



REPUBLIC OF KENYA



**KENYA LAW**  
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**Vinayak v Santokh & 2 others (Civil Appeal (Application) 175 of 2017)  
[2023] KECA 1433 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1433 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 175 OF 2017  
MA WARSAME, K M'INOTI & JM MATIVO, JJA  
NOVEMBER 24, 2023**

**BETWEEN**

**DR SUNIL VINAYAK ..... APPELLANT**

**AND**

**MANRANJAN SINGH SANTOKH ..... 1<sup>ST</sup> RESPONDENT**

**SANTOKH SINGH MOOL SINGH ..... 2<sup>ND</sup> RESPONDENT**

**SARAVPAL SINGH SANTOKH SINGH ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgement of the Environment and Land Court at Nairobi (Gitumbi, J.) in ELC Case No. 32 of 2014 Formerly High Court CC Case No. 409 of 2009)*

**JUDGMENT**

1. The appellant, Dr. Sunil Vinayak is aggrieved by the judgment and decree of the Environment and Land Court issued on 7<sup>th</sup> April 2017 in Nairobi ELC No. 32 of 2014, formerly HCCC No. 409 of 2009. In the said suit, the appellant had sued the respondents herein Santokh Singh Mool Singh, Manranjan Singh Santokh Singh and Saravpal Singh Santokh Singh by a plaint dated 4<sup>th</sup> June 2009, which was subsequently amended on 21<sup>st</sup> January 2014. He sought the following orders:
  - a. A permanent injunction to restrain the defendants by themselves, their servants, agents, employees or auctioneers or otherwise howsoever from levying distress and evicting the plaintiff or the persons referred to in paragraph 8 of the Plaint from L.R. No. 1870/IX/98 (hereinafter referred to as the “suit premises”).
  - b. A declaration that the plaintiff is a protected tenant on the suit premises.
  - c. The sum of Kshs 40 million plus interest from the date of filing suit until payment in full.
  - d. General damages.



- e. Costs of the suit and interest thereon.
  - f. Further or any other relief as the court may deem suitable.
2. The genesis of the dispute was an unregistered lease agreement dated 1<sup>st</sup> January 2003 between the appellant and the respondents pursuant to which the respondents allowed the appellant to take possession of the premises on LR No. 1870/IX/98 for a period of 11 years at an agreed monthly rent of Kshs.70,000,000/= . It was the appellants' case that under Clause 2 (c) of the said agreement, it was agreed that the appellant would at his own cost and with the consent of the respondents make structural adjustments and repairs to the suit premises for purposes of enabling him run his business of dental practice, surgery and laboratory services.
  3. The gravamen of the appellant's case was that he obtained consent from the respondents as per the above clause to undertake structural adjustments pursuant to which he erected a two-storey building on the said premises at a cost Ksh.40,000,000/= . He accused the respondents of inter alia planning to levy distress against him and depriving him enjoyment of the said premises and occasioning him loss.
  4. The respondents filed a statement of defence and counter-claim dated 24<sup>th</sup> July 2009 denying that the lease agreement granted the appellant possession of the suit property for a period of 11 years or that they had granted the appellant consent to make any structural adjustment, constructing, demolishing or otherwise tampering with the suit premises. They denied the alleged expenditure of Kshs.40,000,000/= . They prayed for dismissal of the appellant's suit and an order that the appellant vacates the premises. They also prayed the Court to grant such further orders as it may think fit and just.
  5. In the impugned judgment dated 7<sup>th</sup> July 2014, the learned Judge addressed the following issues:
    - a. Did the parties enter into a lease agreement and if so, which one(s)?
    - b. What was the term of the lease(s), if any?
    - c. Is the plaintiff a protected tenant? If so, what are the implications? If not, what are the implications?
    - d. Was the plaintiff authorized to demolish the house and other structures on the suit premises and to put up a two storey building on the suit premises?
    - e. Did the plaintiff spend Kshs. 40,000,000/= for the construction of a two storey building on the suit premises and is he entitled to a refund of that sum plus interest from the defendants?
    - f. Was the plaintiff authorized to sub-let the suit premises to sub-tenants?
    - g. Should the court issue an order evicting the plaintiff and his sub-tenants out of the suit premises?
    - h. Who shall bear the costs of this suit?
  6. The trial court dismissed the appellant's suit holding inter alia that the appellant was not a protected tenant having entered into an 11-year lease agreement, which expired on 31<sup>st</sup> December 2013, after which it was not renewed. Consequently, the appellant and his sub-tenants were ordered to grant the respondents vacant possession of the suit premises within 30 days of the delivery of the judgment.
  7. Despite clear court's directions requiring the parties to file written submissions, they did not comply. When the appeal came up for hearing on 4<sup>th</sup> July 2023, the parties submitted orally. Learned counsel Mr. Nyachoti represented the appellant while learned counsel Ms. Okimaru appeared for the respondent.



8. In his submissions, learned counsel for the appellant, Mr. Nyachoti, elected to focus on only 3 grounds of appeal, namely, grounds 12, 13 and 14 of the memorandum of appeal and abandoned grounds 1-11 of the memorandum of appeal because the ownership and possession of the property had since reverted to the respondents. The said grounds are as follows:
  12. The learned Judge erred in failing to consider the appellant's documentary evidence and Witness Testimony adduced before the Superior Court in support of his claim for Kenya Shillings Forty Million (Kshs. 40,000,000/=).
  13. The learned Judge erred in making a finding on a counterclaim for which no evidence was led or presented before the Superior Court.
  14. The learned Judge failed to consider that the respondents were unjustly enriched by the appellant's development of the suit property.
9. Mr. Nyachoti submitted that there was an oral agreement between the appellant and the respondents for the appellant to carry out renovations and that the respondents were well aware of what was going on in the suit premises. Therefore, nothing could have been easier than stopping the said renovations by the process of law. He argued that the trial Judge ignored the arrangement between the parties. Counsel also submitted that the learned Judge ignored the appellant's evidence and ended up dismissing the appellant's claim.
10. The respondent's counsel, Ms. Okimaru submitted that there was no evidence to show that the appellant incurred the alleged Kshs. 40,000,000/= and/or that the respondents consented to the expending of the said sum. It was also her submission that at the beginning of the tenancy agreement, it was agreed that the appellant would adjust the suit property in order to use it as a dental clinic, a laboratory and staff housing. Further, according to the renovation agreement, an amount of Kshs.4,020,000/= was the cost and the respondents paid half of the said sum as agreed by the parties.
11. Counsel further submitted that the appellant brought down structures on the suit property and built a new structure contrary to what they had agreed. It is the respondents' case that there was no communication from the appellant on his intention to put up new a structure and or the safety of the structure. In conclusion, Ms. Okimaru submitted that a written agreement cannot be altered orally. Counsel urged the court to dismiss the appeal with costs.
12. In his rejoinder, Mr. Nyachoti submitted that the issue of renovation was not a new issue, since the same existed at the beginning of the lease. Consequently, counsel submitted that there was consent from the respondents from the beginning of the contract, which was extended throughout the lease.
13. This being a first appeal, the realm of our mandate under Rule 31(1) of the Court of Appeal Rules, 2022 is to independently reappraise the evidence and draw our own conclusions. (See *Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR). A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of Section 78 of *Civil Procedure Act* reproduced below, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

78. Powers of appellate court



1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power— (a) to determine a case finally;
  - b. to remand a case;
  - c. to frame issues and refer them for trial;
  - d. to take additional evidence or to require the evidence to be taken; (e) to order a new trial.
2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

(Judge, its important not to forget the other important rider, namely that where the issue turns on credibility of witnesses, the first appellate court will not easily disregard the advantage of the trial court of seeing and hearing the witnesses as they testified. A first appellate court is not entitled to treat itself in all respects as the trial court)

14. First, we will address the appellant’s ground that the learned judge failed to consider his submissions. In addition, the appellant’s counsel faulted the trial Judge for ignoring the appellant’s evidence and for dismissing the appellant’s claim.
15. We appreciate that it is imperative for a trial court to evaluate all the evidence and the submissions presented by the parties. A court cannot afford to be seen to be selective in determining what evidence or submissions to consider. However, the reality is that some of the submissions or evidence tendered might be found to be irrelevant or of little value. The best indication that a court has applied its mind in the proper manner to all the material presented before it is to be found in its reasons for judgment.
16. Requiring the trial court to consider and weigh all the evidence and the submissions does not mean that the judgment of the trial court must also include a complete embodiment of all the evidence tendered and the submissions made, as if it comprises a transcript of the proceedings. The duty of the appellate court is to determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decision. In other words, in order to determine the merits of the appellant’s contention, this Court must consider his evidence and submissions in the lower court, and, juxtapose it against the judgment, and finally determine whether there is any basis for interfering with the judgment.
17. If this Court finds that a particular fact or submission is so material that it should have been dealt with in the judgment, but such fact or submission is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This Court must then consider whether either the said misdirection, viewed on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by this Court.
18. We have carefully studied the trial court’s proceedings and the judgment. We are persuaded that the learned judge carefully summarized the facts, the evidence, considered the submissions, and supported her findings with the law. We therefore find no merit in the argument that the trial court failed to consider the appellant’s submissions and evidence.



19. We now address the appellant’s contestation that the respondents authorized and consented to the demolition of the structures, which were on the suit property, and they consented to the construction of a two-story building on the said property at a cost of Kshs.40,000,000/=. The appellant maintains that the respondents granted him consent to undertake the said construction in terms of clause 2 (c) of the lease agreement; therefore, the learned trial judge erred in failing to find that indeed the respondent had consented to the construction of a two-storey building.
20. Granted, the parties herein signed a lease agreement. The question here is what did the agreement provide and whether there was breach and if so, by who. Closely related to the foregoing question is the question whether the alleged consent was granted as claimed. A contract is the source of primary legal obligations upon each party to it to ensure that whatever he has promised will be done is done. Therefore, the above answers can only be resolved by interpreting the relevant clause of lease agreement signed by the parties.
21. Although it is often said that the purpose of interpretation is to ascertain the intention of the parties, it is trite that it is the objective meaning of the contract, rather than the subjective intention, which is being determined. In *Attorney General of Belize vs Belize Telecom Ltd* [2009] 2 All ER 1127 (PC) 1132) the Privy Council, per Hoffmann LJ, explained that:
- “ [the court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.”
22. Professor A. Burrows QC, usefully summarized the modern approach to contract interpretation in the following terms in *Federal Republic of Nigeria vs JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm), paragraph 32 approved by the Court of Appeal in *JP Morgan Chase Bank NA vs Federal Republic of Nigeria* [2019] EWCA Civ 1641, paragraphs 29, 73 and 74 :
- “ The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain.”



23. Before considering the meaning of clause 2 (c) heavily relied upon by the appellant, we find it useful to reproduce here below what the learned judge said in addressing the issue at hand. The learned judge stated:

“In asserting that he was authorized to demolish the house on the suit premises and build a two storey building thereon, the Plaintiff sought to rely on clause 2(c) of the Lease Agreement which stated as follows:

“The Tenant will carry out at his own cost and with the consent of the Landlord which is hereby given certain structural adjustments and repairs to the Premises and in consideration therefore the Landlord has agreed to grant the tenant Eleven (11) years term to be formalized by way of a renewal lease.”

In his testimony, the plaintiff stated that his agreement with the defendants was that he would lease the suit premises to build a dental surgery and carry on the business of a dentist there. He admitted that the house standing on the suit premises needed some necessary renovations to convert it into a dental surgery. It was his further testimony that upon embarking on those “necessary renovations”, the experts he had hired to do the job concluded that the house standing on the suit premises could not sustain a dental surgery, pointing out that the floor and the roof were not in a good state. I will quote his testimony when he said as follows:

“We decided to demolish and re-build”

My understanding is that by “we”, he meant himself and the experts that he had hired.

On their part, the defendants contended that they did not in any way authorize the demolition of the house and structures that they leased to the Plaintiff further stating that what the Plaintiff did was to step out of his mandate under the Lease Agreement which only authorized him to make “structural adjustments and repairs” on the house that was standing on the suit premises but definitely not pulling it down as the plaintiff

did. They denied having been involved in that process and expressed shock when they saw the changes that the Plaintiff carried out at the suit premises.

My finding is that the Plaintiff had no authority from the defendants to demolish the house that was standing on the suit premises and to build a two storey building thereon.”

24. The relevant clause is reproduced in the above excerpt. At the risk of replicating the same, the clause provided: “the Tenant will carry out at his own cost and with the consent of the Landlord which is hereby given certain structural adjustments and repairs to the Premises...”
25. The fundamental consideration in determining the terms of a written contract or its application to an event that arose during the course of their relationship is to discern the intention of the parties from the words used in the context of the document as a whole, the factual matrix surrounding the conclusion of the agreement and its purpose or (where relevant) the mischief it was intended to address.
26. More importantly, where parties deliberately enter into a contract on certain terms, they must be held to those terms even if that led to hardship, and that the courts must not make new contracts for the parties. Holding the parties to self-imposed obligations gives effect to the principle of freedom of contract. The underlying principle of contract law is that parties are free to choose if they want to contract, with whom and on what terms. This accords with another founding principle of the law of contract, namely the doctrine of *pacta sunt servanda*, according to which contracts should be upheld and enforced. According to this principle, the courts should interfere only where contracts were not



freely entered into, such as contracts induced by duress, misrepresentation, undue influence, or where the terms of a contract are immoral, illegal and contrary to public policy.

27. Clause 2 (c) reproduced in the above excerpt talks of structural adjustments. There is uncontroverted evidence that the parties agreed that the appellant would build a new extension of a laboratory on the premises. There is evidence that the development plan was agreed upon and the respondents gave the appellant Kshs.2,010,000/= for renovation and for the proposed construction of the laboratory. There is uncontroverted evidence that what was to be build was “an extension of a laboratory”. At this crucial moment, the parties agreed on construction of “an extension of a laboratory” as opposed to a two-storey building”. The parties’ intention at this point is clear. We are unable to find evidence on the record explaining why and how an extension of a laboratory metamorphosed into a two-storey building. An extension cannot possibly mean demolition and building of a new structure. An extension presupposes the continued existence of the building to which the extension is a form of appendage.
28. We note that the respondents admitted being informed by the appellant about the demolition of the main house which was as a result of advice by the architect who was supervising the works. It is however the respondents’ case that they did not consent to the demolition of the main house and building of the new two-storey building. Simply put, there is no evidence that the parties consented to the construction of a two-storey building.
29. It is also the respondents’ case that they were never supplied with the drawings of the proposed development, that the appellant never asked for any money from them for construction, and that they only invited the 1<sup>st</sup> respondent to the opening ceremony assuring him that he would be shocked to see the building. Our reading of clause 2 (c) is that the respondents’ consent was limited to structural adjustments and repair of the premises and not demolition and building of a new structure. The words used in clause 2 (c) convey the parties’ intention with sufficient clarity.
30. Next, we will address the question whether the counter-claim was proved on a balance of probabilities. In their counter-claim, the respondents prayed that: (a) the appellant’s suit be dismissed; (b) the appellant be ordered to give vacant possession of the suit premises; and (c) such further orders as the court may think fit, and costs of the suit. In addressing this issue, the learned judge stated as follows:

I did note earlier that the Plaintiff acknowledges that the defendants are the registered proprietors of the suit premises and he is their tenant. I also made the finding that the term of the Lease Agreement expired on 31<sup>st</sup> December 2013. The plaintiff has not obtained any renewal of the Lease Agreement. He is also not a protected tenant. This leads to my finding that he is under obligation to deliver up vacant possession of the suit premises to the defendants. The rights of a registered proprietor are well enunciated in the law. One of the main rights enjoyed by a registered proprietor of a parcel of land is to have possession thereof to the exclusion of all others. The plaintiff cannot hold on to the suit premises any longer and this applies to all his sub-tenants. The plaintiff is therefore ordered to grant the defendants vacant possession of the suit premises within 30 days from the delivery of this Judgment.”

31. It should be recalled that the relationship between the appellant and the respondents was that of landlord and tenant grounded on a lease agreement dated 1<sup>st</sup> January 2003 which had been terminated.



The respondents in their counter claim prayed for inter alia vacant possession. In *Graham vs Ripley* 1931 TPD 476 the court stated the following:

“Where an owner of property sues for ejectment his real cause of action is simply the fact that he is owner, and therefore prima facie entitled to possession. Consequently, an allegation in his declaration or summons that he has granted defendant a lease which is terminated is merely a convenient way of anticipating defendant’s

plea that he is in possession by virtue of a lease, and is not strictly necessary to the cause of action.”

32. We agree with the trial Judge’s finding that the appellant was under an obligation to give vacant possession of the suit premises to the respondent after the appellant’s lease was not renewed. In any event, as admitted by the appellant’s counsel, the issue of vacant possession of the suit premises has already been overtaken by events because the respondents are now in possession. Accordingly, the appellant’s ground faulting the learned judge’s for allowing the counter-claim collapses because it is otiose.

33. Next, we address the argument that the respondents were unjustly enriched by the alleged expenditure of Kshs. 40,000,000/= towards the construction of the two-storey building on the suit premises and if so, whether the appellant is entitled to a refund.

34. Unjust enrichment has been defined as: "a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense." (See Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573). A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.

In the leading case of *Fibrosa vs. Fairbairn*, [1942] 2 All ER 122, Lord Wright stated the principle thus :

“any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi- contract or restitution.”

35. Lord Denning in *Nelson vs Larholt*, [1947] 2 All ER 751 stated:

“It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires.”

36. Guided by the above excerpts, we shall address our minds to the question whether the appellant has demonstrated the elements of unjust enrichment and whether the justice of this case requires this Court to order a restitution. The essentials of the doctrine of unjust enrichment are: (a) the defendant has been enriched by the unjust benefit; (b) this enrichment has taken place at the expense of the plaintiff; and, (c) the enrichment which has been acquired is unjust or unfair.



37. As was held by the Supreme Court of India in *Sabakari Khand Udyog Mandal Ltd. vs Commissioner of Central Excise & Customs*, 2005 AIR SC 1897, the doctrine of “unjust enrichment” is based on equity, and it can be invoked to deny the benefit to which a person is not otherwise entitled. Before claiming a relief of refund, it is necessary for the appellant to show that he has paid the amount for which relief is sought, that he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss.
38. This Court in *Chase International Investment Corporation and Another vs Laxman Kesbra and 3 Others* [1978] eKLR was emphatic that the aim of equity is to do justice between parties. That is what the doctrine of unjust enrichment is all about. This appeal turns on the question whether the respondents were enriched by the appellant’s act of building a two-storey building on the suit premises. To put this issue into perspective, we need to bear in mind that the respondents’ herein only consented to renovation of the suit premises and construction of a laboratory and the measurements of the laboratory. The appellant never shared the development plans of the two-storey building with the respondents. He never even asked for funds from the respondents, yet when the respondents consented to the structural renovation and building of a new laboratory, they actually contributed half of the cost of the renovations. In our view, the appellant went on a frolic of his own and built a two-storey building without the respondents’ consent. The respondent only learnt of the extent of the appellant’s frolic during the opening ceremony.
39. Furthermore, during cross-examination, the appellant confirmed that he sub-let the suit premises to his sub-tenants in exchange for rent. His justification for sub-letting was that the lease agreement did not preclude him from sub-letting the suit premises. Consequently, we find that the respondents were not enriched at the expense of the appellant because the appellant used the two-storey building for its own benefit and he even sub-let the premises and he was collecting rent to the exclusion of the respondents who were the landlords. There is no evidence that the respondents earned from the said building. Briefly, this was an unauthorized structure, which was constructed, in total disregard of a written lease agreement. The doctrine of unjust enrichment is an equitable remedy and therefore, he who comes to equity must come with clean hands and must do equity. The conduct of the appellant in this case betrays him. It does not endear him to an equitable remedy.
40. Lastly, we address the question whether the appellant proved the alleged expenditure of KShs.40,000,000/= on the two-storey building. While resolving the said issue, the learned Judge held:

The Plaintiff claimed that he spent the sum of KShs.40 million to build the two-storey building now standing on the suit premises. However, he did not produce any evidence to support this assertion. Pressed to prove this expenditure, the Plaintiff admitted that he did not produce any receipts or other documents to demonstrate this expenditure. Further, even if he were to prove that he did indeed spend KShs.40 million to demolish the house standing on the suit premises and to build the new two-storey building, the court has already arrived at the finding that the expenditure was unauthorized. This further finds support from clause 2 (c) of the Lease Agreement which I cited earlier which stated that the authorized structural adjustments and repairs to the Premises were to be carried out by the Tenant “at his own cost”. It is obvious that the Plaintiff clearly went on a frolic of his own when he spent KShs.40 million on the suit premises. This expenditure was unauthorized and therefore not refundable from the defendants.”



41. It is trite law that special damages must not only be specifically pleaded, but must also be strictly proved with as much particularity as circumstances permit. This Court in Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR observed:

“...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of...”

42. Our decisional law is quite clear that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts for payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt meets the test. (See Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs Janevams Limited

[2015] eKLR, Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR).

43. As the record shows, on 16<sup>th</sup> July 2014 when PW1 was being cross-examined, the question of receipts in support of the expenditure arose. Counsel for the appellant sought and was granted leave to amend the plaint to include a new prayer for special damages amounting to Kshs.40,000,000/=. However, upon resumption of hearing on 17<sup>th</sup> July 2014, the appellant’s counsel informed the court that the receipts were in the custody of the auditors and retrieving them was a lengthy exercise. Therefore, no receipts were produced in support of the said claim. That being the position, we find that even if for argument sake we were to find that the respondents consented to construction of the two-story building as claimed, then the appellant’s claim would still have failed as it does for want of proof.

44. Flowing from our findings on the issues discussed herein above, the inevitable conclusion is that the appellant’s appeal is for dismissal. Accordingly, we hereby dismiss it with costs to the respondents. The upshot is that we uphold the judgment and decree of the Environment and Land Court at Nairobi (Gitumbi J.) delivered on the 7<sup>th</sup> April 2017.

**DATED AND DELIVERED AT NAIROBI 24<sup>TH</sup> THIS DAY OF NOVEMBER, 2023.**

**M. WARSAME**

.....  
**JUDGE OF APPEAL**

**K. M’INOTI**

.....  
**JUDGE OF APPEAL**

**J. MATIVO**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

