied the particulars of damaged/destroyed property listed in the Plaintiff.

The Defendant called Wilfred Wanyonyi Masinde (DW1) who filed a witness statement dated 29th October 2013 and gave oral evidence. He stated that he was working with the Nairobi City County as a building inspector and that he had worked with the City Planning Department for 20 years. He informed the Court that the suit property is located in Eastleigh, Muratina Street. He stated that he did not know the owner of the property.

While informing the Court that the procedure to follow to get building approvals entails making an application to the director of city planning which is either approved or rejected, DW1 stated that any development without an application is illegal. According to this witness, where a development is illegal, an enforcement notice indicating the type of illegal development and the action to be taken is issued. He stated that after issuance of the notice, a developer can appeal to the Liaison Committee and High Court.

DW1 stated that he visited the suit property together with his supervisor where he found a number of temporary structures. He stated that there were no permanent structures on the site and contended that they issued several enforcement notices and served them on the occupants of structures in LR 209/14211, 209/14212 and 14213. He informed the Court that the copies of the enforcement notices were in the Defendant's bundle of documents filed on 8th April 2013. He produced a bundle of 8 enforcement notices as Defendant Exhibit 1.

DW1 stated that the enforcement notices were served by Mohamed Rashid and that the owner refused to remove the structures after being served. He averred that the owner never appealed and that one person was charged in suit no. 1967 of 2006 in the City Court and was ordered to remove the structures. The order issued in criminal case no. M. 1967 of 2006 was produced as Defendant Exhibit 2. DW1 reiterated that the owner refused to remove the structures and in December 2006, the Nairobi City Council removed the structures. According to DW1, the owners have not complained about the demolition.

While testifying that they only inspect structures that are approved, DW1 contended that the health department does not inspect buildings as they only deal with hygiene. He was emphatic that it was only building inspectors from the City Planning Department who inspects buildings and averred that they did not inspect the buildings on the suit property. He maintained that they followed the procedures and averred that it was their duty to inspect structures to ensure they were built to good standard.

In cross-examination, DW1 informed the Court that enforcement notices are normally addressed to developers. He contended that the notices in this case were addressed to the developers/owners and that since he was not dealing with ownership of the property, a general notice was issued to the occupiers of the structures. DW1 maintained that the notice was properly served on the site. According to this witness, the notices were to be served on the developers of the 3 plots and further, that the developer was Mohammed Rashid Hussein who received the notice for the three plots.

In further testimony, DW1 stated that the Land Reference number indicated in the notices was obtained from the City Councils' registry. DW1 reiterated that Mohammed Rashid Hussein was on site and that he was served, received and signed the notice on 3rd November 2006. It was the evidence of DW1 that although he believed that Mohammed Rashid was the owner, he was not sure of the same. DW1 contended that the date on the court order was not clear and stated that it was possible that it was issued before the enforcement notice was issued.

DW1 averred that since they deal with developments and not ownership, they serve the notice on whoever they find on site. He stated that the suit property which was registered land was private land and that the structures were already built and occupied. He stated that the enforcement notice indicates the plot numbers to be LR No. 209/14211-13 and informed the Court that the second enforcement notice had the name Paul Gichohi in addition to that of Mohamed Rashid. According to DW1, the third enforcement notice had Daniel Ouko's name while others had Peter Musyoki's name.

While stating that the writings on the enforcement notice were authored by his supervisor, DW1 stated that the original enforcement notice had no writings and that the rest were photocopies. He averred that the names of the structures indicated on the top of the notices were written by his supervisor and were obtained from the site while the names at the bottom were in respect to those who received the enforcement notice.

According to DW1, a notice was drafted on an original copy and that since there were several structures on the ground, 7 copies were made and addressed to several institutions and that the notices were received by Mohamed Rashid & others. DW1 averred that the notices were prepared by his superior Dominic Mutegi. He denied that the notices were prepared and served in the City Council's Office and admitted that there was no notice in respect to LR No. 209/14329. While stating that the court order produced as Defendant Exhibit 2 mentioned Mohamed Rashid as the accused, DW1 averred that the court order had no land reference number.

In further evidence, DW1 stated that they did not have any approved plan for the suit property. He

averred that he was present at the time of demolition and further, that although he could not tell the number of people occupying some structures which were demolished, one of the structures which was housing children was demolished. DW1 denied that the borehole was demolished and averred that they were concerned with the structures and not the borehole. He denied that the demolition took place at midnight and contended that he did not see Mohamed Rashid during the demolition.

