Hardy Residents Association & another (Suing through its officials; Wainaina Kinyanjui Chairman, Karen Mclean Secretary and Neil McRae Treasurer) v Ng'ang'a (Environment & Land Case 214 of 2013) [2024] KEELC 5690 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5690 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 214 OF 2013

EK WABWOTO, J

JULY 29, 2024

BETWEEN

HARDY RESIDENTS ASSOCIATION ..... 1ST PLAINTIFF

COUNTY GOVERNMENT OF NAIROBI ..... 2ND PLAINTIFF

SUING THROUGH ITS OFFICIALS; WAINAINA KINYANJUI CHAIRMAN, KAREN MCLEAN SECRETARY AND NEIL MCRAE TREASURER

AND

ANDREW NG'ANG'A ..... DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 4th February 2013 seeking the following reliefs:
    a. An order of permanent injunction restraining the defendant by himself, his tenants, servants or agents from maintaining, operating or continuing the business of a student hostel or committal of any nuisance of like kind on the suit property in Hardy estate.
    b. An order directing the Plaintiff, their agents or servants to pull down or remove and clear the suit property of the pit latrines, showers and boarding structure now forming the student hostels.
    c. General damages.
    d. Costs of the suit.
2. The suit was contested by the defendant who filled an amended Defence dated 8th December 2021. The defendant sought for dismissal of the plaintiff's suit and equally sought the following reliefs in the counter claim

a. A declaration that the plaintiff's suit is fraudulent.

b. A declaration that the plaintiffs have committed the constructive tort of trespass to land.

c. Damages for constructive trespass to land in the sum of Ksh 42,000,000.

d. Damages for the loss of income in the sum of Ksh 42,000,000

1. Exemplary damages as per the rule in Oboyo -vs- Municipla council of Kisumu (1997) EA 91.

e. Interest in (4) above from 1st January 2014 until payment in full

f. Costs of the suit.

The 1st Plaintiff's case.

3. The 1st plaintiff averred that on October 2012, they noticed a sudden influx of rowdy youths entering and leaving the defendant's property and on inquiry, they found that there had just been opened a student hostel, housing an estimated 300 students.

4. It was averred that the 1st plaintiff protested against the same and the defendant belatedly applied for permission to change use of the suit property from residential to a student hostel which was published in the standard newspaper on 2nd November 2012. The 1st plaintiff objected to the same on 3rd November 2012.

5. It was further argued that the student hostels were developed and opened without requisite approvals under the law and the same was illegal. The particulars of illegality were particularized at paragraph 12 of the plaint. It was further argued that no approval had been granted by National Environment Management Authority (NEMA) and that by developing and maintaining a student hostel and in accommodating an estimated 300 students in the estate, the defendant has interfered with the 1st plaintiff's ordinary concept of life and has fundamentally changed the nature, security and environment of the estate and greatly negatively affected the 1st plaintiff in several ways as was demonstrated at paragraph 15 of the plaint.

6. During trial, Stephen Mclean, a former Chairman and member of Hardy Residents Association testified on behalf of the 1st Plaintiff. He stated that he was the immediate Chairman of the Association and its certified paid up member. He produced the following documents in his evidence in chief, Certificate of registration of Hardy Residents Association as PExh 1, Newspaper advertisement on standard newspaper dated 13/12/2012 as PExh 2 and letter of objection to change of user and attached signatures of petitioners and PExh 3. It was his testimony that Hardy area is still zoned as a residential area. It still has a minimum plot size of 1 acre which can be subdivided. He also stated that he is currently 62 years old and has lived in Karen since he was 8 years old.

7. The witness stated that the current use of the defendant's plot has not complied with the regulations in terms of building density since there are as many structures in the said property. The witness stated that the property is being used to house students contrary to the law and this has been a nuisance to the residents of the area.

8. It was his testimony that the defendant had not obtained a change of user since he had applied for one on 2nd November 2012 which appeared in the Standard Newspaper of the said date. He stated that the residents objected to the same and they sent their objection to Nairobi City Council and NEMA on 3rd November 2012. He also stated that they were only seeking to ensure that the defendant complies with the zoning laws and the user requirements of the area.

9. In cross examination, he stated that the plaintiffs' suit is not fraudulent. He was not aware if the defendant was running a nursery school and a catering school. He was aware that an injunction was issued against the defendant and that the defendant was restrained from carrying out any business activity pending the hearing and determination of the suit. He denied the fact that the suit had been filed to force the defendant to sell his property. He also stated that he was aware that a notice had been issued by the 2nd plaintiff requiring the defendant to demolish the structures on the property.

10. On further cross examination he denied the fact that the Association had been involved in any criminal case against the defendant. He also stated that the Association was not involved in the judicial review case that was filed by the defendant and neither was he aware of any appeal that was filed.

11. When asked about the change of user, he stated that from the defendant's side, a change of user was recommended for approval from residential to catering school. He also stated that he was not sure of the exact number of students, though they have been affected by the activities of the on the defendant's property and a number of incidents had been reported to the police though he had not provided any OB Number.

12. When reexamined, he stated that on 2nd November 2012, there was an application for change of user from residential to student hostel which they had objected to and they had not seen any approval in relation to the same. He also stated that a catering school is different from a student hostel. He also stated that the defendant has been in contempt of court since the student hostel is still in operation. He also stated that he had not seen the substantive pleadings of the judicial review case which the defendant had previously filed.

The 2nd Plaintiff's case

13. Dominic Mutegi, an employee of the 2nd plaintiff testified pursuant to summons that were issued by the court after an application being made by counsel for the defendant. He stated that he works in the urban planning department of the 2nd plaintiff. He made referred to a letter dated 19th June 2013 which had been filed in court. He stated that the 2nd plaintiff had no objection to the catering college subject to fulfillment of some conditions. It was his testimony that the change of user from residential to hostel was not granted.

14. Upon cross examination by counsel for the 1st Plaintiff he stated that there was only a change of user from residential to catering college and that there were several objections to the student hostels. The 2nd plaintiff did not approve the change of user from residential to student hostels and that by 2013 there was an unauthorized hostel in operation by the defendant.

15. When cross examined by counsel for the defendant he stated that the complaint that led to the issuance of the enforcement notice was about the construction of the hostels without approval on the suit property. He also stated that he was not aware that the enforcement notice had been quashed by the High Court.

16. When asked again about the change of user, he stated that there was an approval from residential to catering school and that accommodation does not necessarily mean hostel, he also stated that there were objections to the application made by the defendant and that he had produced the communication confirming the decision to reject the approval. He also stated that the 2nd plaintiff's officers visited the team and came up with the report. He also reiterated that the suit property had no approval for change of user from residential to student hostel.

17. When reexamined he stated that the letter from the department of Public Health did not refer to the suit property L.R No. 2327/172 as it only referred to L.R No. 209/86204. He also reiterated that there was no approval for the change of user in respect to the defendant's project.

The Defendants case

18. On Commencement of the defendant's case, Dr. Kamau Kuria, S.C made an opening statement by submitting that the defence and counter claim filed by the defendant was based on a claim of tort to land. There was trespass to land and the plaintiffs are in possession of the suit property after they had evicted the students. It was also submitted that a landlord who is deprived of rent by eviction or by interference with the user of the property is entitled to damages and that the defendant herein is entitled to rent which he would have received from Cooperative University from January 2024 to the date of the judgment. Counsel also concluded in his opening statement by stating that the defendant would also be seeking exemplary damages against the plaintiffs as had been pleaded in his defence.

19. The defendant filed an 'amended amended statement of defence and counter claim' dated 8th December 2021 which for the purposes of this proceedings shall just be referred to an amended statement of defence and counterclaim. It was averred that the plaintiffs' suit was fraudulent and had been filed with a view of securing the destruction of his business and investment. It was also averred that the defendant had filed a judicial review application No. 286 of 2013, against Nairobi City County in which he had sought inter alia to bring up and quash the enforcement notice dated 19th February 2013 and that the said application was successful leading to the quashing of the 2nd plaintiff's enforcement notice dated 19th February 2013.

20. The defendant pleaded that he was at all material times the registered proprietor of L.R No. 2327/172, a 1.5 acre (the suit property) on which stood a catering school which also served as a students hostel. It was also pleaded that Hardy Estate serves as a commercial and residential area and that on 30th August 1995, the defendant obtained from the 2nd plaintiff a change of user for the suit property from Nursery school to catering college. He averred that he adopted the buildings on the same and turned them into a catering school which was to be used by both day and boarding catering students. On 1st November 1995, the then City Council of Nairobi inspected the said catering school and confirmed that it was suitable for use by students and that since 1995 the suit property has been used by him as a catering school and also as a students hostel.

21. In his counter claim, it was pleaded that between 1996 to 2002, Andrews Hardy college had a student population of between 100 to 250 students majority of whom were boarders and further that from 2001 many learning institutions have sprung up in the Karen area.

22. It was averred in the counterclaim that on 22nd August 2012, the Defendant let to the Cooperative University College 83 rooms to use as a hostel for its students at a monthly rent of 500,000 and that the injunction granted on 29th October 2013 on the plaintiffs application had an identical effect of eviction of the defendant from the suit property by the plaintiffs and taking possession over the same and thus denying him an opportunity to earn from his income as a result of which he suffered loss particularly which he pleaded on paragraph 35 of the counter claim, the defendant sought the following reliefs in his counter claim dated 8th December 2021:

    I. A declaration that the plaintiffs suit is fraudulent.

    II. A declaration that the plaintiffs have committed the constructive tort of trespass to land.

    III. Damages for constructive trespass to land in the sum of Kshs 42,000,000/=

IV. Damages for loss of income in the sum of kshs 42,000,000 Exemplary damages as per the rule in Obonyo -vs- Municipal council of Kisumu (1971)EA 91.

V. Interest on (iv) above from 1st January 2014 until payment in full.

VI. Cost of the suit.

23. The evidence of the defendant was presented by Millicent Wambui Mugih who is the mother to the defendant. She had filed a comprehensive witness statement which she relied upon together with defendant's bundle and supplementary bundle of documents which he produced and relied upon in her evidence in chief.

24. Upon cross examination, she stated that she bought the land in 1980 and she moved to Hardy in 1982 and that the suit property has a catering college which had boarding facilities and a classroom. She also stated that a change of user had been obtained for the same and she had been given a license to use it as a catering college.

25. When asked to clarify on the nature of the change of user obtained, she stated that the change of user was from residential to a catering school and that the specific word "Hostel" was not mentioned. She also stated that she did not invite public participation from the residents because she was not a member of the Association.

26. She also stated that Cooperative University College came to her requesting for space for use as a students hostels, she also stated that the change of user that had been granted does not expire unless it is leasehold land and that her land was free hold and thus her change of user had not expired.

27. When asked about what led to the closure of her business, she stated that the same was closed pursuant to a court order. Though she had appealed against the same. She also stated that she had lost her revenue upon closure of the business.

28. When reexamined, she stated that the Association was the one that applied for an order to stop the operation of the hostel. The injunction that was issued was to last until the determination of the case and the hostel has remained closed ever since.

29. She also stated that Cooperative University had paid her a deposit for lease of the hostel for Kshs 1,000,000 on 23/08/2012 and another Ksh 1,000,000 on 31/08/2012. She also stated that between 1995 – 2012 no complaint was made against her business and its activities were never interrupted. She also stated that Hardy Estate is full of hostels and she was surprised when the 2nd plaintiff claimed that there was an illegal development in her property including the hostels.

30. She further stated in reexamination that the judgment in J.R Case No. 286 of 2013 led to the quashing of the enforcement notice dated 19th February 2013 which had been issued by the 2nd plaintiff.

The 1st Plaintiff's submissions

31. The 1st plaintiff filed written submissions written 3rd May 2024. Counsel Submitted on the following issues;

i. Whether the defendant sought or obtained permission to change of user of the suit property from single residential to student hostel.

ii. Whether the defendant sought or obtained a business license to operate a student hostel on the suit property.

iii. Whether the operations at the suit property were a nuisance and in violation of plaintiffs right to a clean and healthy environment

iv. Whether the 1st plaintiff's case meets the threshold for issuance of a permanent injunction.

v. Whether the plaintiff has locus standi to institute this suit.

32. Counsel submitted that it was not disputed that the defendant had obtained a change of user from residential to a catering school however the change of user for student hostels was not granted as was confirmed by Dominic Mutegi, from the Director for Urban Planning Nairobi County. It was also submitted that the reasons for not granting the change of user as per the said witness was that the student hostels were not suitable for the neighborhood.

33. Citing section 3(a), 30 (1) and 33 of the Physical Planning Act and the Physical Planning (Building Development Control) Rules of 1998, it was argued that the defendant had not obtained a change of user for the student hostels and no due process had been followed, it was also submitted that the Standard Newspaper advert on the 2nd November 2012 was a confirmation that the change of user had not been obtained prior to the commencement of the hostel activities. The cases of Tiara Villas Management Limited and 4 others -vs- Joe Mutambu and 3 others (2002) eKLR and Ocean Freight E.A Limited -vs- Esmailji and Another (2004) KLR 463 were cited in support of the 1st plaintiff's case.

34. While referring to section 58 and section 63 of the Environmental Management and Coordination Act, it was argued that the defendant had not complied with those provisions and as such the student hostels could not continue being in operation. Reliance was also placed in the case of Taib Investments Limited -vs- Fahmi Salim Said and others (2020) eKLR.

35. As to whether the 1st Plaintiff had locus to institute the suit property, it was submitted that the 1st plaintiff is an Association of the members residing in Hardy, Karen. The suit had been filed by the representatives suing through the Association on behalf of its members.

36. As to whether the plaintiffs are entitled to the plaintiffs sought, it was argued that the plaintiffs had demonstrated to the court that they will suffer irreparable injury which cannot be compensated by way of damages. Reliance was made to the cases of Giella -vs- Cassman Brown and Another (1973) EA 358 and Nguruman Limited -vs- Jan Bonde Nielson and 2 others CA No. 77 of 2012

The 2nd Plaintiff's submissions

37. The 2nd plaintiff filed written submissions dated 16th April 2024. Counsel submitted on the following issues;

i. Whether the enforcement notice was issued maliciously/irregular.

ii. Whether the defendant/counter claimant obtained the change of user.

iii. Whether the injunction orders made on 29th October 2013 constitute the constructive tort of trespass by land and thus the defendant entitled to damages.

38. Counsel submitted that the 2nd plaintiff was mandated to issue the enforcement notice by the law. The reasons for issuance of the enforcement notice was that the defendant had continued with illegal construction of hostels and occupation of the same without permission. The defendant was therefore directed to stop further development and occupation of the premises. The defendant instituted judicial review proceedings which led to the quashing of the enforcement notice.

39. In respect to Nairobi High Court JR MISC Application No. 286 of 2013 Republic -vs- Nairobi City County Expate Andrew Nganga and Another (2014) eKLR, Counsel submitted that the same did not touch on the substance of the enforcement notice and the court was categorical that the orders were granted in order for the parties to concentrate on the suit and avoid parallel proceedings and further that the enforcement notice can be issued in future if deemed necessary.

40. It was further submitted that the enforcement notice having been quashed by the court way back on the 30th October 2014 and which notice formed the basis of the defendant's claim against the 2nd plaintiff, then the claim as brought by the defendant does not disclose any reasonable cause of action against the 2nd plaintiff. It was also submitted that the enforcement notice was not issued maliciously and fraudulently.

41. On whether the defendant obtained change of user, it was argued that the defendant never followed the laid down procedure and never obtained the change of user from catering school to student hostels. No evidence was produced by the defendant as regards to issuance of change of user. The testimony of Mr. Mutegi was to the effect that the 2nd plaintiff never issued change of user from catering school to student hostel and that the 2nd plaintiff was opposed to the issuance of a change of user to a student hostel. The reasons given for the objection was that the student hostel was incompatible with the neighborhood residential development and also the objections received from the residents and property owners.

42. On whether the injunction orders made on 29th October 2013 constitute the constructive tort of trespass to land and whether the defendant is entitled to damages, it was submitted that the injunction orders were issued in the absence of the plaintiffs. The Court of Appeal had upheld the said injunctive orders and hence the 2nd plaintiff cannot be held liable for the consequences of the said orders.

The Defendant's submissions

43. The defendant filed written submissions dated 3rd May 2024. Counsel submitted that the issue of the enforcement notice cannot be inquired into by virtue of the doctrine of res judicata since there was no appeal against the orders issued in the judicial review proceedings.

44. It was submitted that the defendant had operated the hostels for 10 years and had approved rooms for use by 120 students. It was also argued that pursuant to the temporary injunction orders that were issued, the defendant was deprived of his income and revenue from the hostels.

45. The defendant submitted that the then Ministry of Research, Technical Training and Technology had approved the establishment of the catering school same with the public health inspectorate department.

46. Counsel for the defendant faulted the 2nd plaintiff's submissions as being based on an misapprehension on the concept of property in constitutional law. It was also submitted that the injunction issued on 29th October 2013 had the effect of enabling the plaintiffs to take illegal constructive possession of the suit property. The court was urged to dismiss the plaintiffs suit and grant the reliefs sought in the counter claim.

Analysis and Determination

47. The court has considered the pleadings, evidence and submissions of the parties. Parties did not agree on a common set of issues to be determined by the court. Having considered the pleadings, evidence and submissions presented, the following are the key issues for determination: -

    i. Whether the 1st Plaintiff has the locus standi to institute the suit.

ii. Whether the Defendant had obtained the requisite development permission and change of user under the relevant law.

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

iv. Whether the Defendant's counter claim is merited and if so whether the court should grant the reliefs sought in the counter claim.

48. The court shall now proceed to examine the said issues sequentially.

Issue No. I Whether the 1st Plaintiff has the locus standi to institute the suit.

49. The defendant at paragraph 7 of his amended defence dated 8th December 2021 pleaded that the 1st plaintiff lacked the locus standi to institute the suit.

50. Locus Standi simply means the right to appear and to be heard before court. In the case of Alfred Njau & Others =Versus= City Council of Nairobi (1986) eKLR, the Court of Appeal stated and held thus:-

> " Lack of locus standi and a cause of action are two different things, cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear to be heard in court or other proceedings."

The court proceeded to state: -

> " To say that a person has no cause of action is not necessarily tantamount to shifting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to"

51. The 1st Plaintiff in submitting on this issue relied on Order 1 Rule 8 of the Civil Procedure Rules 2010 and argued that a person can sue on behalf of others where they have the same interest in the proceedings. It was argued that the 1st plaintiff is an association of the members residing in Hardy – Karen.

52. In addressing this issue, the court has referred to the 1st plaintiff's plaint on record and it is evident that the suit was instituted by Karen Residents Association through their officials namely: Wainaina Kenyanjui, Karen McLean and Neil McRae and as such it is the findings of this court that the 1st plaintiff has the requisite locus standi to institute the suit herein.

Issue No. II Whether the Defendant had obtained the requisite development permission, approval and change of user under relevant law.

53. The Defendant averred that the change of user from residential to a nursery school took place in 1993. That the user was changed from nursery school to catering school with boarding facilities in 1995 and that the plaintiffs were complaining of alleged want of change of user in 2012, 19 years after the 2nd plaintiff granted the first change of user and 17 years after granting the change of user to catering school. In view of the foregoing the applicable law as at that time was the Physical Planning *Act No. 6 of 1996*. (Now repealed).

54. Under Section 2 of the repealed Physical Planning *Act No. 6 of 1996*, "development" was defined as:-

> " a) The making of any material change in the use or density of any building or land or the subdivision of any land which for the purpose of this Act classified as Class "A" development and

(b) The erection of such buildings or works and the carrying out of such building operates as the Minister may from time to time determine, which for the purposes of this Act is classified as Class "B" development."

55. The Physical Planning Act (CAP 286) (now repealed by the *Physical and Land Use Planning Act*, *Act No. 13 of 2019)* at Section 30 provided as follows: -

"30.

(1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under Section 33.

56. A reading of the above reveals that change of user of a parcel of land was a Class A development under Section 33 of the Act, it required a development permission. Secondly, change of user required a development permission granted by the relevant authority pursuant to an application prescribed from under Section 32 of the Act. Thirdly, the development permission granted under Section 33 was to be in a prescribed form. The application was to be in the form prescribed under the Fourth Schedule (Form PPA1) while the development approval itself was to be in the form prescribed in the fifth schedule (Form PP2).

57. The Defendant contended that the first change of user from residential to a nursery school took place in 1993. That the user was changed from nursery to school to catering school with boarding facilities in 1995 and that the plaintiffs were complaining of alleged want of change of user in 2012 being 19 years after the 2nd plaintiff granted the first change of user and 17 years after granting the change of user to catering school. The defendant also averred that the suit property was used to providing catering services to students attending educational institutions in the neighbourhood. The same had been inspected and approved for use by 120 students. The user of the suit property as a hostel was thus approved by the then City Council in 1995. The said suit property was freehold and therefore the change of user had not expired until February 1983 when it was converted into a nursery school, the initial user of the said L.R No. 2327/172 was residential.

58. Aside from the physical planning issue, there was also the question of whether there was issued an EIA licence for the project undertaken in the suit premises. Section 58 of EMCA which provides as follows: -

"(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee."

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs."

59. From the evidence that was tendered herein, it is evident that the defendant made an advertisement in the Standard Newspaper on the 2nd November 2012 after he had changed the use of the land to student hostels in September 2012 and as such he did not have a change of user approval before the commencement of the project. The 1st plaintiff's witness also gave a detailed account of the operations of the said hostel and activities of the students residing thereon, and how the same have caused the 1st plaintiffs members discomfort, inconvenience and disturbance. The testimony of the 2nd plaintiff's witness was categorical that no change of user had been approved and granted to the defendant in respect to the suit property for use of the same as a students hostel. There was no evidence adduced to demonstrate whether any EIA licence and or approval had been granted prior to the commencement and operation of the students hostel. As such it is the finding of this court that there was no compliance by the defendant with the relevant provisions of the law. The construction and the running of the students hostel by the defendant breached both the planning statutory and environmental law as the development permission and change of user had not been obtained.

Issue No. III Whether the Plaintiffs are entitled to the reliefs sought

60. The Plaintiffs sought for several reliefs in their plaint. The Plaintiff sought for a permanent injunction, an order for removal of the structures on the property now forming the hostels, general damages and costs of the suit.

61. In respect to the relief of permanent injunction that was sought, the 1st Plaintiff submitted that they had demonstrated that they will suffer irreparable injury which cannot be compensated by damages. Further there is no amount of damages that can be adequately compensated due to the harm being caused to the physical and social environment nor can it buy peace of mind.

62. The defendant on the other hand was opposed to the grant of the relief of permanent injunction against him and he submitted that the plaintiffs had not made out a case for grant of the relief of permanent injunction.

63. This court having found that the change of user approval was not obtained prior to the commencement and operation of the defendant's project, it will proceed to grant the prayer for permanent injunction. The court will also proceed to grant the order for removal all the structures forming part of the student hostel. In respect to prayer for damages, the plaintiffs did not submit on the same and as such this court cannot grant the said relief. The court also notes that no proper materials were presented to assist the court in assessing general damages by the plaintiffs. It therefore remains that only prayers (a) (b) and (d) of the plaint dated 4th February 2013 are the adequate remedies that can be granted by this court.

Issue No. IV Whether the defendant's counter claim is merited and deserving of the orders sought

64. The Defendant in opposition to the suit filed an amended defence and counter claim dated 8th December 2021 seeking for the following reliefs against the 1st and 2nd Plaintiffs jointly: -

    1. A declaration that the Plaintiff's suit is fraudulent.

    2. A declaration that the Plaintiffs have committed the construction that of trespass to land.

    3. Damages for constructive trespass to land in the sum of Kshs. 42,000,000/=

    4.

        a) Damages for loss of income in the sum of Kshs. 42,000,000/=

b. Exemplary damages as per the rule in Obongo =Versus= Municipal Council of Kisumu.

5. Interest of (4) above from 1st January, 2014 until payment in full.

6. Costs of the suit.

65. A counterclaim just like a suit ought to be proved to the required standard on a balance of probability.

66. During trial the defendant's witness testified that she had obtained the change of user and she was given a license to use for a catering college. She also stated that she obtained the change of user from residential to catering school. She also entered into an agreement with Cooperative University to offer hostel services and that the City Council knew that she had hostels in her land upon which they had given her an approval.

67. In cross-examination, she stated that she closed her business because of the court order and she lost her livelihood. She denied that her change of user was irregularly expanded to a hostel. She also stated that the allegations stating that she did not have a licence for the students hostel business were false. When re-examined she stated that the area has several hostels serving many students attending the learning institutions in the area and that the other hotel owners have no problem. She also stated that City Hall informed her that she had already gotten a change of user which doesn't expire and that she was not required to apply for any change of user.

68. From the evidence that was tendered herein which the court has analysed, it was evident that the defendant's business was stopped after an injunction order was issued by the court differently constituted. As such, the plaintiffs cannot be faulted for the defendant's misfortunes.

69. In respect to damages for constructive trespass and loss of income that were pleaded and quantified at Kshs. 42,000,000/=. It is worth noting that the same is akin to special damages. In respect to special damages, it is trite law that special damages must be pleaded and strictly proved. Loss of income must be pleaded and proved as they are in the nature of special damages. Loss of income is compensated for real assessable loss which is proved by evidence. See Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR.

70. In Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR, the Court of Appeal reiterated that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit. In Jogoo Kimakia Bus Services Limited v Electrocom International Limited [1992] eKLR, the Court of Appeal stated: -

> " The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

71. Equally the Court of Appeal in the case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR stated as follows: -

> " We agree with the learned judge that 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.

72. The defendant did not adduce cogent evidence on how the claim for loss of income of Ksh 42,000,000/- generated from the students hostels was arrived at. In this instant case the defendant was unable to specifically prove its claim of constructive trespass of Ksh 42,000,000/- and as such the same is declined.

73. In the circumstances the court finds that the defendant's counter claim has not been proved to the required standard and the same is not merited.

Final orders

74. In conclusion, based on the totality of the evidence tendered herein, it is the finding of this court that the plaintiffs have been able to prove their case on a balance of probabilities as against the Defendant. Consequently, the suit by the plaintiffs and the counterclaim defendant are disposed as follows:

    a. The counterclaim by the defendants is dismissed for lack of merit.

    b. An order of permanent injunction be and is hereby issued restraining the Defendant by himself, his tenants, servants or agents from maintaining operating or continuing the business of a student hostels or committal or any nuisance of like kind on the suit property in Hardy Estate.

    c. An order is hereby issued directing the plaintiffs, their servants or agents to pull down or remove and clear the suit property of the pit latrines, showers and boarding structures now forming the student hostels within 45 days from today.

    d. Each party to bear own costs of the suit and counterclaim.

    Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 29TH DAY OF JULY, 2024.

E. K. WABWOTO

JUDGE

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In the presence of:-

Mr. Bibiu h/b for Mr. Onyango for the 1st Plaintiff.

Mr. Ngethe h/b for Mr. Wafula for the 2nd Plaintiff.

Ms. Nduta Kamau h/b for Dr. Kamau Kuria S.C for Defendant.

Court Assistant: Judith.