Kenya Wildlife Service v Sea Star Malindi Limited (Civil Appeal E018 of 2022) [2024] KECA 364 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 364 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E018 OF 2022

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

KENYA WILDLIFE SERVICE .... APPELLANT

AND

SEA STAR MALINDI LIMITED .... RESPONDENT

(An appeal from the Judgement and decree of the Environment and Land Court at Malindi (J. O. Olola J) delivered on 31st July, 2018 in Malindi ELC Case No. 56 of 2016)

JUDGMENT

1. On 31st July 2018, the Malindi Environment and Land Court (Olola J.) delivered a judgment in Malindi ELC Case No. 56 of 2016, in which the Kenya Wildlife Service, the Appellant herein (hereinafter KWS), was condemned to pay Kshs. 90,000,000/- to Sea Star Malindi Limited (hereinafter Sea Star), the Respondent herein, being costs of reconstruction of its hotel; Kshs. 30,000,000/- as general damages, interest and costs of the suit. Sea Star had instituted the suit by a plaint dated 15th August 1998 initially at Milimani Commercial Court in Nairobi in Nairobi H.C Civil Suit No. 579 of 1998, in which it had sued KWS as the 1st Defendant, Dr. David Western as the 2nd Defendant, J. M. Mburugu as the 3rd Defendant and B. K. Mwakau as the 4th Defendant. The suit was transferred to the Malindi Environment and Land Court (ELC) and plaint further amended on 27thMarch 2006, when Sea Star withdrew the suit against J.M. Mburugu and B. K. Mwakau.

2. The claim by Sea Star was that it was the registered absolute proprietor of LR 3170 Malindi, hereinafter the suit land, with a freehold interest in the entire suit land which was surveyed for the first time in 1914 as private land. Further, that at no time was the area where the suit land was situate ever crown land or government land, or compulsorily acquired or set apart by the government of Kenya for public use, and neither was the Minister for Land and Settlement at any time the competent authority over the suit land. In addition, that LN 99 of 1968 which declared 100 feet of government land in Malindi

Marine Park, was not applicable to the suit land, which was situated several kilometres away from the area referred to in the said Legal Notice.

3. However, that on or about 9th November 1997, KWS and Dr. David Western, who was then its employee, jointly and severally ordered game wardens to take physical occupation of the whole of the suit land; physically removed the construction thereon and barred further construction; and kept guard thereon to make sure no activities took place on the suit property, while claiming that 100 feet from the high water mark inside the freehold suit land was government land and had been placed under the management of KWS by Legal Notice No. 99 of 1968. That this caused Sea Star to stop the construction of a tourist hotel within the boundaries of the said suit land, which was half way built as at 20th August 1997 and on which Sea Star had spent a borrowed sum of Kshs. 70,000,000/- at an interest rate of Kshs. 35% per annum, and it expected to complete construction on or about 1st December 1997 at a total cost of Kshs. 100,000,000/-.

4. Sea Star urged that the actions by KWS were in violation of its constitutional rights and illegal, which had caused it huge financial losses during the period of the illegal enforcement, that the losses would continue until all the money ordered as compensation is paid, and during the period of construction which it expected to be 18 months from the date of full payment of the compensation money by KWS. Further, that the sudden forceful removal of all workers in the suit land left the construction work unattended, and exposed the said work to deterioration, which will need to be pulled down and rebuilt. In addition, that the High Court had already made a decision in Republic vs Kenya Wildlife Service and 3 Others, HCCC Misc. Appl. No. 982 of 1997 that the actions of KWS of stopping the development on the suit property was unconstitutional and illegal and KWS's decision was consequently quashed by the High Court on 8th November 2002. Therefore, that only the assessment of damages was remaining.

5. Sea Star accordingly claimed various declarations and orders, namely an order restraining the KWS permanently from interfering with the construction of its intended hotel or use of the suit land; declarations that the area where the suit land is situated has at all material times from 25/3/1958 to the date of the orders being prayed for been private land, it was private land on 26/3/1968 and Legal Notice 99 of 1968 did not apply to any part of the suit land, that consent of the Minister for Land and Settlement referred to by L.N. 99 of 1968 only applied to Government land and not the suit land, and that the decision of KWS dated 20th August 1997 and 9th November 1997 to prevent further construction was unconstitutional, illegal and null and void ab initio; and that KWS and Dr. Western are jointly and severally liable for all the damages and losses incurred by Sea Star from 20th August 1997 to the date when the reconstruction shall be completed.

6. Sea Star also specifically sought the following damages arising from the alleged unconstitutionality and illegality of KWS's decision: that KWS and Dr. Western were "jointly and severally liable for all the damages and losses incurred by the Plaintiff from 20th August 1997 to the date when the reconstruction shall be completed." Further that the two defendants were to pay "the difference between the costs of constructing and completing the development in L.R. 3170 Malindi in November 1997 and the date when the work of construction shall be completed which shall be eighteen months from the date of full payment of compensation", the loss of income of US$75,000/- per month from 1st December 1997 until when the construction shall be completed; and interest on the said payments calculated at the bank over-draft rates of 35% per annum from 1st December1997 until when paid in full. Sea Star also pleaded that the actual quantum of these damages was to be determined in accordance with a Quantity Surveyor's report filed in Court. Lastly, Sea Star also sought exemplary and general damages to be assessed by the Court and costs of the suit with interest at the bank overdraft rates from the date of judgment and of filing of the suit respectively.

7. In response to the Sea Star's claim, KWS filed a Statement of Defence dated 3rd November 1998 in which the averments by Sea Star were denied, and it was stated that the said claim contained a fundamental miscomprehension of the contents, effect, purport and meaning of Legal Notice No. 99 of 1968, as it was never contended therein that the suit land or part thereof constituted Government Land. Further, that they were not the custodians of the register of public land. KWS's case was that the suit land was adjacent to the Malindi Marine National Reserve and Park, and the construction of the hotel by Sea Star had encroached on legally protected area along the coast line which constituted the park as delineated and described by the relevant statutory instruments and legal notices, and contrary to the provisions of the Wildlife (Conservation and Management) Act. Therefore,that KWS was entitled to prohibit any such activities. KWS further stated that when Sea Star persisted in executing, as part of its construction, works that were injurious or harmful to the ecosystem of the adjoining marine park, KWS had no option but to prohibit the execution of the offending works. KWS also averred that the matters in the suit were substantially in issue in previously instituted suits, and therefore the trial Court could not proceed with the suit.

8. Dr. David Western filed a Written Statement of Defence dated 3rd November 1998 wherein he stated that he was no longer the Director of KWS as he had been described in the plaint, and consequently no proceedings founded on tort could be brought in connection with any acts of his after the expiry of twelve (12) months from the date the cause of action accrued, pursuant to section 3 (1) of the *Public Authorities Limitation Act*. Thus, the suit was statute barred. Additionally, and without prejudice, that all acts done by him or on his authority or direction were done in good faith and in discharge of statutory duties, and he was not personally liable in respect of such acts and omissions.

9. He further stated that in the exercise of his powers, he prohibited the further execution of building works upon the area of land surface within 100 feet of the high water mark contiguous to Malindi Marine National Reserve and Park, which construction was considered to imperil marine life and destructive to the ecosystem of the park, and that such prohibition was lawful and in accordance with relevant statutory provisions, rules and regulations and could not give rise to a claim for damages as alleged. He denied the allegations in the plaint, or that Sea Star was entitled to damages against him as alleged.

10. During the hearing of the suit in the ELC, Sea Star called two witnesses. Gianluigi Cernuci (PW1), an Italian citizen residing in Watamu, Malindi testified that he had incorporated Sea Star with his co-director one Pizzigoni Mania on 7th June 1994, with the purpose of putting up a hotel in Malindi at a place called Casuarina. That being an architect, PW1 prepared the architectural designs for the hotel and sent them to the then Municipal Council of Malindi for approval which was done and all the architectural and structural drawings were approved. On or about 10th August 1994 the Respondent Company purchased Plot No. 3170 in Casuarina Malindi measuring 0.5783 hectares for Kshs. 4 Million from one Gaetano Bortoloth and shortly after receiving approval from the Municipal Council, they commenced construction. It did not take long before they started receiving correspondence from the Appellant objecting to the construction, and the witness reiterated the events that thereafter occurred as were set out hereinabove.

11. Wambua Alloys Nzalu (PW2) testified that he is a Quantity Surveyor practicing as such under Gichuhi & Associates Quantity Surveyors in Mombasa, and that Sea Star engaged him to carry out measurements of quantities for the reconstruction of its hotel situated on LR No. 3170- Malindi where he did sketches on the building, carried out measurements and prepared quantities of whatever was required for the structures that were still standing on the parcel of land. Thereafter he prepared his report in which he found that the cost of completed construction as at 1996 would have been Kshs. 68,688,341.58/-. These figures, according to PW2, would vary as construction costs

continue increasing. As a result, as at 2005 when he was engaged, the cost would have been Kshs. 128,778,693.66/=.

12. KWS and Dr. David Western did not call any witnesses during the hearing.

13. After considering the evidence and submissions filed by the advocates for the parties, the trial Judge (J. O. Olola J.) found, in his judgment delivered on 31st July, 2018 that it was not contested that Sea Star was the registered proprietor of the suit land and that the said parcel of land is adjacent to an area designated by the KWS as the Malindi Marine National Reserve and Park. The trial Judge noted that Sea Star had previously filed judicial review proceedings in Sea Star Malindi Ltd vs Kenya Wildlife Services & 2 Others,- Nairobi HCC Misc. Application No. 982 of 1997 seeking to quash the decision by KWS contained in the letter dated 20th August 1997, which advised Sea Star to stop any construction within the 100 feet zone from the high water mark, which suit was decided on 8th November 2002 during the pendency of the suit in the ELC. Further, that the judgment by the High Court (Onyango Otieno J.) quashed the said decision by KWS, and settled the issue of liability of KWS in so far as the dispute in the ELC was concerned. However, that Sea Star did not demonstrate that Dr. David Western acted outside his authority and/or that he was actuated by any ill motive in the discharge of his duties, and being a public officer, the trial Judge did not find him personally liable for any of the acts or omissions complained of by Sea Star. The trial Judge accordingly found that his task was solely to assess the quantum of damages based on the evidence presented by the parties.

14. On the quantum of damages, the learned trial Judge noted that an expert witness, PW2, presented a report which gave various estimates in regard to the possible cost of reconstruction of the hotel depending on the construction costs which varied from one year to the other on the basis of the prevailing costs of materials in the open market. However, that the figures were estimates and not the actual sums of money expended by Sea Star, and PW2 stated that he visited the suit property in 2014 when many of the buildings that were located thereon had been demolished, and his estimates were therefore based on the remnants of the structures. Further, that by the time Nairobi HCC Misc. Application No. 982 of 1997 was conclusively determined on 8th November 2002, the project had been interrupted by some five years, and there was nothing that stopped Sea Star from continuing with the project in question and thereby mitigating the losses that have been claimed to-date. In the learned trial Judge's view, it should have taken Sea Star no more than three years to re-organize themselves and continue as they planned with the project in the year 2005, when the cost of reconstruction was estimated to cost Kshs. 102,239.460.10/= by PW2. According to the Judge, an award of Kshs. 90,000,000/= would suffice as the cost of reconstruction in the circumstances, and that a global sum of Kshs. 30,000,000/= would suffice as general damages. The trial Judge also awarded Sea Star interest on the two awards at commercial bank rates until payment in full, and the costs of this suit.

15. Being dissatisfied with the decision of the ELC, KWS proffered this appeal, where they have raised nine (9) grounds of appeal in their memorandum of appeal dated 3rd June 2022, namely:

    1. The Learned Judge erred by fully relying on the decision of the High Court in Misc. Suit No. 982 of 1997, Sea Star Malindi Limited vs Kenya Wildlife Service in determining the question of liability and failed to independently review and analyse the evidence that was placed before him to arrive at his own independent conclusion. The Learned Judge abdicated his responsibility thereby falling into error.

    2. The Learned Judge by relying entirely on the judicial review decision of the High Court in Misc. Suit No. 982 of 1997 Sea Star Malindi Limited vs Kenya Wildlife Service in holding the Respondent liable while failing to take into account that judicial review only deals with the procedure leading to a particular decision and not the merits of the case.

3. The Respondent's claim for costs of reconstruction was a special damage claim. The Learned Judge erred by treating the claim as if it was a general damage claim when in fact it was a special damages claim which required to be specifically pleaded and proved strictly.

4. The Learned Judge erred by relying on estimates as proof of the costs of reconstruction. The learned Judge erred by failing to hold that the Respondent's claim was speculative and had not been properly proved.

5. The Learned Judge erred by awarding the Respondent Kshs 30,000,000/- as general damages in a claim for loss of profits and out of pocket expenses allegedly incurred by the Respondent. a claim for loss of profits and out of pocket expenses constitute special damages which ought to be specifically pleaded and proved.

6. The award of Kshs 30,000,000/- in general damages was excessive and out of character with the circumstances of the case. The learned Judge did not lay any basis for awarding such a colossal sum in general damages nor set out the comparable case the Court had relied upon to arrive at that sum.

7. The award of interest to the Respondent at commercial bank rates was without legal basis as the Respondent did not tender any evidence to show the basis for the interest and how the interest claimed had been arrived at. The Court's discretion to award interest was exercised capriciously and whimsically as the Learned Judge did not give any reason for his decision to award interest at commercial bank rates.

8. The Learned Judge erred by departing from the principles that interest ought to be awarded at Court rate unless there is an agreement between the parties to charge a specific rate of interest or interest is chargeable at a particular rate due to the parties' trade, custom or usage.

9. the Learned Judge erred in finding that the Respondent had proved its case when in fact it had not.

    1. The appeal was heard on the Court's virtual platform on 6th June 2023, and learned counsel Mr. Ezra Makori together with Mr. Mugambi Mutua appeared for KWS, while learned counsel Mr. Kevin Anami, appeared for Sea Star. The learned counsel highlighted their respective submissions dated 8th March 2023 and 17th March 2023. In a first appeal as this one, the obligations of the Court are as set out in Selle and Another vs Associated Motor Boat Ltd & others (1968) EA 123, namely to reconsider the evidence, evaluate it and to draw its own conclusions of facts and law, and the Court will only depart from the findings by the trial court if they were not based on the evidence of record, where the said court is shown to have acted on wrong principles as held in Jabane vs Olenja (1968) KLR 661, or if its discretion was exercised injudiciously as held in Mbogo & Another vs Shah (1968) EA 93.

17. Four issues are raised in this appeal. The first is whether the trial Judge erred by relying on the decision of the High Court in Nairobi HCC Misc. Application No. 982 of 1997 in determining the question of liability. The second is whether there was a legal basis and justification for the award of general damages of Kshs 30,000,000/=. Likewise, the third issue is whether there was legal basis for the award of special damages, and the last issue is whether interest was payable and if so, at what rates.

18. On the first issue of the findings on liability, KWS contends that the trial Judge had a duty to review and analyse the evidence that was placed before him and arrive at an independent conclusion, even though he may have well arrived at the same conclusion as the Judge in judicial review proceeding, and

that it was hence wrong for him to determine that his task was 'solely to assess the question of damages based on the evidence presented by parties'. Further, that judicial review looks at the process of decision making and not the merits of a decision, and reliance was in this regard placed on the holding by the Supreme Court of Kenya in John Florence Maritime Services Limited & Another vs Cabinet Secretary, Transport and Infrastructure & 3 Others [2021] eKLR for the position that a determination in a judicial review application cannot be termed as a final determination of issues under a constitutional petition. Lastly, that the determination in the judicial review application found that KWS's actions were ultra vires its powers and constituted undue interference with the Sea Star's right to property.

19. Sea Star on its part urged that it led evidence and presented sufficient facts that not only sufficiently discharged its evidentiary burden but also aided the court in the absence of any evidence being led by KWS to arrive at a well-reasoned judgment. Further, that a reading of the judgement by the trial court clearly indicates that it did not singularly rely on the judgment in the judicial review proceedings to determine liability, and that the court took judicial notice that KWS had neither appealed nor reviewed the judicial review determination, and in addition observed that KWS did not lead any evidence to contradict that tendered by Sea Star.

20. I am, in determining this issue, guided by the definitions and requirements of liability in relation to payment of damages. Liability is defined in Black's Law Dictionary, Ninth Edition at page 997 as "the quality or state of being legally obligated or accountable" or "legal responsibility to another or to society, enforceable by civil remedy or criminal punishment" or "a financial or pecuniary obligation". Specifically, in the context of liability to pay damages, a distinction is made by Macgregor on Damages, Nineteenth Edition at paragraphs 6.002-3 between the existence of liability and the extent of the liability. The existence of liability determines the question whether a duty that exists towards another has been breached. Once a breach is established, the extent of the liability then answers the question of whether the injury suffered by the claimant is as a result of the breach, which is determined by the principles of remoteness and causation.

21. The subject matter of the suit in Nairobi HCC Misc. Application No. 982 of 1997 was the decision by KWS in the letter dated 20th August 1997, that was also the subject matter of the suit in the trial Court. In Nairobi HCC Misc. Application No. 982 of 1997, Sea Star had claimed that the banning and restraining of the construction of its hotel in plot No. 3170 Malindi by KWS was unconstitutional, illegal and unlawful, and accordingly sought orders of certiorari, prohibition and mandamus. The learned judge in his ruling therein delivered on 8th November 2022 posed the question that was arising as follows: "however, the question which one has to solve is before the private interest is sacrificed for the general good whether present or future, are there not laws and rules to be followed so that in getting the private interests sacrificed, decency and fair play is assured".

22. After considering the provisions of section 6(1) of the Wildlife (Conservation and Management) Act on the procedures for declaration of a national park, and of the Land Acquisition Act on the acquisition of private land by the government, the learned Judge found as follows:

> " In my humble opinion, unless and until the first respondent complied with those legal requirements, its actions and its decisions over the suit land such as the decision that was conveyed vide a letter dated 20th August 1997, the subject of this application were ultra vires its powers. Not only that but the same action also went against section 75 of *the Constitution*. Much as I would encourage any activities that seek to preserve nature such activities must however comply with the laws of the land. In this case, if the first respondent was of the opinion that the suit land being contiguous to Marine Park, activities on it such as constructing septic tank on it might seriously interfere with the ecosystem in the area,

all it needed to do was to convince the Minister concerned to have the land acquired with consent of the owner who is the competent authority – or by way of Land Acquisition Act. Having so acquired the land, the Minister would declare it a marine Park or a National Park and then proceed to ensure the conservation of the area.

23. The learned Judge concluded as follows:

> From what I have stated above, it will be clear that the evidence adduced in this matter by way of affidavits, and exhibits is sufficient to convince me that the decision by the first respondent was ultra vires its powers. It was manifestly unjust and presented in my considered opinion an undue interference with the applicant in the enjoyment of his property. If such is allowed to continue, ownership of any immovable property would cease to have any meaning at all and the same properties would have no value at all as they would be subject to the whims of those in power and as such no bank or any loans body would put any reliance on them."