DW1 averred that he could not remember anyone pleading with him to get the children out of the structures. He stated that there were new flats on the ground and that he did not know the developer. His evidence was that they only deal with developments and not eviction.

In re-examination, DW1 stated that they did not force the Plaintiffs out of the suit property and deny them an opportunity to go back to the property. His evidence was that they were just following court orders. According to DW1, Mohamed Rashid was the owner of the suit property otherwise the court would not have issued orders against him.

The Submissions

The Plaintiffs filed submissions dated 9th June 2014 where they argued that they filed the instant suit, HCCC No. 6 of 2007 and HC Misc. Application No. 652 of 2009 which were consolidated pursuant to a court order. The Plaintiffs submitted that they were seeking compensation for the loss incurred pursuant to the wrongful act of the Defendant on 20th December 2006 and in addition, that they were seeking compensation by the Defendant for violating the rights of the children claiming in HCCC No. 6 of 2007.

Counsel submitted that the Plaintiffs evidence was consistent and credible and that DW1 did not controvert the testimony of PW1, PW2 and PW3. It was submitted that the court order purportedly used by the Defendant to evict the Plaintiff was not addressed to the Plaintiffs and further, that no evidence was produced to show that the Defendant's act was lawful and justifiable in the circumstances. The Plaintiffs urged the Court to find that they had proved their case on a balance of probabilities and find that the Defendant had violated the rights of the children enshrined under section 7, 8, 9, 13 and 19 of the Children's Act. The Court was urged to exercise its powers under section 22 of the Children's Act and order compensation for the violation.

The Defendant in submissions dated 18th February 2015 averred that the dispute herein is in respect to alleged demolition of unauthorized and unapproved structures that had been erected by the Plaintiffs on the suit property. It was submitted that subsequent to the demolition, the Plaintiffs filed several cases against the Defendant which were eventually consolidated with the instant suit.

Counsel for the Defendant contended that the Plaintiffs herein were the applicants in HC Misc. Application No. 652 of 2007 in which they sought leave to transfer CMCC No. 14181 of 2006 into the High Court for reasons that the lower court lacked jurisdiction to deal with a claim for Kshs 30,000,000/- being the alleged value of the subject matter of the suit. The Defendant averred that the Plaintiff also filed HCCC No. 6 of 2007 against it in which they sought an order for the Defendant to pay them such sum as may be reasonable to cater for their monthly expenditure of Kshs 252,000/- together with punitive and exemplary damages.

The Defendant reiterated the facts as pleaded and given in testimony and argued that in all the suits filed against it, the Plaintiff had expressly admitted to having erected structures on the suit property. Counsel submitted that the Plaintiffs had failed to furnish the Court with the requisite notification of approval to conduct developments on the suit property as per the Physical Planning Act or approved building plans and certificate of occupation as required by the Defendant's Building Code.

It is the Defendant's submission that the structures erected on the suit property were unapproved, unauthorized and illegal. While submitting that it followed the due process to have the structures removed by effecting proper service of an order and enforcement notice on the Plaintiffs, the Defendant argued that the claim against it must fail and ought to be dismissed with costs.

Counsel submitted that the Defendant was at all material times a Local Authority within the meaning of the Local Government Act (repealed) and was responsible for enforcing provisions of the Physical Planning Act within its jurisdiction. Reliance was placed on sections 3, 29 and 30(1) of the Act and it was submitted that the structures which the Plaintiffs had erected were unapproved and unauthorized as required by law and therefore existing on the suit property illegally.

The Defendant argued that the Plaintiffs who were allegedly allocated the suit property in 1997 had ample time to obtain statutory authorization before undertaking the development. Counsel submitted that section 30(3) of the Physical Planning Act provides that any dealings in connection with any development in respect of which an offence is committed shall be null and void and that such development shall be continued. It is the Defendant's submission that the Plaintiffs had erected structures on the suit property without its requisite approval thereby necessitating the removal of the structures.

In further submission, the Defendant averred that an enforcement notice dated 3rd November 2006 was served upon the Plaintiffs who failed to take heed of the notice. The Defendant contended that under section 3 of the Physical Planning Act, an enforcement notice may be served by a local authority on the owner, occupier or developer of the land. The Defendant submitted that upon being served with the notice, the Plaintiffs ought to have immediately taken steps to comply with its requirements and that if aggrieved with the notice, the Plaintiff ought to have appealed to the Liaison Committee pursuant to sections 13 and 38(4),(5), and (6) of the Physical Planning Act.

It is the Defendant's submission that section 39 of the Physical Planning Act grants power to a local authority to enter on the land subject of an enforcement notice and take the measures specified in the enforcement notice where such measures have not been complied with a stipulated time. The Defendant further submitted that the validity of the measures taken by a local authority shall not be questioned if an appeal against the enforcement notice has not been lodged.

The Defendant relied on the case of **Neno Evangelism Centre thro' its Registered Trustee vs. Director of City Planning & 3 others(2012)eKLR** where the court found that since the applicant had failed to demonstrate that the structures in issue had development permission or occupation certificates, the structures were on a *prima facie* basis unlawfully constructed and occupied. The Court was further referred to the case of **Harrison Mwangi Nyota vs. Naivasha Municipal Council (2006) eKLR** where the court stated that with or without notice, the demolition of a fence which was erected without lawful authority was proper and lawfully carried out.

The Defendant argued that it acted on an order issued by a competent court in City Court Criminal Case No. 1967 of 2006 directing the owner of the suit parcel to demolish the structures erected thereon failure to which the structures would be demolished by the Defendant at the owner's cost. Counsel argued that the Plaintiffs were in occupation of the suit parcels when the order was issued and cannot be heard to say that the order was not addressed to them yet it was in reference to the structures they had erected on the suit property.

In further submission, the Defendant contended that the Plaintiffs had come to court with dirty hands since their claim is founded on an unlawful conduct on their part and therefore, that their suit ought to be dismissed. While submitting that the Plaintiff had sought Kshs 19,179,150/- in damages for losses allegedly incurred when the Defendant removed the suit structures, Counsel argued that special damages must be specifically pleaded and strictly proved and further, that the Plaintiffs had failed to satisfy this criterion to justify their prayers.

It is the Defendant's submission that the balance sheet produced by PW1 in support of their claim reveals that the Plaintiffs' goods and assets on the plot as at 31st March 2006 were at Kshs 6,400, 564.75 while in the Plaintiff claimed Kshs 19,179,150/-. Counsel averred that similarly, the total value of the buildings allegedly erected on the suit property together with fittings and furniture's was Kshs 3,375,252/- as per the balance sheet whereas in the Plaintiff, the total value of the church and dormitory together with furniture amounts to Kshs 5,672,000/-. The Defendant submitted that there lack consistency, clarity and strictness in the manner in which special damages have been sought and as such, that they ought to be

dismissed.

The Defendant made reference to the case of **Arkey Industries vs. Samson Ngutu Nyongi (2007) eKLR** where an appeal challenging the subordinate's court award for special damages of Kshs 496,000/- which had not been paid out was allowed. Counsel argued that the Plaintiffs have not shown that the alleged losses were actually incurred as a result of the Defendant's actions. It was further submitted that the Plaintiffs had not produced receipts for all the items claimed in the Plaint and further, that the receipts produced cannot be verified as genuine unless produced by the persons who issued them.

The Defendant submitted that section 39(2) of the Physical Planning Act bars the Plaintiffs from claiming against it since no appeal was lodged against the enforcement notice. It is the Defendant's submission that the Plaintiffs ought to have appealed against the enforcement notice issued to them and challenge the legality of their structures before the Liaison Committee.

The Issues and Determination

It is common ground that the Defendant demolished the Plaintiffs structures put up on the suit property. What is disputed is whether the demolition was lawful. The Plaintiffs averred that they were allocated the suit property by the Defendant and letters of allotment for plots "E" and "F" dated 28th October 1997 were produced in court. This evidence was not challenged by the Defendant. The dispute herein revolves around whether due process was followed before the Defendant demolished the Plaintiffs structures. The Court will also make a determination on whether the Plaintiffs are entitled to the orders sought in the consolidated suits.

a. Whether the Demolition of the Plaintiffs structures was lawfully carried out

PW1 testified that at all material times, they were running a Children Center taking care of orphans and vulnerable children in the society and a church on the suit property. She contended that they had extensively developed the suit property by erecting temporary structures to accommodate the destitute children. Her evidence was that since the structures were temporary, they did not need to submit any building plans as they were waiting for the title deed in order to construct permanent buildings. She testified that on 20th December 2006, the Defendant without any prior notice entered the suit premises through its officers where they brought down all the structures on the suit property using a bull dozer. PW2 and PW3 also gave a similar account on how the demolition occurred.

DW1 was working with the Nairobi City County as a building inspector at the time of the demolition. His evidence was that he visited the suit property together with his supervisor where they found several temporary structures which were not approved and they issued enforcement notices which were served on the occupants of structures in LR 209/14211, 209/14212 and 14213. He produced before the court copies of the enforcement notices. According to the Defendant, the enforcement notices were served upon Mohamed Rashid who refused to remove the structures thereby necessitating the demolition.

The Defendant contended that the owner never appealed against the enforcement notice and he was charged in suit no. 1967 of 2006 in the City Court where the court ordered him remove the structures and in default, ordered removal by the Defendant at the expense of the owner. The Defendant's evidence was that the procedure was followed and that they were performing their duty in ensuring that structures were built to good standard.

The Court has perused the enforcement notices produced as Defendant Exhibit 1. The enforcement notice dated 3rd November 2006 is addressed to the developer/owner(s) of plot LR 209/14211-13 on Muratina Road/street Pumwani area Nairobi. Copies of enforcement notice serial number 0446 dated 3rd November 2006 were made and addressed by hand to 6 different churches including the Foundation of Life Deliverance Ministries and Children Center.

Section 38 of the Physical Planning Act provides as follows with regard to the issue and service of

enforcement notices by local authorities:

“(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

The enforcement notice relied upon by the Defendant was served on the owner/developer of Foundation of Life Deliverance Ministries which is a different organization from the Plaintiffs' organization. According to Plaintiff Exhibit 1 and 7, the Plaintiffs' organizations are duly registered as Fountain of Life Deliverance Fellowship Centre and Fountain of Life Children's home. The enforcement notice bearing different names was therefore in respect to a different entity.

The enforcement was addressed to the developer/owner(s) of plot LR 209/14211-13. The Plaintiffs case was that they were allocated plots “E” & “F” which were subsequently allocated LR No. 209/14213 and 209/14329. During cross examination, DW1 admitted that no enforcement notice had been issued in respect to LR No. 209/14329. The Defendant did therefore not establish any nexus between the enforcement notices and parcel number LR 209/14329 and the demolitions of the structures on the said parcel were therefore unauthorized..

As regards the demolitions on land parcel number LR No. 209/14213, under section 38(1) of the Physical Planning Act, a Local Authority is required to serve an enforcement notice on the owner, occupier or developer of the land where development has been or is being carried out without the required development permission having been obtained. There is no evidence before the court that the Mohamed Rashid upon whom the enforcement notice was served was the owner, occupier or developer of the LR No. 209/14213 which was claimed by the Plaintiffs. No other evidence was brought of service on the owners or occupiers of the said parcel of land.

Similarly, the court order issued in **Criminal Case No. M. 1967 of 2006** produced as Defendant Exhibit 2 which allegedly sanctioned the demolition does not indicate the land reference number in which the structures subject to removal were erected. In addition, the court order was not addressed to the Plaintiffs and there is no evidence that the accused, Mohamed Rashid was in any way related to the Plaintiffs' organization. It is therefore the court's finding that no enforcement notice was properly issued and/or served upon the Plaintiffs as required by section 38 of the Physical Planning Act with respect to LR No. 209/14213 and that the Defendant's action of demolishing the Plaintiff's structures was done without following due process and was therefore illegal.

b. Whether the Plaintiffs are entitled to the reliefs sought.

Having found that the Defendant's actions were unlawful, the Court is of the view that the Plaintiffs have proved their case on a balance of probabilities. In the instant suit, the Plaintiffs sought special damages of Kshs 19, 179,150/-. In addition the Plaintiffs also sought orders in HCCC No 6 of 2006 that the Defendant pays the Plaintiff such sum as may be reasonable for the monthly upkeep of the children who were named

as the Plaintiffs in HCCC No 6 of 2006 and such other orders to safeguard their rights, as well as punitive and exemplary damages.

This Court also notes that although the Plaintiffs has applied for transfer of CMCC No. 14181 of 2006 to the High Court on the ground that they wished to amend the Plaint therein to claim Kshs 30,000,000/= as the value for LR Nos 209/14213 and 209/14329, the said amended Plaint does not appear to have been filed. The orders sought in CMCC No. 14181 of 2006 were therefore the original orders of a permanent injunction restraining the defendants from building, constructing or putting up any structures on Plots E and F otherwise known as L.R Nos 209/14213 and 209/14329 respectively.

On the special damages sought of Kshs 19, 179,150/, courts have held that special damages must first be pleaded and then strictly proved. See **Coast Bus Service Limited vs. Murunga & others Nairobi CA No. 192 of 1992 (ur)** and **Kampala City Council vs. Nakaye (1972) EA 446**. The Court of Appeal in the case of **Hahn vs. Singh (1985) eKLR** held that the degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. Similarly, in **Ouma vs. Nairobi City Council (1976) KLR 375** the Court of Appeal stated as follows in respect to special damages:

" As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen L J said at pages 532, 533:

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

Therefore, in making a determination as to whether the Plaintiffs have complied with the requirement of strictly proving their claim for special damages, the Court must consider the circumstances of the case, namely the character of the acts producing the damage, and the circumstances under which those acts were done.

PW1 testified that they incurred a loss of about 20 million following the demolition and that since all the documents were lost during the demolition, they were unable to produce any evidence. Considering that the demolition caused destruction and loss of the Plaintiff's property, the Court is satisfied with the Plaintiffs explanation on unavailability of evidence to support their claim. The Plaintiffs produced in evidence a balance sheet filed in the Plaintiffs' supplementary list of documents dated 4th June 2012 which showed that the worth of the Plaintiffs' net assets as at 31st March 2006 was 6,400,564.45. Taking into account appreciation of value between that date and the filing of the instant suit on 20th November 2007, the Court considers that an amount of Kshs 8,000,000/= would be a reasonable award in the circumstances for special damages.

In HCCC No. 6 of 2007, the Plaintiffs did not bring any evidence of the minors that were affected by the demolition exercise, whether they are still under the guardianship of the Plaintiffs and the amounts required for their upkeep. This Court cannot therefore grant the orders sought on the upkeep and protection of the rights of the said minors in the absence of such crucial evidence.

The Plaintiffs in addition sought punitive and exemplary damages against the Defendants. The Court of Appeal in the case of **Obongo & Another -vs- Municipal Council of Kisumu (1971) EA 96** established that the exemplary and punitive damages are appropriate in two classes of case: oppressive, arbitrary or unconstitutional action by the servants of the government and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff.

In this case, the Plaintiffs evidence that demolition of their structures took place without notice and in the

middle of the night was consistent. The Defendant's servants and/or employees acted in an arbitrary and high handed manner by demolishing the structures at night without paying regard to the welfare of the children who were housed in the structures they demolished. This is therefore a proper case for issuance of exemplary and punitive damages.

On the claim for a permanent injunction against the Defendants with respect to LR No. 209/14213 and 209/14329, the Plaintiffs are relying on the letters of allocation issued to them with respect to unsurveyed plots No "E" and "F" both 28th October 1997. The Plaintiffs produced as evidence correspondence with the Commissioner of Lands dated 13th January 2006 and 15th April 2003 on the issuance of title for the said plots. No evidence of such title was however provided by the Plaintiffs. PW1 also testified that other persons have since settled on the said plots and built structures thereon.

It was stated by the Court of Appeal in **Dr. Joseph Arap Ng'ok vs. Justice Moiwo Ole Keiwua & others (1997) eKLR** and **Wreck Motors Enterprises vs. Commissioner of Lands & others (1997) eKLR** that a letter of allotment is not a title but an offer to treat and further, that title once issued takes precedence and is supreme to alleged equitable rights. This Court cannot therefore issue a permanent injunction with respect to the parcels of land now described as LR No. 209/14213 and 209/14329 on the basis of the letters of allocation issued in respect of unsurveyed plots, and in the absence of evidence of title to the said parcels of land, especially as there is the likelihood that third parties may have since acquired interests over the said parcels of land.

Lastly, as the Plaintiffs have largely succeeded in their suit, the costs shall follow the cause.

This Court therefore enters judgment in favour of the Plaintiffs to the extent of the following orders:

1. The Defendant shall forthwith pay the Plaintiff special damages of a sum of Kshs 8,000,000/= with interest at court rates with effect from the date of filing of this suit until the date of full payment.
2. The Defendant shall forthwith pay the Plaintiff exemplary and punitive damages of a sum of Kshs 500,000/= with interest at court rates with effect from the date of this judgment until the date of full payment.
3. The Defendant shall meet the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____24th____ day of ____March____, 2015.

P. NYAMWEYA

JUDGE