



Katangi Developers Limited v Kenya Railways Corporation & another (Environment and Land Case Civil Suit E036 of 2021) [2024] KEELC 6290 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E036 OF 2021
SO OKONG'O, J
SEPTEMBER 26, 2024**

BETWEEN

KATANGI DEVELOPERS LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants through a plaint dated 31st May 2021. The Plaintiff averred that it was the registered proprietor of all those parcels of land known as Kisumu Municipality Block 7/414, 7/415, 7/417, 7/419, 7/420, 7/421, 7/422, 7/424, 7/425, 7/426, 7/429, 7/430, 7/431, 7/432, 7/433, 7/434, 7/435, 7/436, 7/437, 7/438, 7/439, and 7/440 (hereinafter referred to as “the suit properties”) which were leasehold from the Government of Kenya for a term of Ninety-Nine (99) years from 1st November 1990.
2. The Plaintiff averred that the Defendants unlawfully entered the suit properties without justifiable cause and notice, and through their agents, employees, officers or persons acting on their instructions unlawfully taken full and exclusive possession of the said properties. The Plaintiff pleaded the particulars of the Defendants’ trespass as including; unlawfully taking full and exclusive possession of the suit properties; forcefully, expressly and constructively evicting the Plaintiff and the Plaintiff’s tenants from the suit properties; fencing off and blocking the suit properties thereby denying the Plaintiff and its tenants access to their businesses and showrooms therein, and forcefully and unlawfully acquiring the suit properties without any notice or compensation. The Plaintiff averred that the properties registered as Kisumu Municipality/Block 7/432, 433, 434, 435, 436, 437, 438, 439, and 440 were developed with shops or showrooms (hereinafter referred to only as “the road frontage plots”). The Plaintiff averred that the road frontage plots were situated on the front of the main commercial and industrial road in the City of Kisumu known as Obote Road. The Plaintiff averred



- that the properties registered as Kisumu Municipality/Block/7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, and 431(hereinafter referred to as “the rear plots”) were off the said Obote Road and were at the rear of the shops and showrooms along Oginga Odinga Road. The Plaintiff averred that the rear plots were developed with go-downs each of which had a railway siding.
3. The Plaintiff averred that the properties registered as Kisumu Municipality Block 7/419, 420, 421, and 422 had incomplete developments (hereinafter referred to as “plots with incomplete structures”). The Plaintiff averred that on these plots, it had commenced the construction of a customised building for Crown Motors Group Limited to be used by the said company as a showroom, service centre, offices, and for associated services rendered by auto-dealers. The Plaintiff averred that it was agreed between the Plaintiff and Crown Motors Group Limited that Crown Motors Group Limited would be given partial possession of the building at the end of September 2019 and full possession by the end of November 2019 when the construction of the building was expected to be completed. The Plaintiff averred that the construction of the said customised building for Crown Motors Group Limited was at 70% completion level and had so far costed the Plaintiff about Kshs. 130,000,000/-.
 4. The Plaintiff averred that two (2) of the showrooms on Kisumu Municipality/Block 7/ 433 and 434 were at the time of the Defendants’ trespass undergoing reconstruction to modernise and improve their structural, aesthetic, and commercial value. The Plaintiff averred that four (4) of the road frontage plots were already developed with customised commercial buildings comprising of among others an automobile showroom, a service bay, and an office. The Plaintiff averred that at the time of the Defendants’ trespass, Kisumu Municipality Block 7/414 was occupied by a rent-paying tenant, Gordon Okayo t/a Kiscien Enterprises who was paying a monthly rent of Kshs. 48,916/- for an area measuring approximately 1550 square foot. The Plaintiff averred that this tenant was forced to vacate the property in September 2019 with an outstanding rent amounting to Kshs. 135,228/-. The Plaintiff averred that on Kisumu Municipality Block 7/414, it had lost a total rental income of Kshs. 978,320/- being rent from September 2019 to April 2021 (20 months).
 5. The Plaintiff averred that Kisumu Municipality Block 7/415 measured approximately 2110 square feet and was not leased due to the barrier and fence that was erected by the Defendants which hindered access to the property. The Plaintiff averred that it was losing Kshs. 168,800/- per month as rent at the market rate of Kshs. 80/- per square foot. The Plaintiff averred that it had lost a total rental income of Kshs. 3,376,000/- being rent that it would have earned from September 2019 to April 2021 (20 months) from the premises. The Plaintiff averred that at the time of the Defendants’ trespass, Kisumu Municipality Block 7/417 was occupied by a rent-paying tenant, Simon Omondi Ayaywa t/a Komosh General Plastics. The Plaintiff averred that this tenant was paying a rent of Kshs. 56,034/- (for 6 months), Kshs. 61,638/- (for 12 months) and Kshs. 67,802/- (for 2 months) for an area measuring approximately 2000 square feet. The Plaintiff averred that this tenant was forced to vacate the premises in September 2019 with outstanding rent amounting to Kshs. 64,994/- due to the Defendants’ acts of trespass aforesaid. The Plaintiff averred that it had lost a total rental income of Kshs. 1,211,464/-being rent that was due to be received from the tenant from September 2019 to April 2021 (20 months).
 6. The Plaintiff averred that at the time of the Defendants’ trespass, the properties, Kisumu Municipality Block 7/419, 420, 421 and 422 were to be occupied by a rent paying tenant, Crown Motors Group Ltd. which was to pay a rent of Kshs. 756,000/- (for 12 months) and Kshs. 801,360/- (for 6 months) for an area measuring approximately 16800square feet. The Plaintiff averred that it had lost a total rental income of Kshs. 13,880,160/- being rent from November 2019 to April 2021 (18 months) which it would have received from the tenant.
 7. The Plaintiff averred that the property, Kisumu Municipally Block 7/424 measuring approximately 1184 square feet was not leased due to the barrier and the fence that was erected by the Defendants



- which hindered access to the same. The Plaintiff averred that it was losing Kshs. 94,720/- per month being the rent that it would have received from the property at the market rate of Kshs.80/- per square foot. The Plaintiff averred that it had lost a total rental income of Kshs.1,894,400/- from September 2019 to April 2021 (20 months) on this property.
8. The Plaintiff averred that at the time of the Defendants' trespass, Kisumu Municipality Block 7/425 was occupied by a rent-paying tenant, Nyanza Trading Limited which was paying rent of Kshs. 38,288/- per month (for 9months) and Kshs. 40,202/- (for 11 months) for an area measuring approximately 1184 square feet. The Plaintiff averred that this tenant was forced to vacate the premises in September 2019 due to Defendants' said acts of trespass. The Plaintiff averred that it lost a total rental income of Kshs. 786,814/- from September 2019 to April 2021(20 months). The Plaintiff averred that at the time of the Defendants' trespass, Kisumu Municipality Block 7/426 was occupied by a tenant, Uniworld Collections which was paying the Plaintiff a monthly rent of Kshs. 123,276/- for an area measuring approximately 5,400 square feet. The Plaintiff averred that this tenant was also forced to vacate the premises in September 2019 with an outstanding rent of Kshs. 1,085,431/-. The Plaintiff averred that it lost a total rental income of Kshs. 2,465,520/- from September 2019 to April 2021 (20 months) on this property.
 9. The Plaintiff averred that its properties, Kisumu Municipality Block 7/429, 430 and 431 each measuring approximately 1356 square feet were not leased due to the blocked access caused by the barriers and fence that was erected by the Defendants. The Plaintiff averred that it had lost rent of Kshs. 108,480/- per month on each property making a total loss of rental income of Kshs. 6,508,800/- from September 2019 to April 2021(20 months).
 10. The Plaintiff averred that at the time of the Defendants' trespass, Kisumu Municipality Block 7/432 was occupied by Galaxy Paints & Coating Limited. The Plaintiff averred Galaxy Paints & Coating Limited was paying a monthly rent of Kshs. 186,345/- (for 9 months) and Kshs. 200,321/- (for 11 months) for an area measuring approximately 2400 square feet. The Plaintiff averred that like the others, this tenant was forced to vacate the premises in September 2019 with an outstanding rent amounting to Kshs.648,480/-. The Plaintiff averred that it had lost a total rental income of Kshs. 3,880,636/- from September 2019 to April 2021 (20 months) on this property.
 11. The Plaintiff averred that at the time of Defendants' trespass in September 2019, the properties, Kisumu Municipality Block 7/433 and 434 were under construction and the buildings under construction would have been ready for leasing from November 2019. The Plaintiff averred that the construction of the buildings on the two properties which measured approximately 2400 square feet each were not completed and leased due to lack of access occasioned by the barriers and fence that was erected by the Defendants. The Plaintiff averred that on each property it had lost a monthly rental income of Kshs.192,000/- at the rate of Kshs.80/- per square foot. The Plaintiff averred that it lost a total rental income of Kshs.6,912,000/- on the two properties from November 2019 to April 2021 (18 months).
 12. The Plaintiff averred that at the time of the Defendants' trespass in September 2019, Kisumu Municipality Block 7/437 was occupied by Henkel Polymer Company Limited which was paying a monthly rent of Kshs. 93,007/- (for 3months), Kshs. 100,448/- (for 12 months), and Kshs. 108,483/- (for 6 months) for an area measuring approximately 1250 square feet. The Plaintiff averred that this tenant was forced to vacate the premises in September 2019 with an outstanding rent amounting to Kshs. 1,300,105/-. The Plaintiff averred that it lost a total rental income of Kshs. 2,042.288/- from September 2019 to April 2021 (20 months) on this property.



13. The Plaintiff averred that at the time of Defendants' trespass in September 2019, Kisumu Municipality Block 7/439 was occupied by Amar Fabrics Limited which was paying a monthly rent of Kshs. 88,578/= for an area measuring approximately 1650 square feet. The Plaintiff averred that this tenant also vacated the premises in September 2019 with an outstanding rent amounting to Kshs. 4,027/- following the acts of trespass by the Defendants. The Plaintiff averred that it lost a total rental income of Kshs. 1,771,560/- from September 2019 to April 2021 (20 months) on this property.
14. The Plaintiff averred that at the time of the Defendants' trespass in September 2019, Kisumu Municipality Block 7/440 was occupied by Nyanza Trading Limited which was paying a monthly rent of Kshs. 76,577/- (for 2 months) and Kshs. 80,406/- (for 11 months) for an area measuring approximately 1650 square feet. The Plaintiff averred that this tenant also vacated the premises in September 2019 due to the Defendants' acts of trespass. The Plaintiff averred that it lost a total rental income of Kshs. 1,573,659/- from September 2019 to April 2021(20months) on this property.
15. The Plaintiff averred that the Defendants arbitrarily took over the Plaintiff's properties and denied the Plaintiff quiet possession and peaceful enjoyment of the same without invoking the procedure for compulsory acquisition as spelt out in *the Constitution* of Kenya 2010 and the *Land Act* 2012. The Plaintiff averred that when the Defendants encroached on the suit properties, the Plaintiff filed a suit against them in the Environment and Land Court of Kenya at Kisumu namely, Kisumu ELC Petition *No. 10 of 2019* (hereinafter referred to only as "the first suit"). The Plaintiff averred that the first suit between the parties was determined by the court in favour of the Plaintiff. The Plaintiff averred that the court held that the suit properties were private properties lawfully owned by the Plaintiff as the leasehold proprietor thereof. The Plaintiff averred that if the Defendants required the suit properties for public use, they should comply with the procedure for compulsory acquisition of land as provided in *the Constitution* of Kenya 2010 and the *Land Act* 2012.
16. The Plaintiff prayed for judgment against the Defendants for;
 - a) Special damages for the total outstanding rent lost at the time of the Defendants' trespass and the time the tenants vacated the premises amounting to Kshs.3,238,265/- as follows;

Plot No.	Rent lost
7/414	Kshs.135,228/-
7/417	Kshs.64,994/-
7/426	Kshs.1,085,431/-
7/432	Kshs.6484,80/-
7/437	Kshs.1,300,105/-
7/439	Kshs. 4,027/-
Total KSHS.3, 238,265/=	
 - b) Kshs. 63,695,138/- being the cost of remobilising the contractor to complete the work on Plot Nos. 7/419, 7/420,7/421,7/422,7/433 and 7/434.
 - c) Special damages for rental income lost from September 2019 to April 2021 as per the lease agreements in respect of the suit properties amounting to Kshs. 14,710,261/- made up as follows;

Plot Nos.	Rental income lost
-----------	--------------------



7/414 Kshs.978,320/-
7/417 Kshs.1,211, 464/-
7/425 Kshs.786,814/-
7/426 Kshs.2,465,520/-
7/432 Kshs.3,880,636/-
7/437 Kshs.2,042,288/-
7/439 Kshs.1,771,560/-
7/440 Kshs.1, 573,659/-
Total KSHS.14,710,261/-

- d) Special damages for rental income lost from September 2019 to April 2021 calculated at the market rate of Kshs. 80/- per square foot on the following properties;

Plot Nos. Rental income lost

7/415 Kshs. 3,376,000/-
7/424 Kshs. 1,894,400/-
7/429 Kshs. 2,169,600/-
7/430 Kshs.2, 169, 600/-
7/431 Kshs. 2,169,600/-
Total KSHS. 11,779,200/-

- e) Special damages for rental income lost from November 2019 to April 2021 on the premises which were under construction and due for completion and handover in October 2019. Lost Rental income for Plot Nos. 7/419,7/420, 7/421 and 7/422 calculated as per the lease agreements and Lost Rental income for Plot Nos. 7/433 and 7/434 calculated at the market rate of Kshs. 80/- per square foot as follows;

Plot Nos. Rental income lost

7/419,420,421 and 422 Kshs. 13,880,160/-
7/433 Kshs. 3,456,000/-
7/434 Kshs. 3,456,000/-
Total Kshs.20,792,160/=

- f) Interest on (a), (b), (c), (d) and (e) at market rate.

- i) 10% increment on monthly rent on (c), (d) and (e), starting May 2021 until the date of full and final settlement of the matter. Monthly rent subject to a 10% annual increment starting May 2021 are as follows;

Plot Nos. Monthly rent Add 10% Annual Increment

7/414 Kshs. 48,916/- Kshs.53,808/-
7/415 Kshs.168,800/- Kshs.185,680/-
7/417 Kshs.67,802/- Kshs. 74,582/-



7/419,420,421 and 422 Kshs.801,360/- Kshs.881,496/-

7/424 Kshs.94,720/- Kshs.104,192/-

7/425 Kshs.40,202/- Kshs.44,222/-

7/426 Kshs.123,276/- Kshs.135,604/-

7/429 Kshs.108,480/- Kshs.119,328/-

7/430 Kshs.108,480/- Kshs.119,328/-

7/431 Kshs.108,480/- Kshs.119,328/-

7/432 Kshs.200,321/- Kshs.220,353/-

7/433 Kshs.192,000/- Kshs.211,200/-

7/434 Kshs.192,000/- Kshs.211,200/-

7/437 Kshs.108,483/- Kshs.119,331/-

7/439 Kshs.88,578/- Kshs.97,436/-

7/440 Kshs.80,406/- Kshs.88,447/-

Total 10% increment on monthly rent Kshs. 2,785,535/-

- j) Cost of litigation incurred by the Plaintiff in defending suits or claims brought by the Plaintiff's former tenants (the particulars to be supplied) concerning any of the following properties, Kisumu Municipality Block 7/414, 7/415, 7/417, 7/419, 7/420, 7/421, 7/422, 7/424, 7/425, 7/426, 7/429, 7/430, 7/431, 7/432, 7/433, 7/434, 7/435, 7/436, 7/437, 7/438, 7/439, and 7/440.
- k) General damages for trespass.
- l) In the alternative and without prejudice to prayers (a),(b), (c), (d) (e),(f),(g),(h),(i),(j) and (k) above; Should the Court find that the suit properties are needed for public use, the Defendants be ordered to immediately comply (within such period as the court may deem reasonable) with relevant provisions of *the Constitution* of Kenya 2010 and the *Land Act* 2012 in acquiring and compensating the Plaintiff for the suit properties at the prevailing market value, and in particular ensure that the compensation is assessed, all relevant factors considered and payment thereof made promptly.
- m) Costs of this suit and interests thereon.
- n) Any other reliefs that this Honourable court may deem fit to grant.
17. The 1st Defendant entered appearance and filed a statement of defence on 15th July 2021 while the 2nd Defendant entered appearance and filed its statement of defence on 2nd September 2021. The 1st Defendant denied the allegations made against it in the plaint. The 1st Defendant averred that the court lacked jurisdiction to hear and determine the issues raised in the plaint as the said issues were directly and substantially raised in Kisumu ELC Petition *No 10 of 2019* (the first suit between the parties) between the same parties and were tried and determined in a judgment delivered on 11th February 2021. The 1st Defendant averred further that in the said first suit between the parties, the Plaintiff herein in paragraphs 29 to 36 of the petition, complained of acts of trespass, encroachment, denial of access and infringement of their property rights over the suit properties which the 1st Defendant claimed was the same cause of action raised herein.



18. The 1st Defendant averred that since the first suit between the parties concerned the same subject matter and was between the same parties, the Plaintiff herein, which was the petitioner in the first suit, ought to have included all the claims they purported to have over the said subject matter in the said suit for determination. The 1st Defendant averred that its position in the first suit was that the suit properties fell within a larger parcel of land owned by the 1st Defendant and further, that all the suit properties were held and occupied by the Plaintiff subject to leases granted by the 1st Defendant and for which the Plaintiff paid rent. The 1st Defendant averred that as it had pleaded in the first suit, the acts attributed to the 1st Defendant were carried out by the Government's Multi-Agency Unit which was tasked with the responsibility of reviving and rehabilitating the Kisumu Port. The 1st Defendant averred that it could not be held responsible for what was beyond its control. The 1st Defendant denied that it was liable for any loss or damage purportedly incurred by the Plaintiff. The 1st Defendant averred that the Plaintiff's suit was res judicata and that the jurisdiction of the court was limited to dismissing the same. The 1st Defendant denied that the Plaintiff was entitled to the prayers sought in the plaint. The 1st Defendant urged the court to dismiss the suit with costs.
19. In its defence to the Plaintiff's claim, the 2nd Defendant denied all the allegations made against it in the plaint and contended that it was a stranger to the same. The 2nd Defendant averred that if any fencing was done as claimed, the same was lawful since the suit properties were legitimately owned by the 1st Defendant. The 2nd Defendant prayed that the Plaintiff's suit be dismissed with costs.
20. At the trial, the Plaintiff called three witnesses. The Plaintiff's first witness was Suku Sherwin Elisha(PW1). PW1 adopted his witness statement dated 31st May 2021 as his evidence in chief and produced several documents in the Plaintiff's list and bundle of documents dated 31st May 2021 as exhibits. He produced in evidence a sketch map (P.EXH.2) which showed the physical location of the suit properties and how the Defendants blocked access to some of the properties. He stated that due to the blockade on Luangni Road, neither the Plaintiffs nor its tenants could access some of the suit properties. He stated that the blockade was in the form of a fence that blocked access to the said properties. He stated that the Plaintiff could not proceed with the construction works on Kisumu Municipality/Block 7/ 419, 420, 421, and 422 due to the blockade. He stated that the land parcels, Kisumu Municipality/Block 7/433 and 434 were also affected by the blockade. PW1 produced several documents as exhibits in proof of the existence of tenancy agreements between the Plaintiff and several tenants who were said to have been in occupation of the suit properties before the Defendants' acts of trespass.
21. PW1 stated that several tenants could not pay rent because their premises were inaccessible. He stated that the suit properties were valued by Chriscah Real Estate Ltd. He stated that the Plaintiff also engaged a quantity surveyor who assessed the lost rental income.
22. The Plaintiff's second witness was James Juma Absalom(PW2). PW2 told the court that he was a quantity surveyor and had practiced for 17 years from the time he was registered. He stated that he was approached by the Plaintiff in 2017 to do a project estimate and bill of quantities for it. The project involved the conversion of go-downs to showrooms. The project was to be undertaken on the back and in front of a road. The plots at the rear were land parcels, Kisumu Municipality Block 7/419, 420, 421 and 422 while the plots that had a road frontage were Kisumu Municipality Block 7/433 and 434. He stated that he prepared a bill of quantities and gave estimates for budgeting. He stated that the Plaintiff thereafter got a contractor, Shiloah Investments which priced the works, an architect Reminder Singh Ubhi, and a structural and civil engineer, Mangat. He stated that the bill of quantities is normally a bulky document and that in his report he had provided only a summary of the same and the costings.



23. PW2 stated that the two projects were to cost a total sum of Kshs. 318,475,690/-. He stated that the contractor and the Plaintiff agreed upon this cost. He stated that the work was to commence on 31st October 2018 and was scheduled to be completed on 30th November 2019. He stated that the agreement the parties had entered into had a provision for penalties for delay as there were costs involved in such an event such as insurance and regulatory approval fees. PW2 stated that the term remobilisation meant the revival of a project that had stalled. He stated that it involved putting together facilities and necessary regulatory approvals for the project to re-start. He stated that the project in this case came to a halt because the contractor and the developer were denied access to the site by the 1st Defendant which fenced off the area partially and put a gate that was manned by its security personnel. He stated that the said fence and gate were removed by the 1st Defendant between October and November 2022. He stated that before the removal, nothing was going on at the site.
25. PW2 explained that abortive work was work that had been done but had to be redone and included material that deteriorated and could not be used. He stated that the total cost of the abortive or repeat works was Kshs. 5,849,744/-. He stated that the contractor calculated loss of profits on incomplete work and retention up to 19th July 2022. He stated that this would require updating since the loss was continuing. He stated that the developer also had a claim. He stated that the fluctuation cost was computed from the cost index provided by K.N.B.S. He stated that the fluctuation was costed up to the end of 2021 and came to a total of Kshs. 4,256,318/86.
26. PW2 stated that the consultants also raised a claim. He stated that the consultants were the structural engineer, the architect and the quantity surveyor. He stated that this claim was for additional work. PW2 stated that there were also claims related to regulatory compliance, insurance and bonds. He stated that the prices used were obtained from the regulatory bodies and amounted to Kshs. 2,169,374/-. PW2 stated that the Plaintiff had to pay Kshs. 177,657,719.40 to complete the works. He stated that if the cost of the pending works was removed, the costs that the plaintiff had to incur over and above what it had budgeted for was Kshs. 63,700,201.39. He stated that what was being claimed by the Plaintiff in paragraph (a) (i) of the prayers as Kshs. 63,695,138/- was the cost of remobilisation as at July 2022. He stated that the costs would increase if the same were worked out to date due to changes in prices over time.
27. He stated that he would not advise the developer to resume work because there was a pending appeal to the Court of Appeal by the Defendants against the decision of this court that found that the suit properties were owned by the Plaintiff. He stated that even if the development was completed, the potential tenants would be scared. PW2 produced his report by Apollo Associates dated 18th March 2022 as PEXH. 7.
28. On examination by the court, PW2 stated that from his report, abortive/repeat works, contractors' remobilisation claims, allowance for fluctuations, additional consultancy and regulatory fees, compliance, insurance, and bond claims were all contingent costs which depended on whether or not the project would resume. He stated that his costings were prepared on the assumption that the project would resume around July 2023.
29. The Plaintiff's third witness was Nobert Kisanya(PW3). PW3 told the court that he was a property valuer working for Chrisca Real Estates. He stated that the Plaintiff instructed Chrisca Real Estates to assess the market values of the properties they had on Oginga Odinga Street and Obote Road. He stated that Oginga Odinga Street and Obote Road were the prime business/commercial streets in Kisumu town. He stated that there was always excess demand for premises in these locations. He stated that the premises on these streets always attracted higher rents compared to the other streets. He stated that the rents in Kisumu Central Business District for a standard building would retail at around Kshs. 100/-



- per square foot per month. He stated that he visited the Plaintiff's premises on 26th March 2021 and carried out the inspection of the same. He stated that he prepared reports dated 8th April 2021 which he produced as exhibits as P.EXH. 6 (a) to P.EXH. 6 (o).
30. He stated that they entered the premises with some difficulty. He stated that most of the buildings were complete and some were occupied. He stated that some were incomplete while in some, the tenants had left. He stated that they documented all their observations and the status of occupation of all the properties. He stated that they assessed the rent for the premises that were off and at the back of Obote Road at between Kshs. 60/- to Kshs. 80/- per square foot per month. He stated that the premises which were on Obote Road would fetch a rent of about Kshs. 100/- per square foot per month. He stated that the rental income that was being claimed by the Plaintiff at Kshs. 80/- per square foot per month was reasonable. He stated that the barricading of the premises discouraged tenants.
 31. In examination by the Court, PW3 stated that he was not a registered valuer with ISK. He stated that a valuer had to work with a registered valuer for some time before he gets registered.
 32. The Plaintiff's last witness was Pius Isaiah Khaoya(PW4). PW4 told the court that he was a registered property valuer and was practicing in the name of Chrisca Real Estates. He stated that he had two valuers who worked under him, Nobert Kisanyi (PW3) and Stephen Mathai. He stated that PW3 had worked with him for over 20 years. He stated that he signed all the reports that were produced by PW3 and that he visited the properties together with PW3. He stated that he co-authored the reports and signed the same. He stated that he had practised in Kisumu for several years. He stated that he was aware of the rental income for properties in Kisumu town. He stated that a shop on Obote Road would retail at about Kshs. 100/- per square foot per month while the shops at the back of the road would attract a rent of Kshs. 60/- per square foot per month. He stated that they entered the premises and carried out the measurements.
 33. The 1st Defendant called one witness, Justine Omoke (DW1) while the 2nd Defendant closed its case without calling evidence. DW1 stated that he was working with the 1st Defendant as assistant estate and valuation manager. He stated that he was a licensed valuer and a registered estate agent. He stated that he had 20 years experience in property valuation and management in the private and public sectors. He stated that he prepared a valuation report dated 21st May 2021 in respect of the suit properties which was filed in court on 18th May 2021. He stated that he visited the site of the properties but did not get into the premises as he did not get permission from the owners. He stated that he valued the land and not the developments since he did not get access to the premises. He stated that the premises were under the control of the Plaintiff which had locked up the same. He stated that the 1st Defendant did not own the suit properties and had no interest in the same. He stated that the 1st Defendant was also not interested in acquiring the suit properties. He stated that the present case was filed after the conclusion of another court case. He stated that the 1st Defendant valued the plots because the 1st Defendant had an interest in the plots. He stated that after the decision of the court in the first suit on the ownership of the suit properties, the 1st Defendant ceased to have any interest in the properties. DW1 produced his valuation report as D.EXH.1.
 34. On cross-examination by Ms. Masaka, DW1 stated that before the conclusion of *Petition No. 10 of 2019* (the first suit), the 1st Defendant had partially taken possession of the suit properties. He stated that the 1st Defendant had placed a manned barrier that blocked access to some of the suit properties. He stated that there was however no eviction of the Plaintiff from the properties. He stated that what was put in place by the 1st Defendant was just the said barrier which restricted access to some of the properties. He stated that after the determination of the first case, the said barrier was removed. He stated further that the 1st Defendant did not use any of the buildings on the suit properties.



35. In re-examination by Ms. Moraa, DW1 stated that by stating that the 1st Defendant took partial possession of the suit properties, he meant that the Plaintiff could access the properties fronting Obote Road as their access was not blocked but were barred from accessing the properties which were behind the buildings on Obote Road. He stated that the Plaintiff had no alternative access from Obote Road. He stated that when he visited the suit properties, the businesses on Obote Road were running as there was access to the same. He stated that the Plaintiff could access the properties in front of Obote Road while the rest were inaccessible.
36. After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed submissions dated 15th December 2023. The 1st Defendant filed submissions dated 21st February 2024 while the 2nd Defendant filed submissions dated 8th February 2024.

The Plaintiff's Submissions

37. The Plaintiff submitted that the Defendants had forcefully and unlawfully taken possession of the Plaintiff's properties. The Plaintiff cited *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* [2013] eKLR, in which the court held that once trespass is proved, the Plaintiff is entitled to general damages and that the Plaintiff does not need to prove that he has suffered any damage. The Plaintiff also cited *Halsbury's Laws of England 4th Edition, Volume 45* and *Philip Ayaya Aluchio v. Crispinus Ngayo* [2014] eKLR on the computation of damages payable for trespass.
38. The Plaintiff submitted that it had satisfied the court through evidence that the suit properties were private properties and as such it was entitled to the remedies sought together with costs of the suit as prayed in the plaint. The Plaintiff submitted that the acts of the Defendants were tantamount to constructive eviction of the plaintiff and its tenants from the suit properties. The Plaintiff submitted that as a result of the actions of the Defendants, the Plaintiff was unable to utilise and enjoy quiet and peaceful possession of its properties. The Plaintiff submitted that its tenants who were affected by the Defendants' actions determined their leases and left the suit properties with rent arrears. The Plaintiff submitted that prospective tenants could not also take up space on the suit properties as they were afraid of the Defendants locking up their businesses and denying them access to the same. The Plaintiff submitted that the potential tenants were also afraid that the Defendants could demolish the premises with their goods inside and cause them loss.
39. The Plaintiff submitted that the 2nd Defendant filed a defence but failed to call a witness. The Plaintiff submitted that the 2nd defendant failed to adduce any evidence to rebut the Plaintiff's claim. The Plaintiff cited *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] eKLR and submitted that the evidence adduced by the Plaintiff stood uncontroverted.
40. The Plaintiff submitted that it was not disputed that the Defendants denied it access to the suit properties. The Plaintiff submitted that despite the court giving a mandatory injunction for possession it took two contempt of court sentences against the Defendants before they granted the Plaintiff access to the suit properties. The Plaintiff submitted that Defendants being government entities owed the Plaintiff a duty to uphold the law and that their actions of cordoning off the suit properties were extra-judicial and thus a breach of that duty. The Plaintiff submitted that all the losses suffered by the Plaintiff flowed from that breach and thus the Defendants were liable for the damages suffered by the Plaintiff.
41. On the issue of res judicata raised by the Defendants, the Plaintiff submitted that although the 1st Defendant pleaded the issue in its defence, no evidence was led by the 1st Defendant in relation thereto. The Plaintiff submitted that the prayers that it sought in the *ELC Petition No. 10 of 2019* (the first suit) concerned the ownership of the suit properties. The Plaintiff submitted that the suit before the court was for damages and as such it was not res judicata as damages were not one of the issues raised



for determination in the ELC Petition [No.10 of 2019](#) (the first suit). The issue of ownership takes precedence over damages. The Plaintiff submitted that the evidence that it adduced in proof of the damages it had suffered was not challenged by the Defendants. The Plaintiff submitted that it had proved its claim for damages on a balance of probabilities. The Plaintiff submitted that it had also proved its claim for lost income based on the leases that existed and those that were in place for the future rents. The Plaintiff submitted that it should be placed in the same position it would have been but for the unlawful conduct of the Defendants. The Plaintiff submitted that the rental income lost and the opportunities denied should be compensated as claimed in the plaint. The Plaintiff urged the court to award it the damages claimed in the plaint as they were all attributable directly to the actions of the Defendants.

The 1st Defendant's Submissions

42. The first point argued by the 1st Defendant in its submissions is that of res judicata. The 1st Defendant submitted that there was a previous suit between the parties in which the cause of action was trespass on the suit properties which was heard and determined in Kisumu ELC Petition [10 of 2019](#) (the first suit). The 1st Defendant submitted that the Plaintiff herein which was the petitioner in the first suit had the option of seeking an order for compensation under Article 23(3)(e) of [the Constitution](#) but chose not to do so even though it raised issues of losses occasioned to it as a result of the trespass. The 1st Defendant cited *Moi Education Centre Co. Ltd. v. William Musembi & 16 others* [2017] eKLR and *Gitobu Imanyara & 2 others v. AG* [2016] eKLR in support of this submission.
43. The 1st Defendant submitted that pursuing the issue of trespass in a new suit while the same had been raised and determined in the previous suit constituted res judicata within the meaning of section 7 of the [Civil Procedure Act](#). The 1st Defendant urged the court to strike out and dismiss the Plaintiff's suit as an abuse of the court process. The 1st Defendant further submitted that should the court proceed to entertain the claim; the Plaintiff was not entitled to general and special damages for failure to demonstrate any losses it suffered as a direct consequence of the trespass. In support of this submission, the 1st Defendant cited *Kenya Power and Lighting Company Limited v. Phillip A M Kimondiu* [2018] eKLR.
44. The 1st Defendant submitted that the court should find that subletting the suit properties without the requisite consent of the Government rendered the lease transactions involving the suit properties illegal and as such voidable. The 1st Defendant submitted that the occupation of the premises by supposed tenants was also founded on an illegality incapable of being sanctioned by the court. The 1st Defendant urged the court to find that the Plaintiff was not entitled to the damages sought. The 1st Defendant submitted further that Section 43 as read with Section 54 of the [Land Registration Act 2012](#) makes it mandatory for all dispositions in land within the meaning of Section 2 of the [Land Act 2012](#) to be registered to give effect to the said dispositions. The 1st Defendant submitted that the evidence adduced by the Plaintiff's witnesses indicated that there were no notable registration of the dispositions as alleged by the plaintiff. The 1st Defendant submitted further that there were no demolitions of structures on the suit properties or evictions and that the trespass involved merely the placement of a fence and/or barrier on part of the suit properties. The 1st Defendant submitted that trespass did not occasion damage as alleged.
45. For Kisumu Municipality Block 7/414 that was said to have been leased to Gordon Okayo t/a Kiscien Enterprises, the 1st Defendant submitted that the Plaintiff produced in evidence a simple agreement for occupation license for a duration of 1 year commencing 1st March 2019. The 1st Defendant submitted that the agreement did not indicate the property number. The 1st Defendant submitted that implying



- that the agreement related to Kisumu Municipality Block 7/414 would amount to inviting the court to vary the same but also constitute the introduction of extrinsic evidence in violation of the parole evidence rule. The 1st Defendant submitted further that the said agreement was void for lack of execution on the part of the Plaintiff as the same appears to have been executed by Grandways Venture Limited when the said entity was not indicated as the licensor nor did it execute the same as an agent of the Plaintiff. The Plaintiff also submitted that there were no receipts and/or invoices produced to support the claim for loss of rental income.
46. For Kisumu Municipality Block 7/ 415, 424, 429, 430, 431, 433 and 434, the 1st Defendant submitted that there was no proof that the same were ever leased before September 2019 or even had any prospects of being leased before September 2019. The 1st Defendant submitted further that there was nothing before the court which could form a basis for the rent claimed at the rate of Kshs. 80 per square foot. The 1st Defendant submitted that there is no proof that the premises would be let out at the rates alleged. The 1st Defendant submitted that the Plaintiff had failed to demonstrate the alleged loss. The 1st Defendant submitted that the alleged loss (if any) could not be said to have arisen as a result of the trespass. The 1st Defendant submitted that the Plaintiff was not entitled to prayers (c), (d), (e), (f) in the plaint. The 1st Defendant submitted that if the same were to be granted, it would amount to inviting the court to dictate terms of the agreements between the Plaintiff and unknown tenants.
47. For Kisumu Municipality Block 7/417 said to have been leased to Simon Omondi Ayaywa t/a Komosh General Plastics, the 1st Defendant submitted that the Plaintiff produced a letter of offer dated 3rd December 2018 claiming that the lease was for 3 years commencing 1st March 2019. The 1st Defendant submitted that the letter did not contain the property number like the purported license in respect of Kisumu Municipality Block 7/ 414 that was said to have been issued to Gordon Okayo t/a Kiscien Enterprises. The 1st Defendant submitted further that the purported agreement was void for lack of execution on the part of the supposed tenant as there was no evidence that one, Christopher Omore Wairoma was duly authorised to execute the agreement on behalf of Simon Omondi. The 1st Defendants submitted further that there were no receipts in support of the claim for loss of rental income nor invoices in support of the claim for outstanding rent of Kshs 64,994/- claimed in the plaint.
48. For Kisumu Municipality Block 7/ 419, 420, 421 and 422 claimed to have been leased to Crown Motors Group, the 1st Defendant submitted that the properties were not fully developed and that the plaintiff produced in evidence a sub-lease for a term of 6 years commencing on 1st February 2019 until 29th February 2024. The 1st Defendant submitted that the sublease like the others mentioned earlier did not indicate the property number. The 1st Defendant submitted further that there was also no proof of occupation of the properties prior to September 2019 and/or payment of rent provided in the said agreement as no receipts were produced to that effect.
49. The 1st Defendant submitted that the lease between the Plaintiff and the said M/s Crown Motors dated 9th October 2018 was prepared for these proceedings and that that fact was clear from the report produced by PW2 in which it was stated that the development works were to commence sometime in October 2018. The 1st Defendant urged the court not to rely on the lease. The 1st Defendant submitted that in the absence of proof of developments, the court was not in a position to find that the Plaintiff had suffered a loss to the tune of Kshs. 13,880,160/- as alleged. The 1st Defendant submitted further that by inviting the court to award the 10% annual rent increment of Kshs 881,496/- as from May 2021, the court was being invited to vary the agreement when it was not privy to the same.
50. For Kisumu Municipality Block 7/425 and 440 said to have been leased to Nyanza Trading Limited, the 1st Defendant submitted that there were no agreements for lease before the court to demonstrate that



Nyanza Trading Limited was a tenant of the Plaintiff on the premises. The 1st Defendant submitted that there were no receipts demonstrating payment of rent to support the claim for loss of rental income. The 1st Defendant submitted that a perusal of the letter dated 17th June 2019 showed that the Plaintiff wrote to the said Nyanza Trading Limited seeking to renew the lease for 2 years as the agreement was expiring on 30th June 2019. The 1st Defendant submitted that there was also no proof that money had changed hands before and/or after the proposal for renewal of the lease made by the Plaintiff in June 2019. The 1st Defendant submitted that moreover, in the absence of agreements for that purpose, the court could not award increments of rent as claimed.

51. With regard to Kisumu Municipality Block 7/426 said to have been leased to Uniworld Collections, the 1st Defendant submitted that the Plaintiff produced in evidence a letter of offer dated 13th May 2019 claiming that the lease was being renewed for 1 year commencing 1st May 2019 until 30th April 2020. The Plaintiff submitted that the letter did not indicate the property number. The 1st Defendant submitted further that there were also no receipts and/or invoices in support of the claim for loss of rental income claimed in the sum of Kshs 1,085,431/-. The 1st Defendant submitted that the invoices referred to in the statement of account were not produced in evidence. The 1st Defendant submitted that it was important for the court to look at the invoices in light of the contradiction in the outstanding rent as claimed and as indicated in the statement of account. The 1st Defendant submitted further that with respect to the outstanding rent (if any) claimed in the sum of Kshs. 1,085,431/- the court should be guided by clause 7 of the agreement which stated that rent was paid quarterly. The 1st Defendant submitted that as at 2nd September 2019, trespass had not occurred. The 1st Defendant submitted that according to the judgment in the first suit, the trespass occurred on or about 5th September 2019 which was way past the date when the said Uniworld was required to have cleared the rent. The 1st Defendant submitted that the Defendants could not be blamed for the alleged nonpayment of rent by the tenant. The 1st Defendant submitted that guided by clauses 4 and 7 of the agreement between the Plaintiff and the tenant, the Plaintiff was not entitled to loss of rental income as claimed in prayer (b) of the plaint as there was no renewal clause in the agreement. The 1st Defendant submitted that moreover, the court could not award the 10% annual rent increment of Kshs 135,604/- as from May 2021 as it was not provided for in the agreement.
52. With regard to Kisumu Municipality/Block 7/432 said to have been leased to Galaxy Paints & Coating Limited, the 1st Defendant submitted that the Plaintiff produced a letter of offer dated 3rd November 2018 and claimed that the lease with Galaxy Paints & Coating Limited was for 6 years commencing on 1st November 2018 until 31st October 2024. The 1st Defendant submitted that the purported lease did not indicate the property number. The 1st Defendant submitted further that the court could not award the 10% annual increment claimed by the Plaintiff in the sum of Kshs 220,353/- with effect from May 2021 as that would amount to the court varying the purported agreement when it was not privy to the same.
53. Concerning Kisumu Municipality/Block 7/437 said to have been leased to Henkel Polymer Company Limited, the 1st Defendant submitted that the Plaintiff produced a letter of offer dated 3rd November 2018 and claimed that the premises were leased for a term of 6 years with effect from 1st November 2018 until 31st October 2024. The 1st Defendant submitted that the letter of offer did not indicate the property number. The 1st Defendant submitted further that the purported lease was invalid for lack of execution and consideration. The 1st Defendant submitted further that there were also no receipts demonstrating payment of rent in support for the claim for loss of rental income. The 1st Defendant submitted that the statement of accounts produced referred to Henkel Chemicals and there was no



evidence of any connection between Henkel Chemicals and Henkel Polymer which were two different entities.

54. The 1st Defendant submitted further that the said statements of account do not support the alleged outstanding rent of Kshs. 1,300,105/-. The 1st Defendant submitted further that in the absence of an agreement to support the claim, the court cannot award the 10% annual rent increment of Kshs. 119,331/- from May 2021 claimed by the Plaintiff. The 1st Defendant submitted that the rent increment sought in prayer (f) of the plaint contradicted the terms of the letter of offer dated 3rd November 2018 particularly clause 7 thereof.
55. As concerns Kisumu Municipality Block 7/439 said to have been leased to Amar Fabrics Limited, the 1st Defendant submitted that the produced a letter of offer dated 11th March 2014 provided for a lease for 6 years from 1st May 2014 until 30th April 2020. The 1st Defendant submitted that there were no receipts placed before the court in proof of payment of rent which could support the claim for outstanding rent of Kshs. 4,027/-. The 1st Defendant submitted that the statements of account produced in court referred to receipts which were not before the court and therefore it was questionable where the information in the statements was derived from. The 1st Defendant submitted further that with respect to the outstanding rent (if any), the statement of accounts showed that the invoice was allegedly issued on 2nd September 2019 before the trespass had occurred. The 1st Defendant submitted that according to the judgment in the first suit, the trespass occurred on or about 5th September 2019 which was past the due date when the Amar Fabrics was required to have paid the rent. The 1st Defendant submitted that the Defendants could not be blamed for the failure of the said company to pay rent. The 1st Defendant submitted further that the 10% annual rent increment of Kshs 97,436/- from May 2021 claimed by the Plaintiff had no basis as the court's role was limited to construing contracts and not varying them.
56. As concerns the claim for remobilising the contractor to complete the works on Kisumu Municipality Block 7/419, 420, 421, 422, 433 and 434, the 1st Defendant submitted that the same were not in the nature of special damages as the money claimed had not been spent by the Plaintiff but were money which the Plaintiff claimed it would incur in remobilising the contractor. The 1st Defendant submitted that the Plaintiff engaged M/s Shiloah Investments Ltd. (hereinafter M/s Shiloah) through a contract dated 20th September 2018 to undertake the project at a cost Kshs. 318,475,690/-. The 1st Defendant submitted that the contract price was based on a priced bill of quantities drawn by Apollo Associates in 2017 which PW2 confirmed was not produced in court. The 1st Defendant submitted that the report produced by PW2 also referred to drawings and design works which were supposedly prepared by the architects and design consultants as well as a structural engineer. The 1st Defendant submitted that these were also not produced before the court for perusal by the court.
60. The 1st Defendant submitted further that the letter dated 17th March 2022 by MIBP Consulting Engineers and the fee note by Ravinder Singh Ubhi dated 17th March 2022 did not demonstrate qualifications of the said persons as professional engineers or architects as stipulated under the Engineers Registration Act or the *Architects and Quantity Surveyors Act* respectively. The 1st Defendant submitted that the contractor had expressed willingness to resume works which included repetitive works. The 1st Defendant submitted that a perusal of clause 3.8 of the contract showed the nature of work that was supposed to be carried out by the contractor, M/s Shiloah. The 1st Defendant submitted that the court could not ascertain the status of M/s Shiloah as there was no definitive proof that it was a duly registered contractor as required under sections 15 and 17 of the *National Construction Authority Act*. The 1st Defendant submitted further that the license to carry out business issued by the National Construction Authority (hereinafter referred to as "NCA") was issued on 16th August 2018 for a period of one (1) year. The 1st Defendant submitted that there was nothing before the court to show that the



license was renewed upon expiry on or about 15th August 2019. The 1st Defendant submitted further that the development by the Plaintiff required approvals and that there was no evidence that the same were obtained. The 1st Defendant submitted that in the absence of approved building plans, there could not have been any lawful developments being undertaken by the Plaintiff on the suit properties. The 1st Defendant submitted that there was also no proof that the developments that were being undertaken were 70% complete to justify the claim for pending and repetitive works. The 1st Defendant submitted that if indeed the works were 70% completed as alleged, the Plaintiff would have availed receipts by M/s Shiloah as per the payment schedule in clause 3.8 of the contract. The 1st Defendant submitted that the report by PW2 had instead contained a letter drawn by M/s Shiloah dated 16th March 2022 claiming Kshs 43,159,765/-. The 1st Defendant submitted that a perusal of the claim alongside the provision of clause 3.8 of the contract, it is hard to determine the level that the developments on the suit properties had reached. The 1st Defendant submitted that the claim by M/s Shiloah to the tune of Kshs 43,159,765/- was said to be in respect of expenses incurred and/or losses occasioned during the period up to 19th July 2022. The 1st Defendant submitted that the claim was not legally tenable in the absence of a renewed NCA license (which had expired on 15th August 2019) to enable M/s Shiloah to continue with works after 16th August 2019. The 1st Defendant submitted that failure by M/s Shiloah to renew the license could not be attributed to the Defendants since the trespass occurred sometime in September 2019.

61. The 1st Defendant submitted that the claims by M/s Shiloah which included interest and loss of profit were not contemplated in the contract and should be disallowed. The 1st Defendant submitted further that there were no annual returns or financial records by M/s Shiloah placed before the court to support the loss of profit claim.
62. The 1st Defendant submitted that with respect to the value of pending and repetitive works, the court was not shown the bill of quantities which PW2 stated was over 100 pages to ascertain the prices referred to in P.EXH.7 (at pages 13-15). The 1st Defendant submitted that the court was not in a position to ascertain that the bill of quantities was indeed prepared by the firm of Apollo & Associates as alleged. The 1st Defendant submitted further that the documentation from the structural engineer would have enabled the court to come to an informed finding on the extent of the works alleged to be pending and/or repetitive works seeing that the Plaintiff paid for structural plans. The 1st Defendant submitted further that there was no proof of the existence of the consultants and the works they were said to have undertaken such as the design works and/or structural plans to justify the fee notes raised in support of the claims by the Plaintiff. The 1st Defendant submitted that, furthermore, the said fee notes did not capture the suit properties. The 1st Defendant submitted that for the fee note raised by the quantity surveyor, he disclosed a fee deposit demand dated 25th July 2017 of Kshs 1,015,000/- raised by Apollo Associates. The 1st Defendant submitted that there was no proof of the existence of this firm and that PW2 had a practicing certificate for the 2017.
63. The 1st Defendant submitted that with respect to the claim for regulatory compliance expenses, the 1st Defendant submitted that the claim relating to insurance and bonds was not legally tenable in the absence of proof that M/s Shiloah was a duly registered contractor as required under Sections 15 and 17 of the [National Construction Authority Act](#). The 1st Defendant submitted that there was no proof that applying for registration would cost Kshs 171,000/-. The 1st Defendant reiterated that there were no building and/or structural plans or design works which would have triggered the commencement clause 2.4 and there was no proof that developments were at 70% stage of completion. The 1st Defendant submitted that there was also no proof of the existence of the 120 workmen said to have been engaged nor their employment contracts to support the claim for health insurance covers.



The 1st Defendant submitted that the documents issued to M/s Shiloah sometime in 2017 by First Assurance and the Ministry of Health had no connection with the contract dated 20th September 2018 which had no retrospective effect. The 1st Defendant submitted that the documents related to other projects other than the one in dispute. The 1st Defendant submitted further that in the absence of a valid NCA license and/or proof of extension of contractual period in accordance with clause 3.5, the receipt dated 1st March 2022 by Anyuro Engineering Works for Kshs 30,000/- should be disregarded as the same did not indicate any relation to the suit properties and/or the Plaintiff.

64. As concerns, the costs of litigation, the 1st Defendant submitted that there were no pending suits and furthermore, the prayer constituted special damages and ought to have been specifically pleaded and strictly proved which was not done. As concerns, compulsory acquisition, the 1st Defendant submitted that the suit properties were not the subject of compulsory acquisition and as such the court should decline the Plaintiff's alternative prayer. In conclusion, the 1st Defendant urged the court to dismiss the Plaintiff's suit with costs.

The 2nd Defendant's Submissions

65. The 2nd Defendant submitted that the Plaintiff's claim did not concern the 2nd Defendant. The 2nd Defendant submitted that all the evidence adduced in court clearly showed that it was only the 1st Defendant which was claiming the suit properties. The 2nd Defendant submitted that the other agencies such as the National Youth Service (NYS) and the Police were simply providing security at the request of the 1st Defendant. The 2nd Defendant submitted that a messenger could not be penalised for following orders given by the sender. The 2nd Defendant submitted that the 1st Defendant was a legal entity with a semi-autonomous nature and as such the 2nd Defendant could not shoulder liability on its behalf. In support of this submission, the 2nd Defendant relied on *Securicor Kenya Ltd. v. Kyumba Holdings Ltd.* [2005] eKLR, and *Joseph Wabukho Mbayi v. Frida Lwile Onyango* [2019] eKLR.
66. The 2nd Defendant submitted that the Plaintiff in its pleadings and submissions acknowledged that the acts of trespass it was complaining about were committed by the agents, servants, employees, officers and/or persons acting on instructions given by the Defendants, particularly the 1st Defendant. The 2nd Defendant submitted that although the fence that blocked access to the Plaintiff's properties was placed by a multiagency team comprised of the NYS and other agencies, the multiagency team was only acting as agents of the 1st Defendant. The 2nd Defendant submitted that the 2nd Defendant acted on the belief that the suit properties legitimately belonged to the 1st Defendant. The 2nd Defendant submitted that it could not be faulted for acting as per instructions given by the 1st Defendant which they believed was the owner of that suit properties.
67. The 2nd Defendant submitted that it was clear from the evidence adduced that the Plaintiff's buildings on the suit properties were not demolished save that due to the barrier that was placed by the 1st Defendant, the Plaintiff lost some financial returns. The 2nd Defendant submitted that what was lost by the Plaintiff if any, was special damages which must be specifically pleaded and proved. The 2nd Defendant submitted that each claim must have receipts and must have been specifically pleaded. The 2nd Defendant submitted that the Plaintiff failed to specifically plead and prove its claim for special damages. In support of these submissions, the 2nd Defendant cited *Zacharia Waweru Thumbi v. Samuel Njoroge Thuku* [2006] eKLR and *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at pages 717 and 721.
68. The 2nd Defendant submitted that a party claiming special damages must show that it actually suffered the specific injury before compensation is permitted. The 2nd Defendant submitted that the courts have



insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. The 2nd Defendant submitted that in this regard, the courts have held that an invoice is not proof of payment and that only a receipt meets the requirement. In support of this submission, the 2nd Defendant relied on Total (Kenya) Limited Formerly Caltex Oil (Kenya) Limited v. Janevams Limited [2015] eKLR. The 2nd Defendant submitted that the Plaintiff had not provided any receipts to support and/or prove its claim for special damages. The 2nd Defendant urged the court to find that the Plaintiff's case against the 2nd Defendant lacked merit and should be dismissed with costs.

Analysis and determination

69. I have considered the pleadings, the evidence and the submissions by the parties. In my view, the issues arising for determination in this suit are the following;
- a. Whether the Plaintiff's suit is res judicata;
 - b. Whether the Defendants trespassed on the suit properties;
 - c. Whether the Plaintiff is entitled to the special damages claimed;
 - d. Whether the Plaintiff is entitled to the general damages claimed;
 - e. Whether the Plaintiff is entitled to the cost of litigation claimed;
 - f. Whether the Plaintiff is entitled to the alternative prayer for the compulsory acquisition of the suit properties by the Defendants; and
 - g. Who is liable for the costs of the suit?

Whether the Plaintiff's suit is res judicata;

70. The doctrine of res judicata is enacted in Section 7 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

In Black's Law Dictionary 10th Edition “res judicata” is defined as:

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

71. In Christopher Kenyariri v. Salama Beach [2017] eKLR, the court stated as follows on res judicata:

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit;
- b) Former suit between same parties or parties under whom they or any of them claim;
- c) Those parties are litigating under the same title;



- d) The issue was heard and finally determined; and
- e) The court was competent to try the subsequent suit in which the issue is raised.”

72. In *E.T v. Attorney General & Another* [2012] eKLR the court stated that:

“The Courts must always be vigilant to guard litigants evading the doctrine of Res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”

77. In *Omondi v. National Bank of Kenya Limited and Others* [2001] EA 177 the Court stated that:

“Parties cannot evade the doctrine of Res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments.”

78. It is not disputed that there was a previous suit between the parties herein namely; *Kisumu ELC Petition No. 10 of 2019*, *Katangi Developers Limited v. The Attorney General and Kenya Railways Corporation* (the first suit). It is also not disputed that the first suit involved the same properties which are in dispute in this suit and that the suit was heard and determined by a court of competent jurisdiction. What is disputed is whether the issues that were determined in the first suit are the same issues that have been brought up for determination by the Plaintiff in the present suit, and if the issues are not the same, whether the issues raised by the Plaintiff in this suit could have been raised and determined by the court in the first suit. I have perused the court file for the first suit. The first suit was brought by the Plaintiff by way of a constitutional petition to challenge the constitutionality of the Defendants’ action of arbitrarily depriving the Plaintiff of the suit properties. In the judgment delivered in the first suit on 11th February 2021, the court stated as follows in part:

“I do find that the act of cancelling the petitioners title without hearing the petitioner was unconstitutional and in breach of Article 47 and 50 of *the constitution* of Kenya 2010. The right to be heard is cardinal and cannot be wished away by brute and impunity.

79. The Act of forcibly taking the petitioners property by registering the same in the 2nd respondents name was in breach of the provisions of Article 40 of *the constitution* of Kenya 2010.

80. The upshot of the above is that the petition is well founded on Articles 40, 47 and 50 of *the Constitution* of Kenya 2010. It is even worrying that Respondents have caused the parcel of land to be included in the giant parcel of land that was registered in the title of the 2nd Respondent. It is worrying that Kenyans deliberated so hard to enact a constitution that has been billed as the best in the world only for government agencies to disregard it and to act with impunity against its citizens.”

81. The reliefs sought by the Plaintiff in the first suit were declaratory. The Plaintiff never sought damages for breach of its constitutional rights or for trespass. The issue of whether or not the Defendants herein had trespassed on the suit properties and whether or not the Plaintiff herein was entitled to damages for such trespass was not raised and determined in the first suit. I am also not persuaded that it would have been proper for the Plaintiff to convert the constitutional petition into a normal civil suit for damages for trespass. The Defendants’ contention that the issues raised in this suit should have been



raised in the first suit is therefore not legally sound. For the foregoing reasons, I am not convinced that the present suit is *res judicata*.

Whether the Defendants trespassed on the suit properties.

82. In the first suit, the court stated as follows:

“The upshot of the above is that the petitioner holds a valid title to the property the same having been transferred by Norlake Ltd. This court visited the disputed parcels of land and found that he same had been fenced and that the petitioners could not access the land and that in an act of impunity the second respondent had even secured a title for the suit properties in its names despite the fact that the suit was pending hearing.”

83. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. There is already a finding by a court of competent jurisdiction which has neither been stayed nor set aside that the Plaintiff is the lawful owner of the suit properties. There is also a finding by the said court that Defendants entered the suit properties and fenced off the same thereby denying the Plaintiff access to the same. It was common ground at the hearing of this suit that the Defendants acting under an entity known as a “multi-agency team” put up a fence along the boundary of some of the suit properties and erected a barrier that prevented access to the affected properties. It was also common ground that at the time of erecting the said fence and barrier, the Defendants had no lawful claim or interest in the suit properties or any of them. In the absence of evidence that the Defendants were authorised by the Plaintiff to enter the suit properties and erect the said fence and barrier, their entry was illegal, and as such amounted to trespass. It is therefore my finding that both Defendants trespassed on the suit properties in respect of which the Plaintiff was denied access.

Whether the Plaintiff is entitled to the special damages claimed.

84. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

85. In *Halsbury’s Laws of England* 4th Edition Volume 45 para. 26 1503 the authors have stated as follows on assessment of damages for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with



the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

86. In *Zacharia Waweru Thumbi v. Samuel Njoroge Thuku* [2006] eKLR cited by the 2nd Defendant, the court stated that:

“The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts, are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in *HAHN V. SINGH*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

87. In *Kenya Power & Lightning Company Limited v. Philip A. M. Kimondiu* [2018] eKLR cited by the 1st Defendant, the Court of Appeal stated as follows:

“In the case of *Storms Bruks Aktie Bolag vs Hutchison* (1905) AC 5515 Lord MacNaughten sought to distinguish between the nature of special and general damages and explained that:- ...‘Special damages’ on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore must be claimed specifically and proved strictly. In other words...while in the case of special damages, the respondent would be required to show proof of actual loss on matter that cannot be said to be a natural or direct consequence of the Appellant’s trespass.”

88. In *Fredrick Mukiri Kingatia v. John Njiru & 2 others* [2019] eKLR the court stated that:

“...The court is of the opinion that damages for loss of user are in the nature of special damages. The claimant must plead specific particulars of such loss, including the rate at which the damages are sought and period of time for which they are sought. The Plaintiff did not plead the claim with particularity and no evidence was led at the trial to justify an award for loss of user.”

89. The Plaintiff has claimed special damages under several heads which I will consider one after the other where necessary for clarity. The first special damage claim is in respect of rent unpaid by the tenants who were said to have vacated some of the suit properties namely, Kisumu Municipality Block7/414, 417, 426, 432, 437 and 439 following the Defendants’ trespass which obstructed their access to the premises. The claim is in the sum of Kshs. 3,238,265/-. The burden was upon the Plaintiff to prove that the nonpayment of rent by the said tenants was as a result of the Defendants’ trespass. The Plaintiff produced Ledger Account Statements for each tenant to prove the claim. I have looked at the account for Gordon Okayo who is said to have vacated Kisumu Municipality Block7/414 with an outstanding rent of Kshs. 135,228/-. It is common ground that the Defendants’ trespass commenced



on 5th September 2019. The Plaintiff has not stated in the plaint when this tenant vacated its property. The statement of account shows that the tenant started defaulting in its rent payment in August 2019 before the Defendants' trespass on the premises. I am not satisfied therefore that this tenant's default to pay rent was as a result of the said acts of trespass by the Defendants.

90. I have also looked at the account for Simon Omondi Aywaya who is said to have vacated Kisumu Municipality Block 7/417 with an outstanding rent of Kshs. 64,994/-. The Defendants' trespass commenced on 5th September 2019. The Plaintiff has not stated in the plaint when this tenant vacated its property. The statement of account shows that the tenant started defaulting on its rent payment in June 2019 before the Defendants' trespass. This tenant's failure to pay rent could not therefore be attributed to the Defendants' trespass. There is also no indication in the statement of account produced by the Plaintiff that as at September 2019, the tenant had rent arrears of Kshs. 64,994/-.
91. For Uniworld Collections Ltd. which is said to have vacated Kisumu Municipality Block 7/ 426, its account shows that as at 31st July 2019, it was in rent arrears to the tune of Kshs. 1,004,000/-. This means that this tenant's failure to pay rent had nothing to do with the Defendants' trespass on the property it was occupying. For Galaxy Paints & Coatings Ltd. which is said to have vacated Kisumu Municipality Block 7/ 432, its account shows that the Plaintiff raised invoices up to 1st November 2019. This means that the tenant was still in occupation by November 2019 when the last invoice was raised. The Plaintiff did not state in the plaint as to when this tenant vacated. The tenant did not vacate the property in September 2019 following the Defendant's trespass. The said trespass could not therefore have been the cause of the tenant's failure to pay rent.
92. For Henkel Chemicals which is said to have vacated Kisumu Municipality Block 7/ 437, its account shows that the tenant started having difficulties in paying rent in July 2019 when a cheque it had issued in settlement of rent was returned unpaid. I have also noted that the Plaintiff raised rent invoices up to 1st November 2019. This means that the tenant was still in occupation of the subject property by November 2019 when the last invoice was raised. The Plaintiff did not state in the plaint when this tenant vacated. The tenant appears not to have vacated the property in September 2019 following the Defendant's trespass. The said trespass could not therefore have been the cause of the tenant's failure to pay the alleged rent arrears of Kshs. 1,300,105/- which is not even supported by the statement of account produced by the Plaintiff in evidence.
93. As for Amar Fabrics Ltd. which is said to have vacated Kisumu Municipality Block 7/ 439 with an outstanding rent arrears of Kshs. 4,027/-, its statement of account shows that the tenant paid all the rents up to September 2019. The sum of Kshs. 4,027/- claimed by the Plaintiff could not therefore have been on account of rent.

Due to the foregoing, I find no merit in the Plaintiff's claim for Kshs. 3,238,265/- as special damages for loss of outstanding rent.

94. The other special damages claimed by the Plaintiff is Kshs. 63,695,138/- being the cost of remobilising the contractor to complete the works on Kisumu Municipality Block 7/419, 420, 421, 422, 433 and 434. I agree with the Defendants that these claims should not have been sought as special damages since the expenses are yet to be incurred. On examination by the court during the trial, PW2 stated that from his report, abortive/repeat works, contractors' remobilisation claims, allowance for fluctuations, additional consultants' fees, and regulatory compliance, insurance, and bond claims were all contingent costs which depended on whether or not the project would resume. He stated that his costings were prepared on the assumption that the project would resume around July 2023. Since the sum of Kshs. 63,695,138/- claimed by the Plaintiff as the cost of the contractor's remobilization is yet to be incurred,



the court cannot award the same to the Plaintiff as special damages as it is not an actual loss that the Plaintiff has incurred. I will therefore disallow the claim in its entirety.

95. The next special damages claim relates to rental income lost from September 2019 to April 2021 in the sum of 14,710,261/- on Kisumu Municipality Block 7/414, 417, 425, 426, 432, 437, 439 and 440. The Plaintiff contended that Kisumu Municipality Block 7/414 was occupied by a tenant, Gordon Okayo who vacated the property in September 2019 following the Defendants' trespass. The Plaintiff has contended that according to the lease agreement it had with the tenant, it would have earned rental income amounting to Kshs. 978,320/- between September 2019 to April 2021. The Plaintiff averred further that Kisumu Municipality Block 7/417 was occupied by a tenant, Simon Omondi Aywaya who vacated the same following the said act of trespass by the Defendants. The Plaintiff has contended that according to the lease agreement it had with the tenant, it would have earned rental income amounting to Kshs. 1,211,464/- between September 2019 to April 2021. The Plaintiff averred that Kisumu Municipality Block 7/425 and Kisumu Municipality Block 7/426 were also occupied by tenants, Nyanza Trading and Uniworld Collections respectively who similarly vacated the properties following the trespass. The Plaintiff contended that according to the lease agreements it had with these tenants, it would have earned rental income amounting to Kshs. 786,814/- and 2,465,520/- respectively between September 2019 to April 2021. The Plaintiff averred further that Kisumu Municipality Block 7/432, Kisumu Municipality Block 7/437, Kisumu Municipality Block 7/439 and Kisumu Municipality Block 7/440 were also occupied by tenants, Galaxy Paints, Henkel Chemicals and Amar Fabrics who similarly vacated the properties following the trespass. The Plaintiff has contended that according to the lease agreements it had with these tenants, it would have earned rental income amounting to Kshs. 648,480/-, Kshs. 1,300,105/-, Kshs. 1,771,560/- and 1,573,659/- respectively between September 2019 to April 2021. The Plaintiff has claimed that the total rental income lost from the properties amounted to Kshs. 14,710,261/- which it claimed as special damages.
96. I have perused the leases, letters of offer, ledger account statements and the license produced by the Plaintiff in support of this claim. Gordon Okayo had a one-year license that commenced on 1st March 2019 and was to terminate on 28th February 2020. I find no justification for claiming lost rent (license fees) in respect of this licensee from September 2019 to April 2021. The lost rent could only have been from October 2019 up to 28th February 2020 (5months) when the license was to come to an end. This would come to Kshs. 244,580/-. For Simon Omondi Aywaya, the lease offered was for 3 years with effect from 1st March 2019. The lease was to expire on 1st March 2022. The Plaintiff's claim herein is for lost rent from September 2019 to April 2021. The claim for lost rent should have been for rent from October 2019 to April 2021(19months) when the suit was filed. This would come to Kshs.1,064,646/-. I have omitted the month of September 2019 because the Plaintiff had claimed the rent for that month in its claim for "lost outstanding rent".
97. Nyanza Trading was offered a lease of 2 years with effect from 1st June 2019 in respect of Kisumu Municipality Block 7/425 and 440. The lease was to expire on 30th May 2021. There is no evidence that the lease offer by the Plaintiff was accepted by the tenant. There is no basis therefore for the Plaintiff's claim herein for lost rent from September 2019 to April 2021 in respect of the two properties.
98. For Uniworld, it was offered a lease of 1 year with effect from 1st May 2019. This means that the lease was to terminate on 1st May 2020. The Plaintiff has claimed lost rent in respect of this tenant from September 2019 to April 2021 when the suit was filed. I find no reason why the lost rent should be claimed up to April 2021 when the lease was to terminate on 1st May 2020. The Plaintiff is only entitled to lost rent from October 2019 up to April 2020 (7months) when the lease was to come to an end. This comes to Kshs. 862,932/-.



99. Henkel Polymer Co. Ltd. was offered a lease of 6 years with effect from 1st November 2018. The lease was to run until 1st November 2024. From the ledger account statement produced by the Plaintiff in evidence, this tenant had difficulty in paying rent. The tenant's goods were distrained for rent and auctioned and any outstanding rent was written off by the Plaintiff. The Plaintiff cannot now claim that it could have received rent from this tenant from September 2019 up to April 2021. I find no merit in the claim for lost rent in respect of this tenant.
100. Galaxy Paints entered into a lease with the Plaintiff for a term of 6 years with effect from 1st June 2016. The lease was to terminate on 31st May 2022. The tenant is among those which the Plaintiff claims to have vacated the suit properties after the Defendants' acts of trespass in September 2019. The Plaintiff has claimed lost rent from September 2019 to April 2021. Since the Plaintiff had claimed lost rent up to November 2019 under the head of special damages referred to as "outstanding rent", it can only claim lost rent resulting from the vacation of the premises by the tenant from December 2019 to April 2021(17months) if indeed the tenant vacated the suit property as a result of the trespass. As I mentioned earlier, this tenant appears to have been in occupation of the subject property up to November 2019. I would award Kshs. 3,167,865/- for lost rent for the 17 months.
101. For Amar Fabrics, the Plaintiff offered it a lease of 6 years with effect from 1st May 2014. The lease was to terminate on 30th May 2020. Since the tenant's lease was to expire on 30th May 2020, I can see no justification for the Plaintiff's claim for lost rent from September 2019 to April 2021 based on this lease. The Plaintiff can only claim lost rent under the lease from October 2019 up to May 2020(8 months). This would come to Kshs. 708,624/-.
102. From the foregoing, I find that lost rent is due only in respect of the premises that Gordon Okayo, Simon Omondi Oywaya, Uniworld Collection, Galaxy Paints and Amar Fabrics occupied. From the analysis above, the total lost rental income the Plaintiff is entitled to is Kshs. 6,048,647/-.
103. The other head of special damages claimed by the Plaintiff is lost rental income from September 2019 to April 2021 at the market rate of Kshs. 80/- per square foot in respect of Kisumu Municipality Block 7/ 415, 424, 429, 430 and 431 which the Plaintiff claimed could not be leased due to the Defendants' acts of trespass. The total amount claimed under this head of claim is Kshs. 11,779,200/-. The Plaintiff has claimed that these premises were not leased to tenants because of the Defendants' trespass. There is no evidence that these properties had been leased at any time. The Plaintiff did not also give any reason why the properties were vacant at the time of the Defendants' trespass on the suit properties and for how long they had remained vacant. I am of the view that since these properties were vacant at the commencement of the trespass by the Defendants, in the absence of any evidence that there were tenants who had expressed interest in leasing the same, their continued vacant state could not be attributed to the trespass by the Defendants. I will therefore decline to award the special damages claimed for loss of rental income from these properties.
104. The other head of special damages claimed by the Plaintiff is in respect of loss of rental income from November 2019 to April 2021 in respect of the premises on Kisumu Municipality Block 7/419, 420,421, and 422 which were under construction but had been leased and Kisumu Municipality Block 7/433 and 434 which were under renovation. The lost rent in respect of the premises on Kisumu Municipality Block 7/419, 420,421, and 422 in the sum of Kshs. 13, 880,160/- has been calculated as per the lease while the lost rent in respect of Kisumu Municipality Block 7/433 and 424 in the sum of Kshs. 6,912,000/- has been calculated as per the market rent of Kshs. 80/- per square foot per month. It is common ground that the construction of the buildings on the properties the subject of this claim was incomplete. According to the Plaintiff, the buildings were at 70% stage of completion. The buildings were not occupied. For the building on Kisumu Municipality Block 7/419, 420,421, and 422, there



is evidence before the court showing that the Plaintiff had a ready tenant who had committed itself through a written lease to occupy the building in November 2019. Due to the Defendants' trespass, the construction of the building was not completed and as such the Plaintiff lost the rent that it would have earned from November 2019. I find the Plaintiffs' claim for lost rental income in the sum of Kshs. 13,880,160/- in respect of these premises justified. For the building that was being constructed or renovated on Kisumu Municipality Block 7/433 and 424, there is no evidence that the Plaintiff had a prospective tenant who had expressed interest in leasing the same from November 2019 when it was expected to be ready for occupation at a monthly rent of Kshs. 80/- per square foot. I will therefore decline the claim for lost rental income in respect of the premises on Kisumu Municipality Block 7/433 and 424.

105. The other special damages sought by the Plaintiff related to what it referred to as 10% rent increment on the lost monthly rental income that it had claimed under various heads of claim that I have referred to above from May 2021 until full and final payment. I agree with the Defendants that this claim has no basis. The Plaintiff's claim for loss of rental income was based on written agreements and leases with terms and conditions. In none of those agreements is there a clause providing for a 10% annual rent increment with effect from May 2021 or at all. I therefore decline to grant the Plaintiff's claim for Kshs. 2,785,535/- on account of 10% annual rent increment with effect from May 2021.
106. The other special damages claim by the Plaintiff related to the cost of litigation. The Plaintiff placed no evidence before the court in proof of this claim the quantum of which was not even provided. I decline to make any award in respect thereof.
107. In addition to special damages, the Plaintiff also claimed general damages. I have made a finding earlier that the Defendants trespassed on the suit properties. The court made a finding in the first suit that the Defendants had no lawful claim or interest in the suit properties and that their acts of denying the Plaintiff access to the same was arbitrary and unlawful. In the circumstances, the Plaintiff is entitled to damages for trespass. The Plaintiff made no submissions on the quantum of general damages it is seeking. All factors considered including the Defendants' conduct of defying court orders, I think that a sum of Kshs. 3,000,000/- would be a reasonable compensation to the Plaintiff for the Defendants' acts of trespass on the suit properties.
108. As an alternative to the prayers for special and general damages, the Plaintiff prayed that should the court find that the suit properties were needed for public purposes, the court should order the Defendants to comply with the provisions of the law relating to compulsory acquisition of land. The Defendants told the court that they had no interest in the suit properties and as such had no intention of acquiring the same compulsorily. In the circumstances, the court does not need to consider this alternative prayer.

Conclusion

109. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants jointly and severally for;
 1. Kshs. 6,048,647/- being lost rental income in respect of Kisumu Municipality Block 7/414, 417, 426, 432 and 439;
 2. Kshs. 13, 880,160/- being lost rental income in respect of Kisumu Municipality Block 7/419, 420, 421 and 422;
 3. Kshs. 3,000,000/- being general damages for trespass;
 4. Interest on 1, 2 and 3 above at court rates from the date hereof until payment in full; and



5. The costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 26TH DAY OF SEPTEMBER 2024

S. OKONG'O

JUDGE

**JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Saro for the Plaintiff

Ms. Moraa for the 1st Defendant

Ms. Orege h/b for Mr. Kajo for the 2nd Defendant

Ms. J. Omondi-Court Assistant