24. It is my view that KWS, having been found to have breached the law and Sea Star's constitutional rights as a result of the decision made on 20th August 1997, and in a suit involving the same facts and same parties, the question of its liability in this regard was settled, and the trial Court did not err in its findings in this respect. As to the extent of the injury, the learned Judge in his ruling in Nairobi HCC Misc. Application No. 982 of 1997 was also categorical in his findings that the consequence of the decision in the letter of 20th August 1997 by KWS was that this breach interfered with Sea Star's enjoyment of its property, which injury is in the nature of a tort, and directly arose from KWS's actions. The extent of liability in terms of the injury flowing from the breach, must in this respect be distinguished from the extent of losses incurred, which is a question of assessment of the damages.

25. KWS also urges that the question of liability could not be addressed in judicial review proceeding, as it is a merit issue and judicial review is concerned with processes of decision making. Judicial review is the review of the lawfulness of an enactment, decision, action or failure to act in relation to a public function or authority, and allocates responsibility for any illegality involved. It cannot therefore be said that judicial review and findings on liability are mutually exclusive, since judicial review is concerned with the liability or otherwise of constitutional, statutory and administrative bodies in the exercise of their functions. In addition, in determining liability within the confines of grounds of judicial review, the Court can undertake limited merit review, as explained by the Supreme Court of Kenya in the case of Saisi & 7 Others vs Director of Public Prosecutions & 2 Others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR).

26. It is also notable that the learned Judge specifically addressed the question as to whether judicial review proceedings were appropriate in dealing with the dispute in the ruling delivered in Nairobi HCC Misc. Application No. 982 of 1997, and found as follows:

> " In my mind, while I do agree that where facts are seriously in dispute review remedy may not be appropriate, here there is no dispute that the applicant is the rightful owner by the suit land. There is no dispute that the land extends upto high water mark. There is no dispute that legal notice No. 99 of 1978 does not cover this land. There is no dispute that the land has not been acquired either by consulting the competent authority who in this case is the owner or through Land Acquisition Act. I do not think mere saying that certain facts are in dispute would be enough. They must be shown to be really in dispute before a court of law can act on that allegation to refuse the orders sought. In the same way, whether the letter sought to stop any part of the construction or whole of it is in my humble opinion neither here nor there and is not a serious dispute as to the facts as the fact remains that whether part

or whole construction, the respondent is seeking to stop the applicant from the enjoyment of his property to the full. That is not a material serious dispute. The dispute on facts must be material as well as serious.

27. This decision was not appealed, and I do not find any reason to fault the trial Judge for giving the following reasons as to why the issue of liability was settled:

> " 31. As it were, that decision was neither appealed nor reviewed. In the matter before me, the Defendant did not adduce any new facts and/or additional evidence that may impeach and/or cast doubt on the findings made on 8th November 2002 when the ruling was delivered, in essence the findings that the 1st Defendant was liable for the wrongful stoppage of the construction of the Plaintiffs hotel stands...."

28. On the two issues of the legal basis for the awards of general and special damages, the applicable principles were stated by Kneller JA in Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730, as follows:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango Vs Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles."

29. With regards to the award of general damages, KWS challenged the award of Kshs. 30,000,000/- and asserted that the trial Court in this respect dealt with Sea Star's claim for loss of profit from 1st December 1997 until the time of completion of the construction. This Court's attention was drawn to the holding in the case of Siree vs Lake Turkana El Molo Lodges Limited (2002) 2 EA 521, where this Court held that damages for loss of profits were classified as special damages and had to be strictly proved. KWS also contended that the Sea Star's claim for expenses allegedly incurred in the period of construction of the hotel was in the nature of pocket expenses and constituted special damages which ought to have been specifically pleaded and proved. Therefore, that the trial Court did not lay any basis for awarding the sum of Kshs. 30,000,000/- as general damages, neither did the learned trial Judge cite comparable cases that led the Court to the award, and the award was accordingly capricious and arbitrary.

30. Sea Star on its part submitted that the award was based on the persuasive evidence, and the trial Court applied its judicial discretion in awarding Kshs. 30,000,000/- as general damages. The decisions in Mbogo vs Shah (supra), Parliamentary Service Commission vs Martin Nyaga Wambora & Others, Supreme Court Application No. 8 of 2017 (2017) eKLR and Alfarus Muli vs Lucy M Lavuta & Another, Civil Appeal (Nairobi) No. 47 of 1997, (1997) eKLR were cited for the position that we should not interfere with the exercise of the discretion of the trial Judge without a good reason. According to Sea Star, the trial Court took into account the evidence tendered and the nonchalant conduct of KWS, and exercised its discretion judiciously by awarding the damages it did.

31. In awarding the general damages, the learned trial Judge held as follows:

> "45. At paragraph 14 of the Plaint, the Plaintiff claims a sum of US$ 75,000/- as loss of profits from 1st December 1997 until the time of completion of the construction. While there was no basis for the figures cited, the Plaintiff also produced as Pex 4 various reports of shareholder expenses which indicate that they incurred certain expenses in the period the construction of the hotel was interrupted. Taking the totality of the circumstances of this case info consideration, it is my view that a global sum of Kshs 30,000,000/= would suffice as general damages."

32. With profound respect to the learned trial Judge, I find that there was a misapplication of the award of general damages, in light of the type of loss that was being compensated by the award namely the loss of profits and expenses incurred, which are quantifiable monetary losses and therefore in the nature of special damages as held by this Court in National Social Security Fund vs Sifa International Limited [2016] eKLR, and need to be pleaded and strictly proved. In the ruling in in Nairobi HCC Misc. Application No. 982 of 1997, the wrongdoing on the part of KWS was found to have involved both infringement of a constitutional right and a tort. The applicable principles with respect to payment of general damages as compensation to remedy constitutional violations were stated by the South African Constitutional Court in Ntanda Zeli Fose vs Minister of Safety and Security, 1996 (2) BCLR 232 (W), and the Court acknowledged that general damages are an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*, as a distinct remedy and additional to remedies in private law for damages. Further, that the comparable common law measures of damages will be a useful guide in assessing the amount of compensation, which will depend on the facts and circumstances of each case.

33. Compensation is also a recognised remedy for constitutional violations under Articles 23 (3)(e) of *the Constitution*, and the relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of Siewchand Ramanoop vs The AG of T&T, PC Appeal No. 13 of 2004. It was held by Lord Nicholls at paragraphs 18 & 19 of the judgment therein that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:.

> "When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
>
> An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches."

34. The guiding principle to be gleaned from these decisions is that an award of general damages for the infringement of a constitutional right is discretionary and will depend on the circumstances of each

case. The award of general damages would be such that would be appropriate to reflect "the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches" taking into account the circumstances of the infringement of rights, and can therefore be made with or without proof of any loss or damage. On the other hand for an award to be made for loss of enjoyment of the land under tort, a claimant has to bring proof of the diminution in value of the land, which is measured by the cost of replacement of repair, or mesne profits where there is misappropriation of the land by occupation or user. Therefore, a claim for loss of enjoyment of land can only be made by way of special damages and upon proof of the loss incurred.

35. In my view, the award of general damages in the circumstances of this appeal ought to have been a nominal award to recognise, establish, protect and remedy Sea Star's constitutional right to its property. Nominal damages are awarded for the purposes of declaring and vindicating legal and constitutional rights, and do not require proof of harm. I am also alive in this respect to the explanation by this Court in Jogoo Kimakia Bus Services Ltd vs Electrocom International Ltd [1992] KLR 177, which held, while referring to the holding by Earl of Halsbury LC (as he then was) in 'Medina' and the 'Mediana' [1900] AC 113 at116, as follows:

> " ...'Nominal damages' is a technical phrase which means that you have negatived anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."."

36. I accordingly find that an award of Kshs. 30,000,000/= as general damages was unjustifiably excessive to compensate the infraction of Sea Star's constitutional rights by KWS, especially in light of the fact that there were also special damages sought and awarded to address the actual loss that Sea Star suffered. In my view, an award of Kshs. 3,000,000/= as nominal general damages would suffice, taking into account the nature of the injury flowing from the violation of Sea Star's rights. In this respect, similar awards were granted by this Court in Ken Odondi & 2 Others vs James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR where an award of general damages of Kshs. 4,000,000/= was made for libel, in Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR where an award of general damages of Kshs. 7,500,000/= for discrimination at work, and Peter Ndegwa Kiai t/a Pema Wines & Spirits vs Attorney General & 2 Others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) an award of nominal damages of Kshs. 5,000,000/- was made for the destruction of the Appellant's goods.

37. On the award by the trial Court of special damages of Kshs. 90,000,000/- being the cost of reconstruction of the hotel, KWS urged, while citing the holding in Ryce Motors Limited and Another vs Muroki (1995-98) 2 EA 363, that special damages must be specifically pleaded and strictly proved, and that prayer A5 of the Sea Star's further amended plaint dated 27th March 2006 is not specific on the costs of reconstruction being claimed. Further, that Sea Star's case was that due to the stoppage of the construction of the hotel; the already constructed portions suffered wear and tear and would have to be demolished first then reconstructed. Therefore, that Sea Star was required to prove that it had demolished the already constructed portion of the hotel and built it up, and to give exact figures of the sums incurred and not estimates through the evidence of PW 2. However, that this was not the case, as Sea Star had not demolished neither had they rebuilt the hotel.

38. KWS also urged this Court to take judicial notice of its judgement in Civil Appeal No. 121 of 2019 - Sea Star Malindi Limited vs County Government of Kilifi (2022) KECA 22 KLR, which was an appeal against the dismissal of Malindi Environment and Land Court Case No. 47 of 2006 - Sea Star Malindi Limited vs The County Government of Kilifi in which Sea Star had sued the County Government of Kilifi for compensation for the demolished hotel. In particular, that this Court in the said judgment upheld Sea Star's appeal and remitted the suit to the trial Court for hearing, and noted that the hotel had been reconstructed 90% at the time it was demolished by the Municipal Council of Malindi in January 2005. Therefore, that since the hotel was 90% complete in 2005, the Respondents ought to have claimed the actual cost of reconstruction as opposed to estimates. They placed reliance on the Macgregor on Damages, 21st Edition, at pages 55 to 60 for the proposition that the proper approach to a claim for reinstatement costs where the work was already done by the time of trial, was the actual cost of the reconstruction.

39. It was also KWS's assertion that Malindi ELC Case No. 47 of 2006 was related and intertwined with Malindi ELC Case No .56 of 2016 and should have been pursued as one claim, so that the trial Court could fairly determine liability between the County Government of Kilifi and KWS so as to avoid double compensation for the same cause of action. Further, that the opportunity for Sea Star to get redress was not lost because this Court remitted Malindi ELC Case No. 47 of 2006 to the Environment and Land Court for assessment of damages payable to Sea Star.

40. Lastly, KWS submitted that the learned trial Judge acknowledged that Sea Star's claim was a special damage claim and pointed out that the sums claimed were estimates and not the actual sums of money expended by Sea Star. That with these findings the judge ought to have held that Sea Star had not proved the claim and the court could not rely on estimates in a special damage claim but the actual cost of construction proved by receipts, and that section 3(2) of the *Appellate Jurisdiction Act* confers jurisdiction upon this court to reach that conclusion.

41. On its part, Sea Star responded that the Quantity Surveyor (PW 2) who was an expert witness, prepared a report that detailed the cost of construction in 1996, 2002, 2005 and 2016. That the trial Court treated the report as an estimate of the cost of construction and not as an exact amount calculated to a cent, and objectively analysed the expert testimony in arriving at Kshs. 90,000,000/- assessed as the construction cost. Sea Star submitted that this Court should not be influenced by the case it was prosecuting against the County Government of Kilifi, and the reliance by KWS on the evidence led in Malindi ELC Case No. 47 of 2006 to the effect that at the time the hotel was destroyed in January 2005, it was 90% complete.

42. Sea Star proferred the following reasons for this position: firstly, KWS stopped the Sea Star from constructing its hotel on 20th August 1997 until 8th November 2002 when Onyango Otieno J. (as he then was) quashed KWS's decision; secondly, KWS's action resulted in an increase in the cost of construction between August 1997 and November 2002, including demolition of structures due to exposure to the elements during the five year period; thirdly, based on the expert testimony contained in the report presented by PW2, the cost of construction in 2005 would be approximately Ksh.s 77,631,396.56/- not inclusive of the cost of demolition and reconstruction of any condemned structures; fourthly, the action by the Municipal Council of Malindi to destroy the structures constructed as at January 2005 was a separate transaction therefore a different cause of action that resulted in financial loss; and lastly, the consideration by this Court in Civil Appeal No. 121 of 2019 when remitting the case back to the trial Court to consider the question of damages against the County Government of Kilifi, was not the cost for reconstruction of the hotel, but rather loss of profit from 2005 to the date the reconstruction of the hotel would be complete.

43. It is apparent that the contestation in the assessment of the special damages is in two aspects, firstly the basis and extent of loss suffered by Sea Star, including the period of reference when computing any such loss and the implications of the decisions in Nairobi HCC Misc. Application No. 982 of 1997 and Civil Appeal No. 121 of 2019 in this regard; and secondly, the proof of the loss and weight to be given to the evidence of and report produced by PW2. As regards the first aspect of the basis and extent of loss, I have already alluded to the basis for assessing loss in the case of interference with the enjoyment of land, by reference to a restitutionary measure of costs of replacement or repairs. In this respect, it is notable that the claim of the extent of loss by Sea Star was that the act of stoppage of construction of its hotel by KWS increased the cost of construction of the hotel, as a result of the wastage of the amount already expended due to disrepair of the existing structures, and the increased costs of construction. KWS claims that this special damage was not pleaded nor incurred.

44. The pleadings by Sea Star in its Further Re-amended Plaint dated 27th March 2006 as regards the special damages claimed were as follows:

> 13. The Plaintiff claims damages based on the interest of 35% p.a. paid the bank for Kshs. 70,000,000/- borrowed by the Plaintiff from 20/8/1997 to the date when the hotel shall be completed and also the Plaintiff claims in addition, extra cost to be quantified by Quantity Surveyor or architect which the Plaintiff is going to incur to remove or demolish the structure which cannot be saved now and rebuild and complete the hotel over and above the initial cost in 1997 of Kshs. 100,000,000.00 and interest as at 35% or at bank commercial overdraft rate or calculated on monthly rests from 20/8/1997 until when the claimed sum shall be paid in full.
>
> 14. The Plaintiff claims also US$75,000 per month being Joss of profit from 1/12/1997 until when the construction shall be completed and hotel be operational as determined by the Quantity Surveyor actual total sum to be quantified and determined by the Court during the hearing of this suit.

45. It is in this respect stated in Macgregor on Damages, Nineteenth Edition at paragraph 49-017 that a claimant will be debarred from proving special damages only where if he or she fails to plead it at all or where he or she fails to plead it with sufficient particularity. Further, that sufficient particularity normally requires that specific instances should be pleaded. Therefore, a claim for special damages will be allowed to be proved where the existence of such a claim is clear from the statement of the case, and bearing in mind that the main function of pleadings is to make it clear to the opponent what case he has to meet. In this regard, it was also held by Bowen L.J in Ratcliffe vs Evans (1892) 2 QB 524 that the character of the acts which produce the damage and the circumstances under which the acts are done regulates the degree of certainty and particularity with which the damage done ought to be stated.

46. In the present appeal, it was evident from its pleadings that Sea Star was claiming 35% interest payable on its loan of Kshs. 70,000,000/= as a distinct pecuniary loss, and in addition, the costs of replacement of its hotel as quantified by a Quantity Surveyor, the costs of construction expended of Kshs. 100, 000,000/= with interest at 35%, and loss of profit of US$75,000 per month from 1/12/1997 until when the construction shall be completed and its hotel is operational. In my view, there was sufficient particularity in the pleadings as there was quantification of the loss, including a notification that some of the loss would be quantified by a Quantity Surveyor. KWS was therefore aware of the manner in which this particular loss which was pleaded, was to be proved.

47. On the period of loss, Sea Star has sought damages for "all the damages and losses incurred by the Plaintiff from 20th August 1997 to the date when the reconstruction shall be completed" including a prayer that " the difference between the costs of constructing and completing the development in L.R. 3170 Malindi in November 1997 and the date when the work of construction shall be completed

which shall be eighteen months from the date of full payment of compensation" and the loss of income of US$75,000/- per month from 1.12.1997 until when the construction shall be completed. I note and find in this regard that the stoppage of construction of Sea Star's hotel between the date of KWS's decision on 20th August 1997 until 8th November 2002 when the said decision was quashed in Nairobi HCC Misc. Application No. 982 of 1997 is not contested.

48. In addition, as found by the trial Judge, a reasonable time needed to be factored after the ruling of 8th November 2002 for Sea Star to arrange its affairs and continue with the construction, and the date of 2005 proposed by the Judge appears to be a reasonable cut off, with respect to the losses that can be claimed in this regard by Sea Star in terms of computing the cost of replacement of the hotel, as well as the claim on the interest on the loan repayment and loss of profits. Put differently, this is the period Sea Star is deemed to have been out of business arising from the decision by KWS to stop the construction of its hotel. Lastly, the only import of Civil Appeal No. 121 of 2019 and Malindi ELC Case No. 47 of 2006 in my view is the fact that it is not in dispute that there is another pending suit by Sea Star against the County Government of Kilifi arising from the alleged demolition by the then Malindi Municipal Council of Sea Star's hotel in January 2005. Anything beyond this observation is a matter for the pleadings, proceedings and proof in the trial Court that will hear Malindi ELC Case No. 47 of 2006, and I say no more lest I prejudice the pending trial.

49. I am also not persuaded that this matter should be remitted back to the trial Court to be heard together Malindi ELC Case No. 47 of 2006 for two reasons. Firstly, this proposal is not in the interests of substantive justice, since this matter has been in the Court corridors for over 25 years since 1998 when the suit was first filed in the High Court. It is my view that this Court is able to determine the issues raised herein with finality and hopefully, bring this matter to a close, thus saving the parties the expense of another round of litigation. Secondly, the impact of any orders made in this appeal can be considered in the determination of Malindi ELC Case No. 47 of 2006, thus obviating the risk of unjust enrichment on the part of Sea Star.

50. On the proof of the loss, my first observation is that there are claims of special damages made by Sea Star for which there were no supporting documents on record, namely the interest of 35% per annum alleged to have been paid on the credit facility of 70,000,000/= that it procured for construction of the subject hotel, and the loss of profit of US$ 75,000/- per month from 1.12.1997. These items were therefore not proved and are not payable by KWS. On the cost of reconstruction or replacement of the hotel, we have perused the report by PW2 dated 22nd December 2016 and attached Bills of Quantities, detailing the valuation of the costs of reconstruction of Sea Star Hotel as at 1996 (Kshs. 90,100,757.53/=), 2002 (Kshs.97,116,957.67/=), 2005 (Kshs.102,839,460.10/=), and 2016 (Kshs. 167.682,926/=). The learned Judge found as follows with regard to the said costs:

    41. By the time the Judicial Review decision was made, the project had been interrupted by some five years. Granted that the disruption had occasioned losses and probably disoriented the Plaintiff in its pursuit of the Project, I think it should have taken them no more than three years after to re-organize themselves and continue as they planned with the project.

    42. If my arithmetic is right, the additional three years after the Judgment would take us to the year 2005. According to PW2 the cost of reconstruction in the year 2005 would have been Kshs. 102,239.460.10/=. Given my reservations as expressed above on the estimates, l think an award of Kshs. 90,000,000/= would suffice as the cost of reconstruction due to the Plaintiff as sought under Prayers A4 and A5 of the Plaint."

51. The reservations of the trial Judge were that the figures in the Quantity Surveyor's report were estimates and not the actual sums of money expended by the Plaintiff; that PW2 stated that he only visited the

suit property in 2014 and by then much of the buildings earlier on constructed had been demolished and his estimates were based only on the remnants of the structures that were still in place; and that PW2 could not tell the percentage of the structures that were covered by bushes. I also note that KWS did not bring any evidence to refute the valuation report, and have challenged it on the ground that it contained estimates, and that there was no evidence of demolitions or constructions presented.

52. It was held in Parabola Investment Limited & Another vs Browallia Cal Limited (2011) QB 477 at 486 that a claimant should benefit from any uncertainty surrounding proof of consequential loss in a claim of special damages, where that uncertainty has been caused by the wrongdoing of the other party. Toulson LJ held as follows in the said case:

> " Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

53. It was further held in that case that where the quantification of loss involves a hypothetical exercise, the Court does not apply the same balance of probabilities approach as it would to the proof of past facts, but instead estimates the loss by making the best attempt it can to evaluate all the chances, great or small, taking into account all significant factors. Similarly, in Yam Seng Pte Ltd vs International Trade Corp. Ltd (20130 1 Lloyd's Rep 526 [188] Leggatt J. opined as follows:

> 'The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrong doing which has created those uncertainties.'

54. This approach is also put forth in McGregor on Damages (supra) at page 349 paragraph 10-002 wherein it is stated that:

> "Indeed, if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss...Generally, therefore, although it remains true to say that 'difficulty of proof does not dispense with necessity of proof', the standard demanded can seldom be that of certainty. Even if it is said that that the damage must be proved with reasonable certainty, the word 'reasonable' is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating the amount."

55. My understanding of the concerns raised by the trial Judge is that the figures in the report were estimates and were not cast in stone, and could therefore be varied in the light of other evidence adduced. In addition, it is notable that the claim by Sea Star in its Further Re-amended Plaint dated at 27th March 2006, at paragraph 12(a) was that "the Plaintiff contends that the sudden occupation of the whole of LR. 3170 Malindi by the Defendants armed forces physically on 9th November 1997 and forceful removal of all workers in the suit premises left the construction work which had been

completed unattended to which exposed the said work to deterioration which now shows that the said structures cannot be relied upon and has to be pulled down and rebuilt again and the cost of doing all this the Plaintiff do claim it from the Defendants". The Bills of Quantities produced in evidence by PW2 and relied upon by the trial Judge included the costs of demolition and construction in 2005, which he had estimated at Kshs102,839,460.10/=, and the evidence of PW2 was that when he visited the site in 2014, which was almost ten years later, he found some of the buildings demolished. I therefore find that there was sufficient proof to support the findings by the trial Judge, and find no reason to interfere with the exercise of his discretion in awarding special damages for the costs of reconstruction of Kshs. 90,000,000/=.

56. The last issue is that of the award of interest on the general and special damages at commercial bank rates until payment is full. KWS submitted that while the trial Court had discretion to award interest, it should act reasonably and judiciously, and the general principle is that interest should be awarded at Court rates unless there is an agreement between the parties to charge a specific rate of interest, or the interest rate is chargeable at a particular rate due to the parties' trade, customs or usage. Reference was in this regard made to the decisions in Musicraft Manufacturer (K) Limited vs Doughty Limited (1992) KLR 541 and Highway Furniture Mart Limited vs the Permanent Secretary and Another (2006) 2 EA 94. KWS urged that there was no evidence tendered on the alleged borrowing by Sea Star, neither was a rationale given by the trial Court for awarding it interest at commercial rates, and further that commercial interest rates are never static. Thus, the award of interest at commercial rates was arbitrary and capricious and called for this Court's intervention. Reliance was placed on the case of Alba Petroleum Limited vs Total Marketing Kenya Limited [2019] eKLR where the Court set aside an award of interest at commercial rates when there was no evidence to prove the rate and how the rate was arrived at.

57. Sea Star's position on the award of interest was that KWS, not having filed their witness statements to challenge the prayers on interest, could not at this stage claim that the trial Court awarded interest at commercial rates in error, which award is discretionary. Sea Star however conceded that the learned trial Judge ought to have clarified the rate of interest to be applied to the damages awarded, and in this regard placed reliance on section 26 (1) of the *Civil Procedure Act* to urge this Court to specify the rate of commercial interest awarded be calculated from the date of the suit to the date the decree was issued on 9th November 2018, and subsequently on the aggregate sum awarded from the date of the decree to the date of payment.

58. The main considerations in determining a dispute as regards the payment of interest are the legal basis thereof, the rates to be applied, whether simple or compound interest is envisaged, and the period to which the interest will apply. Section 26(1) of the *Civil Procedure Act* in this respect provides as follows:

    (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

59. In interpreting the provisions of section 26(1) it was held in Musicraft Manufacturer (K) Limited vs Doughty Limited (supra) and Highway Furniture Mart Limited vs. Permanent Secretary Office of the President & another (supra) that interest prior to the filing of suit is only awarded if the substantive law permits it, and in this respect is only claimable where under an agreement there is stipulation for the rate of interest , or where there is no stipulation but interest is allowed by mercantile usage which must be pleaded and proved, or where there is statutory right to interest or where an agreement to pay

interest can be implied from the course of dealing between the parties. Further, that interest after filing suit is an exercise of discretion; and interest on special damages is awarded from the date of filing suit while interest on general damages is awarded from the date of the assessment.

60. In the present appeal, it is notable that no evidence of the credit facility that was the basis for the claim of 35% interest rate, nor of any justification to apply the commercial rates of interest, or of the prevailing commercial rate of interest was provided by Sea Star. The trial Judge however proceeded to award interest on the general damages and special damages awards at "commercial rates" until payment in full. This Court in Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs. Janevams Limited (2015) eKLR held that:

> " the award of interest is therefore a matter that is left to the discretion of the trial judge, and generally, an appellate court is enjoined to treat the decision of a trial court with respect, and refrain from interfering with the decision unless it is convinced that the trial judge based the award on some erroneous principal or was plainly wrong ..., but that discretion must always be exercised within limits. it must not be capricious or based on whim."

61. I find that there is basis to interfere with the exercise of the trial Judge's discretion in the award of interest on two grounds. Firstly, the trial Judge failed to provide the basis for awarding the interest at commercial rates and to indicate the applicable commercial rate, in which case the Court rates ought to have applied. Secondly, the trial Judge also failed to take into account the principles as regards the period for with respect to which interest on special damages and general damages are awarded, namely from the date of filing suit and from the date of the assessment respectively.

62. In conclusion it is my view that this appeal partially succeeds only to the extent of setting aside the orders of the trial Judge awarding general damages of Kshs. 30,000,000/= and interest thereon at commercial rates, which I hereby do, and substitute the said orders with an award of nominal damages of Kshs. 3,000,000/= with interest at court rates from the date of judgment by the trial Court until payment in full. I on the other hand affirm and uphold the award by the learned trial Judge of the costs of reconstruction of Kshs. 90,000,000/=, but substitute the order awarding interest thereon at commercial rates, with an order awarding interest on the costs of reconstruction of Kshs. 90,000,000/= at court rates from the date of filing of the suit in the trial Court until payment in full. Lastly, KWS shall pay Sea Star the costs of the proceedings in the trial Court and of this appeal.

63. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

NYAMWEYA

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

CONCURRING JUDGMENT OF ODUNGA, JA

I have had the benefit of reading, in draft, the judgment of Nyamweya, JA in which the learned Judge has comprehensively set out the background of the case and I concur with the conclusion arrived at by the learned Judge.

I only wish to emphasize that the Environment and Land Court in determining the award of damages in Malindi ELC No. 47 of 2016 shall take into account the determination made in this appeal.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

G. V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

DISSENTING JUDGMENT OF GATEMBU, JA

I have had the benefit of reading, in draft, the judgment of Nyamweya, JA in which the learned Judge has fully set out the background, the issues and the rival arguments by the parties.

I address the issue taken before us during the hearing of the appeal, namely, that we should take judicial notice of the judgment of this Court in Civil Appeal No. 121 of 2019 (Consolidated with Civil Appeal No. 95 of 2019) between Sea Star Malindi Limited, the respondent in this appeal and County Government of Kilifi (2022) KECA 22 KLR. The consolidated appeals arose from the judgment delivered by the ELC on 29th May 2019 in ELC Case No. 47 of 2006 that had been instituted by the respondent against the County Government of Kilifi.

In its suit giving rise to the present appeal (Originally Nairobi High Court Civil Suit No. 579 of 1998) the respondent (Sea Star) pleaded that on 9th November 1997, the appellant ordered armed game wardens to physically take occupation of its property LR No. 3170 Malindi and barred further construction of a tourist hotel which was scheduled for completion and ready for business on 1st December 1997. It was averred that the wrongful action by the appellant was based on the false belief "that 100 ft within the freehold boundaries of the said land is government land" that had been placed under management of the appellant by L. No. 99 of 1968 which gave the appellant absolute authority to control all activities within the said 100 ft from high water mark inside the property.

Sea Star prayed for, among other reliefs, a permanent injunction to restrain the appellant from interfering with the construction of its intended hotel "as permitted by Malindi Municipality Building By-Laws in accordance with the approved building Plan No. 63 of 1996"; a declaration that the property is private land and L. No. 99 of 1968 did not apply to it; payment of "the difference between the costs of constructing and completing the development...in November 1997 and the date when the work of construction shall be completed which shall be eighteen months from the date of full payment of compensation" as well as "loss of income of USD 75,000 per month from 1st December 1997 until when the construction shall be completed..." and "general and exemplary damages quantum to be assessed" by the court.

In its further re-amended plaint, Sea Star complained that the appellant unconstitutionally and illegally deprived it of the use of its property; that as at 9th November 1997, it had borrowed Kshs. 70,000,000 at an interest rate of 35% p. a from August 1996 and expected to complete the construction at a cost of Kshs. 100,000,000.00; that it was incurring losses.

In ELC Case No. 47 of 2006 from which the judgment of this Court in Civil Appeal No. 121 of 2019 arose, Sea Star sued the Municipal Council of Malindi, the predecessor to the County Government of Kilifi, for unlawfully demolishing Sea Star's development, "a 5-star hotel" on its property on the suit property LR No. 3170 Malindi, that was "90% complete despite the development having been approved. In addition to seeking exemplary damages, Sea Star sought judgment against the County Government of Kilifi for, among other

reliefs, the cost of reconstruction including professional fee of Kshs. 129,923,240.00, loss of expected revenue and profits of Kshs. 558,448,547.00.

In its judgment in Civil Appeal No. 121 of 2019, this Court observed that whereas liability was not in issue in that appeal, there was the question whether the learned Judge of the ELC erred in concluding, without hearing the parties, that Sea Star "was not entitled to an award for the sums claimed in view of the awards the judge had granted in his judgment in Malindi ELC No. 56 of 2016". This Court then expressed as follows:

> " The matter of the award in Malindi ELC 56 of 2016 had not been raised by either party at the trial or in their respective submissions before the learned Judge. That is probably because of the judgement in Malindi ELC 56 of 2016 was delivered on 31st July 2018, well after the close of the hearing in ELC No. 47 of 2016, and after the appellant and the respondent had filed their respective submissions in ELC No. 47 of 2016 on 21st June 2018 and on 10th July 2018, respectively. The parties did not therefore have an opportunity to address the ELC on the impact, if any, of the award in ELC 47 of 2016 on the appellant's claim in Malindi ELC, No. 56 of 2016. The proper course the learned Judge should have taken, should have been to invite the parties to
>
> address him on the matter. The land judge erred in failing so to do, with the result that the appellant's claim was dismissed on grounds that had not been canvassed by either party."
>
> On that basis, the Court referred the matter back to the ELC for purposes of fresh hearing and consideration regarding the reliefs to which Sea Star may be entitled.

Given that the reliefs Sea Star seeks in both matters revolve substantially around the demolition and reconstruction of the hotel, it would, in my view, be imperative, that the matters be resolved by the same court. Whereas I would uphold the finding of the ELC on liability for the reasons articulated in the judgment of Nyamweya, JA, I would however set aside, in entirety, the awards granted by the ELC in Malindi ELC Case No. 56 of 2016.

I would remit the matter back to the ELC before a Judge other than Olola, J., with directions that ELC 56 of 2016 and ELC 47 of 2016 be consolidated or heard together with a view to determining the reliefs to which the respondent would be entitled. In the event that by the time of delivery of this judgment the ELC in 47 of 2016 will have already re-heard and pronounced in that matter, I would direct that this matter by re-heard on the question of reliefs by the Judge who will have re-heard ELC 47 of 2016.

However, as the majority are of a different opinion, the final orders in this appeal are as pronounced by Nyamweya, JA.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR