



Nyongesa v County Government of Nakuru & another (Environment & Land Case 66 of 2022) [2024] KEELC 5801 (KLR) (9 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 66 OF 2022**

**A OMBWAYO, J
AUGUST 9, 2024**

BETWEEN

PETER NYONGESA PLAINTIFF

AND

COUNTY GOVERNMENT OF NAKURU 1ST DEFENDANT

**THE ATTORNEY GENERAL (SUED ON BEHALF OF THE PRINCIPAL
SECRETARY DEPARTMENT OF PUBLIC WORKS) 2ND DEFENDANT**

JUDGMENT

Introduction

1. Peter Nyongesa (hereinafter referred to as the Plaintiff) commenced this suit vide a Plaint dated 17th November, 2022 against the Defendants seeking the following orders:
 - a. A declaration that the enforcement notice and demolition order dated 17th March, 2021, issued by the defendants is an arbitrary deprivation of the plaintiff's fundamental right to:
 - i. Property and a violation of article 40 of *the constitution*.
 - ii. Fair Administrative action and principles of natural justice under articles 22(3) and 47 of *the constitution*.
 - iii. Violation of the plaintiff's right to access of justice and fair hearing under articles 48 & 50 of *the constitution*.
 - iv. Violation of the plaintiff's right to equal protection under the law and freedom from discrimination under article 27 of *the constitution*.
 - v. Violation of the plaintiff's right not to be subjected to torture, cruelty and inhumanity under article 29(d) of *the constitution*.



- b. The defendants be ordered to pay the plaintiff special, general and exemplary damages arising from their unconstitutional acts as pleaded in this plaint.
 - c. Costs of this plaint be borne by the defendants.
 - d. Any other relief.
2. The 1st and 2nd Defendants filed their Statement of Defence dated 16th February, 2023 and 10th July, 2023 respectively where they denied the averments in the plaint.

Plaintiffs' Case

3. Wainaina Muoge testified as PW1. He testified that he is a civil Engineer in the construction area with a graduate diploma in Engineering by British Engineering council in U.K EC- UK. He further testified that he practiced from December 1980 and retired in 2006. He testified that he had a structural strengthening scheme on 23/735 Nakuru and he prepared the report. It was his testimony that the Plaintiff approached them with a demolition order while the building was under construction. He testified that the building had been recommended by the project architects of the structural Engineer and Joseph Kuto and they were to act as independent investigators and give a report. He went on to testify that there was a dispute with the 1st Defendant. He added that they went to the site with the contractor Mburu Mwaura. PW1 testified that he inspected the building and the ground floor to ensure their safety was guaranteed after which they moved to the upper floor and arrived at some conclusions including, the local failure of the column the ground floor never led to global failure of the building among others as listed in the report.
4. It was his testimony that they made recommendations and that the building was supported by 25 columns and that only one column was deficient. He testified that other offices had already made their proposals and added that the report was served upon the 1st Defendant. That it had been recommended that the rehabilitation of the building be undertaken. He testified that they repaired the building and presented the report to their client. He produced the report as PEX 1 (document No.21) and added that the terms of reference were completed on 22/3/2021.
5. PW1 went on to testify that they recommended that mandatory geotechnical investigation be done to determine the sustainability of the site. He testified that on 23/3/2021 they embarked on the geotechnical investigations which entailed excavations at random points on the site. He further testified that on 26th March 2021, one Mayaka Nyaroo an officer at the County Government visited the site and chased workers out of the site and told them to resume the work upon resolution of the dispute between the plaintiff and the 1st defendant. PW1 testified that he was an independent investigator. He further testified that he is a qualified Engineering Technologist with Nguso Engineering Services which was incorporated on 9/12/2023. By consent he produced his documents which were marked as PEX 1-PEX 15.
6. He testified that on 27/3/2021 the building was demolished without his consultation. He further testified that in general, they found that the building was not on the verge of collapse as it could be strengthened to a sound variation stability. He added that they served the 1st Defendant with the report on 23/3/2021. He testified that the demolition would have been revoked if there was a report. He added that the 1st Defendant should have come up with a report and had the same served upon the developer. PW1 produced an invoice for his service of Kshs. 300,000 which was marked as PEX 46. He testified that he wrote a protest letter to the county executive committee member of the 1st Defendant but there was no reply.



7. Upon cross examination by Mr. Kinuthia learned counsel for the 1st Defendant, PW1 stated that he worked with the Government until 2006. He further stated that he was in the provincial works office Nakuru as a senior public works officer. He confirmed that his identity card number was 6424119. He further confirmed that he had the requisite qualifications and added that he was absorbed in the county government as a public officer in 1980. He also confirmed that he worked in Nyandarua, Western and Rift Valley in 1985. He went on to confirm that he was posted to Baringo and came to Nakuru in 1989. He admitted that his other name is Nguzo, Wainaina Nguzo. He stated that the county did not consult him before they demolished the building. He further stated that he was not party to the approvals of the plan and added that when he arrived, there was already a demolition order.
8. PW1 explained that the Plaintiff approached him on 20/3/2021 after which he investigated the site on 21/3/2021 and compiled a report which was handed to the Plaintiff on 22/3/2021. He added that copies were also sent to the 1st Defendant. He stated that he reached his conclusion through visual observation. He also stated that he used land tools such as masons hammer by knocking the columns and observing the sound. He confirmed that there were no cracks on building. He admitted that his company was not registered by Engineers Board of Kenya and added that it was not necessary that it be registered. He further admitted that he was not a professional Engineer but a graduate Engineer registered with Engineers Board of Kenya. He confirmed that he had a certificate for graduate Engineer without a bachelor's degree in Engineering. He stated that that they are partners with his colleague Karanja who has a masters degree. He however admitted that he did not have any document to prove the same. He stated that they found that one out of 25 columns had collapsed and added that the collapse of one pillar did not necessitate collapse of the whole building. He further stated that the plaintiff was in the process of rectifying the mistake but the building was demolished. He added that the Plaintiff had excavated the foundation and fixed the steel and was about to concrete the foundation when he visited the site. He confirmed that the same was done when he visited the site.
9. Upon cross examination by Ms Shirika learned State Counsel for the 2nd Defendant, PW1 stated that he could not recall his entry job group but confirmed that upon retirement he was at job group L. He stated that there were 2 bodies regulating Engineering from Kenya, the Engineers board of Kenya that accepted graduates of the University of Nairobi and the Engineers Technology Act for Engineers with a degree in Engineering. He stated that he did not have a degree in Engineering but added that a graduate Diploma was an equivalent of degree. PW1 was referred to Section 18 of the *Engineers Act* where he confirmed that the board should determine the other qualification. He admitted that the report by Nguzo was made on 27/3/2021 and that he was gazetted as an Engineering Technologist on 23/4/2021. He was further referred to Section 20 of the Act where he confirmed that on 9/4/2021, Karanja James Njuguna, director of Nguzo Economy services Ltd was registered and licensed as a consulting Engineer. He admitted that he did not have a license. On reexamination, counsel requested to have the witness recalled to produce further documents in support of his qualification.
10. Peter Wangira Nyongesa testified as PW2 where his statement and list of documents dated 17/11/2022 and marked as PEX1-PEX33 were adopted as his evidence in chief. He testified that he is a safety specialist with the Ministry of labour who worked as a compliance officer for the last 34 years before retirement. His lengthy statement was adopted as evidence in chief.
11. Upon cross examination by Kinuthia learned counsel for the 1st defendant, he stated that the defect in the building was detected in January 2020. He stated that upon receipt of the letter in December 2019, he engaged a structural Engineer who did a report which identified the structural challenges and the same submitted to the 1st Defendant. He further stated that the county was to revert with feedback but they never got back to him. He added that he physically visited the county on 24/2/2020 and that Eng Chiragu inspected and informed him to wait for a report. He further stated that the report was prepared



- which identified the challenges. PW2 confirmed that he was familiar with the letter dated 9/3/2020 and stated that he was to come up with a proposal. He also stated that there were recommendations which he complied with through an Engineer. He went on to state that his proposed methodology for rehabilitation was opposed. He explained that he was to do a retrofitting and that he had to get a letter from the 1st Defendant where he got the approval on 5/11/2020. He stated that on 20/11/2020, he started working on the building and started retrofitting on 22/11/2020. He added that he did not see the need of reporting to the county as there was no issue. He stated that on various dates in December 2020, they were never on site. He added that the workers were stopped on 22/12/2020. He also added that the letter dated 19/3/2021 was placed at the construction site yet no work was ongoing.
12. PW2 stated that they started retrofitting work in August where he engaged PW1. He stated that the defendant did not give him time to do retrofitting thus there was no work on site.
 13. Upon cross examination by Ms Shirika, PW2 stated that he did not need any approval from the County Engineer. He further stated that when one wanted to build one applied to the physical planning officer. He stated that he got the license from NEMA in 2020. He also stated that one could construct without a NEMA license. He stated that he chose an independent Engineer Willy Mwangi of Tonygirth Engineer and that Eng. Kuta was the project Engineer. He further stated that a re-design was done as per instruction and submitted to National Building Inspection through the County Government. He stated that the National building inspectorate came on 24/2/2020 and after the building was stopped, he was allowed to remedy but not given the go ahead.
 14. He further stated that later in the year he was given the go ahead but construction stopped in December 2019 upon closure by the inspectorate. He stated that they applied for resumption. He further stated that the letter dated 19/3/2021 from Ministry of Public Works requested him to demolish. He added that the 2nd letter dated 19/3/2021 by the Director Planning also asked him to demolish within 7 days while the 3rd letter dated 19/3/2021 from the County Physical Planning was the official enforcement notice. He stated that the building was demolished before the appeal time was concluded. He further stated that the conditions were general on letter and not on the prescribed form. He stated that he complied with the requirement provisions and added that demolition was not proper. He stated that he paid the necessary fees and approvals. He further stated that PEX 4 were the building plans and that the project was approved. He added that the Architect, structural Eng. signed the forms.
 15. He stated that he was given a certificate of compliance by NCA and they approved the work. He further stated that he received the license from NEMA on 25/2/2020. He stated that construction moved smoothly until 23/12/2019 when the building reached 4th floor. He also stated that the development was supervised by experts. He added that he was required to submit a structural integrity report within 4 days but he could not comply since it was Christmas time. He stated that he also engaged an Engineer. He further stated that he submitted the report on 19/2/2020 but there was no response. He stated that the demolition order gave him 7 days but the law provided for 14 days. He stated that he never gave the building a clean bill of health. He also added that he had indicated that the building had issues of integrity, but that it was capable of strengthening.
 16. Upon cross examination by Kinuthia, he stated that he was gazetted to practice and that he had a license for 2021 in Nairobi. He further stated that his firm was registered with the A.G as a company and not the Engineers Board of Kenya. He confirmed that he did not have anything before court to confirm the same.
 17. Upon cross examination by Shirika, he stated that his company was incorporated in 2013 while the consulting Engineer was gazetted on 9/4/2021. He added that he was gazetted on 23/4/2021 as an Engineering technologist.



18. On reexamination, he stated that he used Nguzo Engineering services. He also stated that the demolition notice had short comings and that he submitted the report but there was no response. He stated that he could have done his part on the recommendation.
19. PW1 was recalled where he produced a further list of documents marked as follows, Diploma in building and Civil Engineering from Mombasa Polytechnic PEX47, Graduate Diploma PEX 48, Application letter PEX 49, Letter of practicing PEX 50 and notice of association PEX51.
20. He stated that as a Civil Engineer he is a forensic Engineer and that he does consultancy in general Engineering. He testified that the gazette notice signified that they qualified.
21. Dr. Samuel Omondi Ogada testified as PW3. He testified that he was a practicing medical doctor at Nakuru Heart Centre with a basic degree in medicine MBCHD. He further testified that he had Masters in internal medicine with a specialty in cardiology and experience of 44 years. He testified that on 8/6/2021, he attended to the Plaintiff who had complained of secondary depression illness. He testified that they counselled him and gave him anti-depression. He further testified that the Plaintiff informed him that his property had been demolished.
22. Upon cross examination by Shirika, he confirmed that there was no doctor trained for a specific illness. He further confirmed that the only degree he needed to testify was the medical degree. He stated that they were trained to handle all deceases.
23. Richard Mburu testified as PW4 where his statement dated 10/11/2022 was adopted as evidence in chief. He testified that he was a Civil Engineer and registered contractor with an experience of 44 years. He further testified that he was registered by Kenya Institute of Technologies. He testified that he was present during the project inception in March. He testified that the he former Engineer was Kuta who supervised until 2019. He further testified that they had trained people and that Engineer Steve Mwangi was the Architect. He went on to testify that the construction was done by a registered person and not quacks. He testified that they were being assisted by N.C.A workers.
24. Upon cross examination by Kinuthia, PW4 stated that he had a license as a contractor registered in 2014. He stated that he was on site from 2018 until when the house was demolished. He further stated that after the notice, there was no construction. He confirmed that Engineer Kuta was there resident Engineer. He stated that he had the Engineers diary and added that retrofitting entailed additional columns.
25. Upon cross examination by Shirika, PW4 stated that the project started in March 2018 and that he was given a certificate of compliance. He further stated that the license was issued every year. He also stated that he had a certificate of registration. He confirmed that Engineer Kuta would send representatives at times. On reexamination, he stated that he had practicing certificates for 2019, 2020, 2021 and 2018.
26. Stephen Njuguna Mwangi testified as PW5 where his statement 10/11/2023 was adopted as evidence in chief. He testified- that he was an Architect by profession and was registered in 2016. He went on to testify that his role was to redesign supervise and present to the 1st Defendant. He testified that he was the project Architect from inception to demolition while the project Engineer was Engineer Kuta. It was his testimony that they signed an indemnity form which showed the contribution made and one would take responsibility of what happened on site. He testified that the project was undertaken by professionals and that he had started the approvals in 2018 and construction in 2019. He further testified that the construction was stopped on 23/12/2019 and they started working on the report which was submitted on 19/2/2020. He also testified that the issues raised by the County Government were addressed.



27. He testified that the methodology and safety submitted were approved on 25/8/2020. He further testified that he gave an approval for rectification on 5/11/2020 and that they started retrofitting on 4/12/2020. He testified that they were to submit a monthly report and that the letter dated 22/12/2020 stopped them from retrofitting. He testified that 3 weeks had not lapsed hence they could not give the report. He went on to testify that they gave a report dated 29/1/2021 which outlined the timelines and methodology. He testified that the integrity report was approved but the 1st Defendant did not respond. He further testified that the 1st Defendant demolished the property before they could act. He added that they had submitted the integrity report. He testified that the retrofitting was done by a licensed contractor and supervised by Engineer Kuta. He testified that his work entailed ensuring that the columns were fit in the right place. It was his testimony that they were to add 2 new columns and that the temporary column was to reinforce the building pending the new column that were permanent. He explained that the persons on the ground from Nguzo did ground investigations. He testified that they prepared the geotechnical report and that Nguzo was to detect the problem. He further testified that he was not informed of the demolition. It was his testimony that the demolition was not proper since they had noticed the default and were going to rectify. He added that they had talked to the County and were in the process of rectification. He also testified that the building could not have collapsed on its own. PW5 testified that the demolition was not authorized by any report and that the building had not been condemned. It was his testimony that the building had been declared unsafe and required remedial action. He produced his practicing certificate.
28. Upon cross examination by Kinuthia, he confirmed that an architect was the lead consultant. He also confirmed that the site was a proposed residential development consisting of 2 bedroomed apartments. He could not comment on the weight exerted by the building on the floor. He also confirmed that he could not comment on the two reports by Engineer Kuto dated 29/1/2021 and Tom Girth dated 19/2/2020. He admitted that he did not do any structural drawings as they were done by Eng. J N Kuta. He stated that the design had no problem, but implementation was the issue. He confirmed that he was not the engineer and that he only supervised the work. He admitted that he did the architectural design and that retrofitting works were on-going in 2019 and 2020. He also admitted that they did not take photos. He further admitted that he did not have a report for retrofitting since one month had not lapsed.
29. PW5 was referred to the 1st Defendant's documents where he confirmed that the steel columns were to strengthen the building. He added that the building had challenges but it was not reported. He confirmed that there was no law for change of design to be reported to the 1st Defendant. He admitted that he did not know the strength of the column. He stated that he introduced Nguzo in November, 2020. He also admitted that they did not do the ground investigations at the start of construction.
30. Upon cross examination by Shirika, he confirmed that on matters strength of a building, it was the work of the structural Engineer. He also confirmed that he was the lead consultant since every aspect touched on the architectural plans. He stated that he engaged Nguzo Engineering services with the Engineer Wainaina who worked under Engineer Kuta. He stated that the report was signed by Wainaina Nguzo and not Engineer Kuta. He admitted that he was aware of two enforcement notices in 2019 and 2020 with a requirement that the engineer was to act on. He stated that the Engineer did not design without the approval of the Architect. He confirmed that they did not re-design and added that the time of notice, they had already done 4 slabs while the 5th slab was done after notice and before retrofitting was completed. He denied having mislead the client.
31. He stated that they were not in agreement with the Engineers recommendations since there was a joint report he did with Eng. Kuta. He also stated that the notice required time. He stated that the tests were done by MBI Tonygrith and themselves. He further stated that the one who did the test could confirm



the strength of a building. He added that it was not a requirement that they do drawings but that they were to check the designs against. He confirmed that they sought approvals from the 1st Defendant. He also confirmed that they started before the license had been issued. He stated that the approvals were not mandatory before start of the project.

32. On reexamination, PW5 stated that the enforcement notice dated 23/12/2019 was addressed to the Plaintiff and they stopped further construction. He further stated that the Engineers wrote a report dated 19/2/2020 submitted to the 1st Defendant on a date he could not recall and that they gave approvals for drawings on 15/11/2020. He stated that the work was stopped on 22/12/2020 before completion of the retro filling. He added that they submitted the drawings and a report but that there was no response. He stated that he brought in Nguzo Engineering for investigation who executed and did a report to enable them do retro filling. That marked the close of the Plaintiff's case.

2nd Defendant's Case

33. Engineer Dr. Samuel Njagi Chiragu testified as DW1 where his statement dated 30/1/2024 was adopted as evidence in chief. He testified that he was the secretary National Boundary Implementation State department of public works. He urged the court to consider his evidence in DEX1. He testified that he conducted inspection of buildings in Nakuru County after which he inspected and declared the suit property unsafe. He testified that they looked at the structure, columns, wall structure and they all looked sagged. He also testified that they looked at cracks. He went on to testify that the first person he engaged was the owner of the building after they noted that some columns had honey combs and the beacons had sagged slabs.
34. He testified that they informed the 1st Defendant to do audit where the owner was called to get the structural Engineer who was to inform them the cause of the cracks. He testified that the letter dated 9/3/2020 confirmed the same where the owner called him and he visited the property in the company of the Engineer Willy Mwangi. He testified that they inspected the building and found that the 5th floor had not been constructed and there were poles of timber that were ready for construction. He further testified that they engaged Leeds Engineering limited which had a contract with the government where they did a test and brought a report to their office. It was his testimony that the audit report was based on the report by Leeds Engineering Limited. He testified that from the structural elements the construction did not follow the required standards. He further testified that the concrete ratio consisted of cement, sand and ballot which the Engineer was supposed to give the ratio. He testified that for the building it was to be 1kg of cement, 1 1/2 kg of sand and 3 kgs of ballast. He went on to testify that the Plaintiff did 1kg of cement, 3kg of sand and 6 kg of ballast. It was his testimony that the Plaintiff may not have known that the construction was not given the proper mixture. He testified that the instructions were to be given by the structural Engineer.
35. He testified that one of the columns had failed and that there was no site book as required by law. He further testified that the Engineering Act 2011 makes it an offence not to check one's work. He testified that the meeting with Engineer Kuta and Architect was between them and county government. He testified that the owner brought the report and they asked them to approve the retrofitting works. He added that they were also to produce structural drawings that showed the methodology of rectifying the defects. It was his testimony that retrofitting needed to have new drawings which were to be approved by the county government. He testified that the letter dated 25/8/2020 was approved for methodology and that the Plaintiff was to follow the county government process for approval. He added that N.C.A was to lift the stopping order and that the owner was to ensure the lifting of the enforcement matures.



36. DW1 testified that he never saw any drawings and he recommended the stoppage of further slabs since the foundation was very weak. He further testified that their recommendation was not adhered to. He testified that they had another case that had complied. He went on to testify that the Director of physical planning was to involve them before the building was demolished. He testified that they had their people on the ground and added that they got a report from NCA that the columns had deteriorated. He testified that he advised him to remove the structure before it collapsed. He further testified that when they came back they found the slab had been constructed in disregard of their directions. He testified that retrofitting had not been done and that the national government was not involved in the demolitions.
37. Upon cross examination by Kinuthia, DW1 confirmed that they had issued an enforcement notice to the owner to remove the structure. He further confirmed that they had given him an opportunity to rectify. He added that if column failed it would have killed people. He stated that the building was a safety risk to Kenyans. He further stated that the procedure of change of design required new structural drawings. DW1 stated that the 5th floor slab added more weight to the already weak building. He also stated that it was the responsibility of the owner to come up with the lead consultant which agreement had to be in writing. He stated that one could get a report from another engineer in consultation with resident engineer. He stated that the report by Mwangi should not have been accepted and that Engineer Kuta should have signed the report.
38. Upon cross examination by Ndolo for the Plaintiff, DW1 stated that development fell under devolved County Government while the current one was under physical land use Planning Act 2019. The witness was referred to schedule four of *the constitution* where he stated that his issue was on the shared function between the national government and county government. He further stated that the National Government had a role to play in planning of the County Government. He went on to state that this was a national service of executive order of 2018 and that they were doing capacity building for counties. He stated that most of the counties did not have residential engineers and architects. He also stated that they were doing building inspection with the County Government team. He stated that their purpose was advisory and that they had no role in issuance of enforcement letter. He stated that they had been informed by the County Government regarding the building after which they did scientific test. He added that they had considered the impact of Engineer Willy Mwangi and gave an advisory recommendation and left it to the 1st Defendant but it was not acted upon.
39. DW1 was referred to PEX23 where he confirmed that the demolition notice was issued by the Permanent Secretary while the enforcement notice was issued by national government and not the county government. He confirmed that the enforcement notice was irregular and that the 1st Defendant was to revoke the previous development and the permission to develop. DW1 stated that the *Public Health Act* allowed for immediate demolition of a structure. He stated that as at 2020 the building could be rehabilitated. He admitted that he had not come back to check the building. He added that the letter dated 19/3/2024 was written later. He also confirmed that unsafe was different from dangerous. He stated that the first person to demolish a building was the owner. He confirmed that the procedure entailed; issuance of a Notice, if unsafe it can be demolished and if dangerous, it ought to be demolished. He admitted that the 1st Defendant could not demolish without a notice. He also confirmed that if remedial measures were done, it could have been restored. He stated that the buildings were evacuated and that the damages were beyond remedy and hence demolished. He confirmed that the other buildings were with damages, people had been evacuated. He added that he was not certain that they were demolished. He denied knowing that the officers were compromised.



40. On reexamination, he stated that an unsafe building could be removed while a dangerous building could not be rehabilitated. He stated that he had involved the county government and that they inspected under the execution order. That marked the close of 2nd Defendant case.

1st Defendant's case

41. Justine Mayaka Nyaroro testified as DW1 where her witness statement filed on 17/3/2023 was adopted as her evidence in chief. She also produced her documents as 1st DEX 1- 1st DEX 16. It was her testimony that she was a Physical planner, Nakuru County. She testified that she was the acting director and that she had worked for 15 years on matters town planning. She testified that she conducted her first visit on 23/12/2019 after being informed by their field officer that there was a building in Naka area plot no 735 which had visible structural challenges. She testified that she met Mr. Wekesa who was in charge of the structural works. She further testified that the building was supported by steel structures as shown in pages 66,67,68, 69 and 70.
42. She went on to testify that when she visited, she always found the Engineers Architect while the constructor was absent. She testified that when they found the challenges, they gave an enforcement dated 23/12/2019 addressed to the Plaintiff. She testified that the Plaintiff was asked to immediately stop development as the structural challenges were visible on site. She further testified that they sought advice from the National government after which she took them to various the construction sites. She also testified that the national government submitted a report and remedial measures vide the letter dated 25/8/2020. She testified that all statutory approvals were to be obtained. She further testified that the project had been stopped by the National Construction Authority. It was her testimony that all the approvals were to be obtained before any work could begin. She testified that the plans were applied and a letter dated 5/11/2020 highlighted the conditions that were to be conformed with. She testified that the materials for testing were not submitted. She added that the site visit was done and it required that an Engineer be on the site. She also testified that they took a drastic action since the building had been stopped and retrofitting was to be done but the developers went ahead and started casting the 5th floor. It was her testimony that there was no effort that showed that the building was rectified.
43. She testified that the photo on page 72 showed that the columns were under pressure and based on the professional opinion from the county and state department, the building was a threat to human life. She testified that a notice was served upon the agent. She further testified that after the site visit the state department advised them to demolish the building. It was her testimony that the county issued a letter dated 19/3/2021 to the Plaintiff to have the building demolished. She testified that they also issued an enforcement notice dated 19/3/2021 and added that the Plaintiff had not complied. It was her testimony that the Plaintiff still developed.
44. She testified that the county secretary team was informed and after a meeting held on 26/3/2021, it was resolved that the building be demolished on the 27/3/2021. She testified that the developer had not shown any interest. She further testified that as per the legal notice No 251 of the Physical land planning Act 2019 under part 2, the County Director had the authority to issue and enforce enforceable notices on behalf of the County Executive members.
45. Upon cross examination by Shirika, she confirmed that she had issued an enforcement notice. She further confirmed that she wholly relied on what she received from N.B.I. She stated that they required to confirm the Approval of architectural drawings, Structural drawings, Approvals from N.C.A and NEMA license. She also stated that a Geotechnology report was required before a structure was done. She stated that the Plaintiff was to obtain the approvals afresh after detecting the weaknesses of the building. She stated that at the time the building was demolished, the 5th floor slab had been down.



46. Upon cross examination by Ndolo, DW1 confirmed that despite the state of the building before demolition, due process had to be followed. She confirmed that she participated in the enforcement process which was part of development control with the main part being planning. DW1 was referred to PEX9 where she confirmed that the enforcement notice was issued by County Secretary. She explained that the County Government Act gave the county Security powers to issue notice. She added that the developer did not stop but continued with the works until it was demolished.
47. She stated that the agents ran away from the site whenever they wanted to have the stop order enforced. She confirmed that the County did not have prosecuting powers. She also confirmed that they never received a structural plan. She added that they never went for the Engineer, Architect and contractor as they were never on site. She admitted that they issued the notice on the eve of Christmas to be complied with by 27/12/2019 since the building had structural challenges and was dangerous. She stated that it was an emergency since their challenge was the safety of people. She also stated that they had a developed control officer who was to check adherence to the applied plans. She added that the subcounty controller was to check compliance. She stated that the role of the Architect was to check if the architectural plans submitted meet the threshold. She added that he did not need to go to site unless there was need. She also stated that the county Structural Engineer was to receive structural drawings supported by the approved architectural drawings. She explained that he had a role to play in ensuring that the structural plan was adhered to. She went on to explain that the engineers for the development were to invite the county engineers to the ground. She stated that an inspection card had to be filled during inspection at various stages. She added that there was also a development surveillance team comprised of planners that visit the sites to ensure compliance with approvals.
48. She explained that the challenges arose at the 5th floor where they go through a notification for approval. She added that there was a report dated 23/12/2019 with the issuance of the enforcement notice. She stated that the report by Engineer Willy Mwangi dated 19/2/2020 was submitted. She confirmed that Engineer Willy Mwangi was not a licensed Engineer which report dated 19/2/2020 was addressed to the County Director. She further stated that Willy Mwangi was not the project Engineer nor a registered Engineer. She added that the report was forwarded to National Building Inspectorate.
49. DW1 stated that they did not respond to the report since they had forwarded to the National Building Inspectorate. She further stated that they subjected the report to other bodies because the National Government office came earlier in the year they had come and identified the building. The report had not been submitted by Engineer Kuta. She stated that the methodology for rectification of the building was responded to by the state department. She further stated that they responded through the letter dated 5/11/2020 with the approval to continue with retrofitting. She added that the county Engineer Architect and structural Engineer did not participate and that the report by county was technical advisory. She confirmed that up to 5/11/2020 the issue of the statement of the building had been resolved and that the issue was implementation of retrofitting which was a condition approval. She confirmed that the developer failed the compliance test. She also stated that before 5/11/2020, the works were ongoing. DW1 confirmed that the demolition order notice was issued by the County Government. She also stated that they gave for the building to be demolished immediately. She confirmed that from 2019 there was an initial enforcement notice and that they requested for immediate demolition because the developer had worked on the upper floor without working on the challenges. She admitted that the action was based on a report dated 19/3/2021 by NBI (National Building Inspectorate). She stated that the decision was re-affirmed through an intergovernmental meeting attended by the County Security team.
50. On reexamination, she stated that they did not have the capacity to review complex structural issue. She added that from December 2019 the developer had not complied with development regulations.



She stated that the developer continued with development when he added a further slab which resulted to more stress on the building. She further stated that the developer had not addressed the challenges. That marked the close of 1st Defendant's case.

Submissions

51. Counsel for the Plaintiff filed his submissions dated 4th April, 2024 where on the first issue, he submitted on the illegalities of the notices. He submitted that the notice dated 5th November, 2020 (PEX15) was incapable of being implemented since it failed to comply with Section 72(2) of the Physical & Land Use Act, 2019 since it did not indicate the date on which the notice should take effect and the period within which the retrofitting works was to be completed. He further submitted that the enforcement notice of 22nd December, 2020 (PEX17) failed to specify the period within which the measures were to be complied with. He added that the notice did not specify mandatory 14 days period of internal appeal to the liaison committee.
52. Counsel went further to submit that the demolition order notice of 19th March, 2021 (PEX20) was illegal since it was contrary to the mandatory procedure under Rule 4 of the Physical Planning (Building & Development Control) Rules 1998 as read with section 72. He argued that the said notice was not in the mandatory requirement of Form P.P.A 7. He added that the notice failed to specify the date on which the notice was to take effect. Counsel submitted that the purported appointment on delegated authority by the CECM was illegal and ultra vires since no gazetteement took place as required under Section 38 of the Interpretation & General Provision Act. He further submitted that the only body that could legally delegate power to the planner was the County Public Service Board. He added that the demolition order notice issued by Mr. Nyaroo was ultra vires and in contravention of Section 43 of the Interpretation & General Provision Act.
53. It was counsel's submission that the legal notice No. 251 was not operational at the time the demolition orders were issued on 19th March, 2021. Counsel argued that the 1st Defendant failed to prove that Mr. Nyaroo had legal authority to act on behalf of the County Director of Physical and Land Use Planning. He submitted that the 3rd enforcement notices issued by the 1st Defendant violated the Plaintiff's constitutional rights under Article 47 of *the Constitution* as read with Section 4(1) (c).
54. He submitted that the 4th enforcement notice issued by the 2nd Defendant was illegal as the principal secretary had no power to sign and that it failed to specify the date which the notice shall take effect. Counsel submitted that the project was demolished on 27th March, 2021 and at the time the Plaintiff received the said notice, five days had elapsed after the demolition.
55. The second issue was whether the Plaintiff complied with the recommendation of the enforcement notice of 22nd December, 2020. He submitted that the notice required the developer to stop further construction, the project architect to submit a report for the retrofitting and submit structural drawings for consideration. Counsel submitted that the Plaintiff complied with the said conditions. He submitted that the only permitted work prior to the notice was retrofitting which had been approved vide notification dated 5th November, 2020 and stopped again vide the said notice. He also submitted that on 29th January, 2021 (PEX18) the project architect together with the project engineer submitted a comprehensive status report on the retrofitting works done. He further submitted that the allegation that the Plaintiff carried out retrofitting without addressing the challenges raised by the NBI report dated 24th February, 2020 was not proved. He submitted that the requirement to submit the structural drawings violated Section 4(1) of the *Fair Administrative Action Act*. He argued that the drawings were a precondition of issuance of the development permission on 5th November, 2020 that was already



- approved in July, 2020. He added that the drawings and designs were re-submitted, paid for, signed and approved by the County Engineer.
56. The third issue was whether the project development and retrofitting works were undertaken by unqualified non-professionals. Counsel while submitting in the negative argued that the engineers, architect, construction workers were all qualified as evidenced by the produced certificates and that the Defendants failed to prove otherwise.
 57. The fourth issue was whether the demolition of the building project was fair, reasonable and justified. On this issue, counsel submitted that the expert reports from 22nd December, 2019 to 23rd March, 2021 demonstrated that the project building was structurally supported and hence the demolition was unjustified. He submitted that the Plaintiff availed all the four reports as required which were not controverted to warrant demolition. It was his submission that the condemnation of the building by the 2nd Defendant was procedurally unfair and ill advised. He added that the Defendant's were to obtain a court order before the actual demolition so as to protect the Plaintiff's constitutional rights under Article 40. Counsel relied on various authorities including *George Wakanene & 2 Others V City Council of Nairobi* [2017] eKLR, *Sunshine Villas Ltd V County Government of Kisumu & Another* [2019] eKLR and *Bamaftah V County Government of Kilifi* [2023] KEELC 15865 (KLR). He submitted that had the Defendants afforded the Plaintiff fair administrative hearing or considered the technical status reported submitted on 29th January, 2021, they could professionally explain the action being undertaken thus averted illegal demolition.
 58. The final issue was whether the Defendants violated the Plaintiff's constitutional rights. Counsel submitted in the affirmative and cited the case in *Friends of Lake Turkana Trust V AG & 2 Others ELC NO. 825 OF 2012*. He submitted that there was violation of various sections of the Physical Land Use Planning Act 2019, Interpretation & General Provision Act and The *Fair Administrative Action Act*. He further submitted that the Defendants violated the Plaintiff's rights as guaranteed under Articles 27, 29(d) and 40 of *the Constitution*.
 59. Counsel for the Plaintiff also sought for general, special and exemplary damages as sought in his plaint. He cited the cases in *Miguna Miguna V Fred Okeyo Matiangi Ministry of Interior and Coordination of National Government & 6 Others*, Mombasa Civil Appeal No. E004 of 2020 *NEMA V Kelvin Musyoka & 17 Others* as consolidated with Civil Appeal No. E032 OF 2021 and *Machakos Petition No. 601 of 2013 David Gitau Thairu V Government of Machakos & Another*.
 60. In conclusion, counsel relied on Section 27 of the *Civil Procedure Act* and urged the court to order the Defendants pay the costs for the suit.
 61. Counsel for the 1st Defendant filed its submissions on 8th May, 2024 where he submitted that the main issue for determination was whether the Plaintiff is entitled to the orders as prayed for in the Plaint. Counsel submitted in the negative and argued that the Plaintiff had been given numerous opportunities and sufficient time to address the structural challenges of the building. He submitted that the initial enforcement notice had been issued on 22nd December, 2020 while the demolition notices were issued on 19th March, 2021. Counsel argued that the Plaintiff despite having been given adequate time to comply, he opted not to take any positive measures towards the same. He added that there was no proof, intention or effort to comply with the professional advice, instructions and recommendations.
 62. He submitted that the instant suit is premature and thus the doctrine of exhaustion precludes the court from entertaining the same. It was counsel's argument that the Plaintiff disregarded other dispute resolution mechanisms as provided for under Section 72(3) of the *Physical and Land Use Planning Act*,



2019. He cited the case of Speaker of the National Assembly V James Njenga Karume [1992] eKLR. Counsel also submitted that the Plaintiff's conduct was replete with improprieties and thus his prayers are unenforceable. He argued that the Plaintiff was the author of his misfortunes by virtue of his acts of omission and commission while in total disregard of the recommendations and professional advice given to him. Counsel added that the Plaintiff chose to rely on Engineer Wainaina Nguzo who went to the project site after the Plaintiff had already been served with the demolition notice. He argued that the Plaintiff's act of conducting the geo-technical tests at the tail end of the condemned project was unprofessional. Counsel also argued that the credibility of the said witness was questionable due to gaps and inconsistency in his testimony. He submitted that the witness did not submit his practicing license despite having been given sufficient time to submit the same. Counsel submitted that the Plaintiff failed to adhere to the building code and also failed to adhere to the professional advice. He cited the case in Five Forty Aviation Limited V Erwan Lanoe [2019] eKLR.

63. It was counsel's submission that the 1st Defendant is clothed with an exclusive constitutional mandate which the court ought not to interfere with. He relied on Article 186 and Section 7 of Part 2 of the Fourth Schedule. He argued that the 1st Defendant has exclusive constitutional mandate to manage and regulate the county's planning and development. Counsel also argued that the court could only interfere when the government acts outside the law. He cited the case in Metropolitan PSV Saccos Limited Union & 25 Others V County of Nairobi Government & 3 Others [2013] eKLR and submitted that the Defendants acted reasonably within the law. He submitted that there was sufficient consultation in tandem with the principle in *Nyathuna Quarry Self Help Group V County Government of Nakuru & Attorney General HCCC Suit No. 12 of 2017* where the court cited the case of LSK V AG & Another [2016] eKLR. Counsel argued that there was sufficient horizontal and vertical consultation which culminated to a unanimous recommendation. He added that a structural audit of the building had confirmed that the same was unsafe and required urgent remedial measures.
64. It was counsel's submission that time was of the essence due to the danger posed by the building to an adjacent building and the general public. He also submitted that the Plaintiff was required to use the least amount of time to avert injury to the public. It was his submission that the Plaintiff never placed material evidence to prove discrimination by the Defendants. He submitted that all developers in the inspected buildings were treated equally and given a fair opportunity to correct their structural failures. Counsel submitted that the instant suit is unmerited and meant to intimidate and harass the Defendants with the aim of preventing them from discharging their statutory mandate. He cited the case in Vivian Muia V Mzoori Limited [2017] eKLR where the court cited the case of County Council of Nandi V Ezekiel Kibet Rutto & 6 Others [2013] eKLR.
65. Counsel submitted that the instant suit is a deliberate attempt by the Plaintiff to circumvent the law and defeat the ends of justice and ought not be allowed. He cited the case in Republic V National Employment Authority & 3 Others Ex parte Middle East Consultancy Services Limited [2018] eKLR. In conclusion, counsel submitted that the Plaintiff's claim is unmerited and urged the court to dismiss the suit with costs.

Analysis and Determination

66. This court has carefully considered the pleadings and the evidence on record and is of the view that the issues for determination are:

Whether the demolition of the Plaintiff's project building was lawful.

Whether the Plaintiff is entitled to the prayers sought in the plaint.



Who is to bear the costs of the suit.

67. In dealing with the first issue, it is not in dispute that the Plaintiff applied for a development permit vide letter dated 2nd January, 2018. It is also not in dispute that the 1st Defendant approved the said development and the Plaintiff commenced the construction work until it was stopped vide an enforcement notice by the 1st Defendant dated 23rd December, 2019 which required remedial measures. The 1st Defendant later approved the said construction vide a letter dated 5th November, 2020 subject to 14 listed conditions. This court has perused the said conditions and it is clear that most of the conditions were adhered to. I also note that the disputed conditions are only four which this court will interrogate in line with the evidence adduced.
68. The first disputed condition as per the letter of approval is condition (iv) where the Plaintiff was to adhere to NEMA and NCA regulations before the works commenced. It was the Plaintiff's case that he had obtained the NEMA clearance in 2020 and the NCA clearance in 2018. This court has confirmed that the Plaintiff indeed got the NCA clearance on 20th February, 2018 and the NEMA clearance on 25th February, 2020 as evidenced by PEX6 and PEX7 respectively. It is this court's view that despite the NEMA certificate having been issued after the project work had already begun, the Plaintiff complied with the said condition since the said certificate was issued albeit late.
69. The second disputed condition was condition (x) where the developer had to contact the building inspector, submit the architect and structural engineer for site inspection. The said condition also provided that monthly reports was to be submitted to the National Building Inspectorate (NBI) and the County Government of Nakuru. In line with this condition, it was the Plaintiff's case that he submitted the architectural and structural plans approving architect Stephen Njuguna Mwangi and engineer Kuta as the project architect and structural engineer respectively which permission was granted. This court has perused the court records and it is a fact that the Plaintiff produced receipts of payment (PEX1) to the 1st Defendant for the project together with the indemnity form (PEX8) indicating the project architect and structural engineer. It is also a fact that the same was approved by the 1st Defendant on 17th January, 2018. The PW2 confirmed that they were to submit a structural integrity report within 4 days but they could not comply since it was Christmas time but when they submitted the report on 19th February, 2020, there was no response. The 1st Defendant also admitted that they issued the notice on the eve of Christmas to be complied with by 27th December, 2019. It was their case that the building had structural challenges and was dangerous hence an emergency. This court has keenly perused the report dated 19th February, 2020 vis a vis the enforcement notice by the 1st Defendant dated 23rd December, 2019. It is clear that the said enforcement notice required the Plaintiff to submit an integrity report by 27th December, 2019 but the same was submitted on 19th February, 2020. It is this court's view that in as much as the integrity report was not submitted on the specified date in the notice, the Plaintiff complied albeit late which this court finds that the delay was not inordinate.
70. It is not in dispute that the Plaintiff stopped the construction work as per the said notice and after the integrity report was received by the 1st Defendant. It is a fact that the 1st Defendant did their own test in the building and required the Plaintiff to do remedial works as prescribed by the NBI. It is a fact that as the Plaintiff was in the process of doing the remedial works which entailed retrofitting subject to the said conditions, the 1st Defendant issued another enforcement notice on 22nd December, 2020. It is not in dispute that the Plaintiff again stopped construction in order to ensure compliance with the requirement that they avail the details of the professionals involved and the work done. This court has perused the court file and it is a fact that the Plaintiff vide the letter dated 29th January, 2021 responded



to the said requirements by the 1st Defendant. In view of the above, this court is of the opinion that the Plaintiff indeed complied with the said condition.

71. The third disputed condition was condition (xiii) where the Plaintiff was required to have the structural details submitted by a registered engineer and approved by the county engineer before the works commenced. It is this court's view that as evidenced by the letter dated 22nd March, 2021 (PEX21) the said structural details were submitted by Nguzo Engineering Services with its director PW1 who confirmed that he was registered as a professional engineer vide gazette notice 3728. This court has also perused the court records and it is a fact that the county engineer had approved the retrofitting works vide a letter dated 25th August, 2020. It is finding that the Plaintiff complied with the said condition.
72. The final condition in dispute was (xiv) where the Plaintiff was to adhere to the recommendations of the NBI given under NBI/SEC/3.VOL/IV (67) and dated 25th August, 2020. It is this court's view that from the evidence, it is clear that the Plaintiff indeed complied with the said conditions in remedying the building despite the numerous notices from the 1st Defendant. I have perused all the notices and it is a fact that the process was frustrated by the 1st Defendant who frequently stopped the construction and requested documents. The result of the same was that the Plaintiff was not given sufficient time to remedy the building in line with the recommendations from NBI.
73. It is not in dispute that the Plaintiff through Engineer Kuta and vide a letter dated 29th January, 2021 (PEX17) requested resumption of the construction work. It is also not in dispute that the 1st Defendant in response to the said letter invited various stakeholders for an inspection meeting to be done on 18th March, 2021 so as to review compliance given by the NBI (PEX19). It is a fact that the 1st Defendant issued a demolition notice to the Plaintiff vide a letter dated 19th March, 2021. This court has noted that from the various notices the Plaintiff was required to comply with the recommendation from Leeds Engineering Company Ltd. This court has also noted that the 1st Defendant issued the demolition notice prematurely before the Plaintiff had finished the retrofitting. It is my finding that the said notices by the 1st Defendant were not clear on the timelines to which the Plaintiff was to comply before the said demolition was effected. In addition, it is my finding that the alleged doctrine of exhaustion as enunciated by the 1st Defendant could not apply in this case since the demolition occurred while the Plaintiff was still working on the retrofitting and therefore it caught the Plaintiff off-guard.
74. Section 72 of the Physical & Land Use Act, 2019 provides that the notice should specify the period within which the measures shall be complied with and notify the developer 14 days right of internal appeal to the liaison committee. It is this court's view that the said notices by the 1st Defendant to the Plaintiff had not complied with the said provisions. In view of the above, it this court's finding that the demolition notice dated 19th March, 2021 was premature, unfair and unlawful. The 7 days' notice period by the 1st Defendant to the Plaintiff between the demolition notice and the actual demolition was contrary to the above provision. The demolition of the project was arbitrary as the rectifications were still ongoing. The acts amounting to the demolition as well as the actual demolition went against the Plaintiff's various fundamental rights and freedom as enshrined in *the constitution* under Articles 40, 22(3), 47, 48, 50, 27 and 29(d). The whole process was riddled with procedural impropriety that led to great loss to the plaintiff.
75. The Plaintiff sought for special damages and it is trite law that a claim for special damages ought to be specifically pleaded and proved with a degree of certainty and particularity. It is my view that without a doubt that from the inception of the project which the Defendants approved, the Plaintiff incurred incidental costs to it as evidenced by the annexed receipts of payment. It is also this court's view that



the Defendants did not dispute the said receipts as produced by the Plaintiff. In the case of Ouma v Nairobi City Council (1976) KLR 304 the court held as follows:

“ Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage...”

76. The Plaintiff also sought exemplary damages for violation of his constitutional rights. The Court of Appeal case in Godfrey Julius Ndumba Mbogori & another V Nairobi City County [2018] eKLR the court was guided by the case in Rookes V Barnard [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded being where the Government action or conduct complained of is oppressive, arbitrary or unconstitutional. Second, where the defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant. In the instant case, this court having already established there was breach of the Plaintiff's fundamental rights and freedoms as provided for in *the constitution*, he is therefore entitled to exemplary damages.
77. This court having found that the said demolition notice was unlawful, the Plaintiff is therefore entitled to the reliefs as sought in his plaint dated 17th November, 2022. In the upshot, having found that the Plaintiff proved his claim to the required standard of probabilities, judgment is hereby entered in favour of the Plaintiff in the following terms:
- a. A declaration that the enforcement notice and demolition order dated 19th March, 2021, issued by the defendants was an arbitrary deprivation of the plaintiff's fundamental right as enshrined under Articles 40, 22(3), 47, 48, 50, 27 and 29(d) of *the Constitution*.
 - b. General and Exemplary damages of Kshs. 2,000,000 with interest at court rates from the date of filing suit.
 - c. Special damages of Kshs. 33,131,637.
 - d. Costs of the suit to be borne by the Defendants.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTRONICALLY ON THIS 9TH DAY OF AUGUST 2024.

A.O.OMBWAYO

JUDGE

