IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED. JJ.A)

CIVIL APPEAL NO. 106 OF 2015

BETWEEN

MUNICIPAL COUNCIL OF ELDORET.....APPELLANT

AND

TITUS GATITU NJAU.....RESPONDENT

*(An appeal arising from the Judgment of the Environment and Land Court of Kenya at Eldoret (**Munyao, J**) dated 30th January, 2015)*

in

Eldoret ELC Cause No. 207 of 2012)

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JUDGMENT OF J. MOHAMMED JA

Background:

1. This is an appeal against the decision of **Munyao, J**. wherein the learned Judge found in favour of the respondent. Dissatisfied with that judgment, the appellant preferred this appeal.

2. A brief background as can be gleaned from the plaint dated 22nd April, 2005 is that the respondent is the registered proprietor of the parcel of land known as Eldoret Municipality Block 4/337 (the suit property) having acquired the same from **Theluji Drycleaners Limited** (the Company) who were the original leaseholders. Upon acquiring the said parcel of land, the respondent was duly issued with a Certificate of Lease on 13th July, 1999. The transaction culminating in the issuance of the Certificate of Lease was sanctioned by the appellant. The respondent had duly paid the requisite land rates and other applicable charges to the appellant and land rent to the Department of Lands. The respondent was desirous of undertaking developments-cum-renovations on the suit property and the buildings erected thereon, but the appellant threatened the respondent that all structures erected on the suit property would be demolished. The respondent maintained that the said threat was unlawful, aggressive and wholly infringed on his right to ownership of the suit property. He sought an explanation from the appellant regarding the unlawful demolition notice issued to him but received no response or any explanation. The respondent urged the appellant, through its Town Clerk to rescind the notice to facilitate his occupation and ownership of the suit property but he received no response. The respondent contended that the appellant had no claim or interest over the suit property and was merely harassing and intimidating the respondent; and that the said conduct would cause the respondent irreparable loss and damage.

3. The respondent therefore lodged a claim against the appellant seeking: a declaration that the appellant through its servants, staff and/or agents was a trespasser on the suit property and that the appellant's conduct was illegal, null and void *ab initio*; a temporary and permanent injunction to restrain the appellant or its agents and/or servants from trespassing, entering, occupying and/or in any manner interfering or dealing with the suit property and the structures erected thereon; and a mandatory injunction against the appellant to cease from laying any claim on the suit property. The respondent also sought costs and interest.

4. On 27th April, 2005, the appellant's employees demolished the structures erected on the suit property. The respondent filed an amended Plaint on 25th July, 2006 and included a claim for loss of monthly rental income of Kshs 81,000/= arising from the demolished buildings erected on the suit premises that had been rented to various tenants; that despite a court order restraining the appellant from demolishing the buildings erected on the suit property the appellant unlawfully proceeded to demolish the buildings; that by reason of the demolition of the buildings by the appellant in a high handed and illegal manner, the respondent suffered both special and general damages; that the appellant's actions were actuated by malice, had no basis in law, were illegal and or unlawful. The particulars of malice were: demolition being effected in disobedience of a court order; victimizing the respondent based on his ethnic background; and demolishing the respondent's property

without probable cause.

5. The respondent sought the following orders:

> ***a) A declaratory order that the appellant through its servants, staff and or agents is a trespasser to the suit property and that the appellant's conduct is illegal, null and void ab initio;***
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> ***b) A permanent injunction to restrain the appellant either acting by itself, servants and or agents from the trespassing, entering, occupying and/or in any other manner from interfering with the suit property;***
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> ***c) A mandatory injunction against the appellant to cease from laying any claim on the suit property;***
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> ***d) A mandatory injunction against the appellant to cease from laying any claim against the respondent's suit property;***
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> ***e) General and exemplary damages for trespass in the face of an existing court order;***
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> ***f) Special damages of Kshs. 11,296,000/-;***
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> ***g) Kshs. 1,296,000/= being the rental income lost as at July 2006 and thereinafter a monthly rental loss of Kshs. 81,000/= until the determination of the suit;***
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> ***h) Damage for reconstruction assessed at Kshs. 10,000,000/= and general and exemplary damages for trespass in the face of an existing court order.***

6. The appellant in its amended defence dated 8th August, 2006, denied that the respondent was the registered proprietor of the suit property and claimed that it was entitled to demolish the structures on the suit property as the suit property had been approved for a service petrol station only; that the respondent's application to change the user of the suit property to business was rejected and the rejection communicated to him; that the respondent constructed buildings and other structures without the appellant's approval; that the respondent was given ample notice to voluntarily remove all illegal structures but he did not heed the notice; that the appellant was not aware of a court order stopping the demolitions and put the respondent to strict proof of the claim for damages and pleaded that if the respondent suffered any losses, then the same were attributable to his own blatant breach of the terms of the lease and any damages incurred arose out of the respondent's breach of the terms of the lease.

7. When the matter proceeded to hearing, the respondent called a total of four (4) witnesses including himself in a bid to prove his case. The respondent testified that the suit property and 20 other plots (leaseholds from the Government) were originally owned by the Company, in respect of which he was a shareholder; that the Company distributed the plots to its 18 shareholders and the respondent was allocated plot No 335. Further, that he purchased plot 336 from the Company; that he later exchanged the suit property with the Company and became the registered proprietor thereof; that prior to the transfer, the Company had applied for a change of user in respect of the suit property from a public car park to a petrol station; that there was also erected on the suit property a single storey building in which he managed a hides and skins business and had leased the premises to several tenants who operated various small businesses; that his total monthly rental income was Kshs. 82,000/=; and that his tenants had permits from the appellant to operate their businesses. That in March 2002, the respondent applied for change of user from petrol station to commercial user; and that the application was approved by the physical planner but rejected by the appellant on the ground that the suit property was a public utility plot. The respondent protested the rejection of change of user through a letter dated 7th August, 2003.

8. **Mr. Jackson Webale (Webale)** was a private court process server. He testified that he served the order of interim injunction upon one **Mr. Sitienei**, the appellant's deputy Town Clerk on 26th

9. **Henry Ndungu** was the respondent's caretaker. He testified that he was at the suit property when the appellant's officers demolished the buildings erected on the suit property despite him showing them the interim order of injunction.

10. **Mr. Wambugu** was a quantity surveyor who estimated that the cost of restoring the demolished building as at April 2006 was Kshs. 7,783,170/= and as at May 2006, it had increased to Kshs. 13,418,300/= owing to inflation.

11. The appellant, in a bid to dislodge the respondent's claim called one witness, **Barnabas Cheruiyot (Cheruiyot)** who was an administrative officer at Uasin Gishu County (the appellant's successor). It was his evidence that the user of the suit property was petrol station; that the respondent's application for change of user was declined; that when the building erected on the suit property was demolished it housed a butchery, shop, hotel and hides and skins go down; that the approval of the user of the suit property for a petrol station had a condition that any structures affecting the proposal and construction of roads and water mains would be demolished; that service of process having been served upon **Mr. Sitienei;** that the building erected on the suit property was earmarked for demolition for being a public utility which was being utilized for a user that was not authorized.

12. The learned Judge found in favour of the respondent and held as follows:

> **"Whether or not the defendant was justified in demolishing the building, because it did not conform to planning regulations, is immaterial, so long as there was a court order stopping the demolition. The defendant had a duty to obey the court order, whether or not they were in agreement with it. It is therefore my view that the demolition of the building was improper."**

13. The learned Judge ordered as follows:-

> ***"(a) That judgment is hereby entered for the plaintiff against the defendant in the sum of Ksh. 15,500,000/= comprising of Kshs. 500,000/= as general damages for trespass and Kshs. 15,000,000/= as exemplary damages.***
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> ***(b) That a declaration is hereby issued, that as against the defendant, the plaintiff is the owner of the land parcel Eldoret Municipality/Block 4/337.***
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> ***(c) That a permanent injunction is hereby issued, restraining the defendant from interfering with the defendant's occupation of the land Parcel Eldoret Municipality/Block 4/337.***
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> ***(d) That the plaintiff shall have costs of the suit.***
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> ***(e) That for the avoidance of any doubt, the liability of the judgment herein will be shouldered by the County Government of Uasin Gishu, who are the successors of the Municipal Council of Eldoret."***

14. Dissatisfied with that judgment, the appellant filed this appeal and raised 9 grounds of appeal that is: that the trial Judge erred in law and fact by: awarding exemplary damages which were not awardable in the circumstances; misapprehending the evidence on record and the legal principles governing the award of exemplary damages and thus making a wrong finding; making an award on exemplary damages which was excessive in the circumstances; failing to exercise proper discretion in awarding exemplary damages thus making an award that was excessive and an erroneous finding; finding that the appellant had trespassed on the respondent's land; making an award of damages for trespass which was excessive in the circumstances; failing to take into account relevant factors and as a result his decision was wrong; and taking into account irrelevant and extraneous factors hence reached an erroneous verdict.

Submissions:

15. When the appeal came up for hearing, **Ms. Chesoo**, learned counsel was present for the appellant whereas **Mr. Kiarie,** learned counsel appeared for the respondent. Counsel relied on their written submissions and briefly orally highlighted the submissions.

16. **Ms. Chesoo** submitted that the respondent was using the property for an unapproved user; that the failure in the demolition notice to state the user of the suit property did not render the notice ineffective; that section 38 of the Physical Planning Act gave the appellant authority to demolish structures and that the demolition was sanctioned by statute. Counsel submitted further that the trial court did not find the demolition illegal other than that it was in disobedience of a court order and the disobedience would have been properly addressed in a contempt application, which application was abandoned by the respondent; that the exemplary damages awarded to the respondent were not sanctioned by statute and were oppressive; and that the award of exemplary damages of Kshs 15 million was inordinately high. Counsel urged us to allow the appeal with costs.

17. Mr. Kiarie opposed the appeal and submitted that by the time the appellant demolished the suit property there was in force an injunction restraining the appellant and its agents from trespassing, entering, demolishing or in any manner interfering with the respondent's possession pending the hearing *inter partes*; that the appellant trespassed on the suit property which justified the award of general and exemplary damages and costs; that the award of damages by the trial court was discretionary; that the learned trial Judge took into account the relevant and correct factors and thus arrived at the correct decision. Counsel urged us to dismiss the appeal with costs.

Determination:

18. We have considered the record, the submissions by the respective parties, the authorities cited and the law. This is a first appeal. In the case of **Kenya Ports Authority v Kuston (Kenya Ltd, (2009) 2 EA 212** this Court stated as follows regarding the duty of first appellate court:

> ***"This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…"***

19. This Court in **Kemfro Africa Ltd v Lubia & Another (1987) KLR 30** laid down the principles upon which the Court would be justified in interfering with the exercise of such discretion as follows:

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."**

20. In that case, this Court stated that an appellate court should only be inclined to disturb the findings of a trial judge as to the amount of damages where it is convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. The purpose of damages has been stated is to give a plaintiff compensation for the damage, loss or injury that he has suffered. The general rule regarding the measure of damages is that the injured party should be awarded a sum of money so as to put him in position which is the same or nearly as close to the position he would have been had he not sustained the injury or loss. In **Total (Kenya) Limited formerly**

Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR, this Court stated as follows:

> **"But whether the claim is in contract or tort the only damages to which the appellant is entitled is a pecuniary loss: it is to put the appellant into as good position as if there had been no such breach or interference. Normally this would entitle the appellant to recover damages for the expenses caused by and gains foregone because of the breach or interference."**
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> (Emphasis supplied)

21. In the same vein, in **Peter M. Kariuki v Attorney General [2014] eKLR**, this Court stated as follows:

> **"Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances."**

In the case of **Total (Kenya) Limited** formerly **Caltex Oil (Kenya) Limited v Janevams Limited [supra]** it was observed as follows**:**

> **"This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general…"** (Emphasis supplied).

22. The appellant faulted the trial judge for misapprehending the principles governing the award of damages and thus arriving at a wrong finding. It was the appellant's contention that the respondent was not the registered owner of the suit property as it was a public utility plot meant to serve as a public car park; that the suit property was also leased out as a petrol station and not for use as a commercial premise and therefore the respondent's use of the suit property was unlawful; that two notices were issued to the respondent to demolish the structures on the suit property as they were not in conformity with the Physical Planning Act and it was the refusal by the respondent to comply with the demolition notices which resulted in the appellant demolishing the unauthorized structures erected on the suit property.

23. In **County Government of Meru v Isaiah Mugambi M'muketha [2017] eKLR** this Court stated:

> ***"The evidence adduced at the trial shows that the appellant and its predecessor were interfering with the respondent's quiet enjoyment of the suit premises. The fact that they (the Municipal Council of Meru) tried to stop the construction of the buildings on the suit premises coupled with the evidence of Joseph Mwithimbu – DW2 who testified that the Municipal Council of Meru, and hence the appellant, participated in destruction of the respondent's property, puts the issue of liability beyond challenge. The buildings being put up on the suit premises had received approval as shown in evidence and testimony of Joseph Mwithimbu. The appellant did not rebut this evidence. After perusing the evidence, it is our finding that the learned Judge arrived at the correct decision on liability."***

24. The appellant has also termed the amount of damages awarded to the respondent as excessive in the circumstances of this case. As observed in **Obongo & Another v Municipal Council of Kisumu [1971] E.A 91,** the court when awarding damages at large is making a general award and it may take into account factors such as malice or arrogance on the part of the defendant which is regarded as increasing the injury suffered by the plaintiff as for example by causing him humiliation or distress.

25. The respondent prayed for exemplary damages. As stated by this Court in **Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR:**

> **"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:**
>
> > **i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute".**

26. In his judgment the learned Judge in awarding the exemplary damages relied on the authority of **Rookes v Barnard (1964) 1 All ER 367**, which espouses principles already set out above. The case has been cited with approval in our jurisdiction in **Obongo v Kisumu Council (1971) EA 91**; **C A M v Royal Media Services Limited [2013] eKLR**, **Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR**.

27. The learned Judge awarded the respondent exemplary damages and justified the award as follows:

> **"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…They may have thought that since such damages may not be awarded, then they will walk away without paying a cent. If they thought so, then they are very wrong. The court cannot allow the defendant to benefit from its conduct. In my opinion, a sum of Kshs. 15 Million in exemplary damages will be fair in the circumstances. In arriving at this figure, I have taken note of the need to deliver a message to all, that court orders must be obeyed, and I have further taken into consideration the value of the property that was demolished and the general conduct of the defendant, who never at any**

one time, attempted to make amends or apologize to the plaintiff for its deplorable conduct."

28. This Court, in **Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR** stated as follows:

> ***" The bulk of the learned Judge's award fell under the head of exemplary damages for which she granted some Kshs. 12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing o do with compensating the plaintiff. This Court in THE NAIROBI STAR***
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> ***PUBLICATION LIMITED V ELIZABETH ATIENO OYOO [2018] addressed this issue as follows, and we agree;***
>
> ***"As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of Halsbury's Laws of England, as follows:-***
>
> ***(1) Oppressive, arbitrary or unconstitutional actions by servants of government;***
>
> ***(2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or***
>
> ***(3) Cases in which the payment of exemplary damages is authorized by statute."***
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> See also ***JOHN V MGN LIMITED*** *(supra).*
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> > ***"We are not satisfied from our perusal of the record, and from the submissions made before us, that there is anything in the conduct of NMG (the appellant), far from laudable though it was, that was so callous, reprehensible, steeped in impunity or actuated by mercenary considerations, that it called for the extreme measure of punishing it by way of exemplary damages. The same did not lie and we would set aside that head and the sum of Kshs. 12,000,000 in entirety."***

29. In the circumstances of this case, the appellant had vide its letter of 21st December, 1998 confirmed its approval for the change of user in respect of the suit property to petrol station subject inter alia to **"Demolition of any structures affecting the proposal and construction of roads, sewer water mains to the satisfaction of the Municipal Engineer."**

Further, the respondent conceded that the appellant duly notified him of its intention to demolish the buildings erected on the suit property and testified as follows:

> ***"In early 2005, the Municipal (the appellant herein) marked the premises that they will demolish it (sic). Earlier, on 6/2/2003, I was given notice that the property is a public car park. I wish to produce a copy of it… The notice stated that if I do not demolish the building, they will demolish it".***

30. In the circumstances of this case, the respondent had notice that he was using the property for an unapproved purpose. The learned Judge in the impugned judgment stated as follows:

> ***"I agree that with appropriate notice, the defendant would have been entitled to demolish the building on the suit land, given that it was not in tandem with the user of the premises."***

The learned Judge did not find that the demolition was illegal on any other ground other than disobedience of a court order.

31. **Section 29** of the **Physical Planning Act** provides as follows:

> ***"Subject to the provisions of this Act, each local authority shall have the power-(a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area."***

I therefore find that in the circumstances of this case, the demolition of the building erected on the suit property did not contravene any statute and was in fact sanctioned by statute.

32. Further, the respondent conceded that he had due notice of the demolition. Section 38 of the Physical Planning Act provides as follows:

> ***"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."*** *[Emphasis supplied].*

33. In the circumstances, I find that the respondent had due notice of the demolition and that the demolition was carried out in accordance with the Physical Planning Act. Accordingly, I am not satisfied that the appellant's conduct was oppressive, arbitrary or unconstitutional to justify an award of exemplary damages as a measure of punishment. Accordingly, I would set aside the exemplary damages of Kshs.

15,000,000/= awarded to the respondent.

34. The trial judge's award for damages on trespass has also been challenged. **Section 5** of the **Trespass Act** provides as follows:

> ***"Trespass with intent to commit an offence or to intimidate, insult or annoy (1) Any person who-(a) enters into or upon property in the possession or occupation of another with intent to commit an offence or to intimidate, insult or annoy any person lawfully in possession or occupation of such property;…"***

35. In **M'Mukanya v M'Mbijiwe (1984) KLR 761**, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

> ***"trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153."***

36. Further, in **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428** states as follows:

> ***"Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land."*** *[Emphasis supplied].*

37. It is therefore not in dispute that the respondent had due notice from the appellant that the structures erected on the suit property would be demolished as they were unlawful. It is also clear that the appellant was duly authorized by statute to demolish structures that were illegally erected on the suit property. Accordingly, in the circumstances of this case, the respondent cannot claim damages arising from trespass against the appellant herein. Accordingly, I would set aside the award of damages of the sum of Kshs 500,000/= in regard to trespass.

38. The assessment of damages is a discretionary relief. In the case of Supreme Court of Canada in **Vancouver (City) *v.* Ward, 2010 SCC 27, [2010] 2 S.C.R. 28** the Court held that:

> ***"… In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests…"***

39. From the foregoing, I find sufficient justification to interfere with the learned Judge's exercise of discretion in assessing the damages awarded to the respondent. Accordingly, I would allow the appeal and set aside the award of exemplary damages of Kshs 15,000,000/= and general damages for trespass of Kshs 500,000/=. I would award the costs of this appeal to the appellant.

Dated and delivered at Nairobi this 3rd day of February, 2020.

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

JUDGMENT OF OKWENGU, JA

I have read in draft the judgment of **J. Mohammed, JA** and I am in agreement with the conclusion she has arrived at.

In was common ground that the respondent was the registered proprietor of the suit property i.e. Eldoret Municipality Block 4/337. The respondent has admitted that he was using the suit property for a purpose of which change of user was not approved, and that the appellant had served notice on him to demolish the illegal structures erected on the premises or else it would demolish the same. The demolition done by the appellant was not unlawful even though it was done in contempt of a court order restraining the appellant from interring with the suit propriety. This is because as a Council the appellant had powers to enforce the laws and regulations which includes demolition of illegal structures. The demolition was an action whose redress was in contempt proceedings and not in action for damages. Moreover the circumstances did not justify an award for exemplary damages to punish and deter the appellant as the actions of the appellant were not calculated to profit the appellants.

I concur that this appeal should be allowed and that orders be made as proposed by **Hon. J. Mohammed, JA**.

It is so ordered.

The judgment has been decreed in accordance with **Rule 32 (3)** of the **Court of Appeal Rules.**

Dated and Delivered at Nairobi this 3rd day of April, 2020.

H. M. OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR