THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.174 OF 2019

MUGISHA JULIUS KAMULEGEYA ATEENYI::::::::::::PLAINTIFF

VERSUS

1. **KAMPALA CAPITAL CITY AUTHORITY**
2. **PASTOR ELDAD MULIRA::::::::::::::::::::::::::DEFENDANTS**

BEFORE HON. JUSTICE SUSAN KANYANGE

JUDGMENT

Introduction.

The plaintiff's suit against the defendants jointly and severally is for a declaration that the 1st defendant breached its statutory duty to have plans approved, a declaration that the Lukwago's representation of the 2nd defendant at KCCA amounts to conflict of interest and influence peddling.

The plaintiff sought a further declaration for fraud against the 2nd defendant, an order compelling the 1st defendant to perform its statutory duty, compensation of ***Ug. Shs. 630,000,000/- (Uganda Shillings six hundred thirty million only)*** and interest of 27% p.a thereon from the date of submission of the plans until payment in full, aggravated damages of ***Ug. Shs. 200,000,000/- (Uganda Shillings two hundred million only)*** for the high handed actions of the defendants, general, punitive, & exemplary damages and

interest at 27% per annum thereon from the date of judgment until payment in full. The plaintiff also sought costs of the suit.

Brief facts.

The plaintiff averred that sometime in July 2018, he submitted building plans in respect of ***Kyadondo Block 4 plot 68 Namirembe Hill Rubaga Division*** for approval to the 1st defendant's Directorate of Physical Planning but the 2nd defendant through his lawyers ***M/s Lukwago & Co. Advocates*** wrote to the director of physical planning requesting a stay of approval of the said building plans.

That the 1st defendant acting on the instructions of the Lord Mayor of Kampala, Erias Lukwago refused/or neglected to take action in so far as the plaintiff's plan is concerned which then prompted that plaintiff to complain to the 1st defendant's Executive Director and the Chairperson Board of Physical Planning on 8th October 2018 and another on 15th November 2018 in a bid to seek their intervention and guidance in respect of his building plans.

That by letter dated 3rd December 2018, the 1st defendant invited the parties to a meeting on 5th December 2018 wherein the 2nd defendant, through his lawyers demanded an additional piece of land for an access road measuring 7 meters from the plaintiff's land which was contrary to the 3 feet that court had granted in ***Civil Suit No.671 of 2004*** and while the plaintiff agreed to adjust his plans so as to provide the 7 feet required to make 10 feet subject to payment of ***Ug. Shs. 75,000,000/- (Uganda Shillings seventy-five million only).***

In addition, the 1st defendant's Director of Physical Planning directed the plaintiff to submit another plan reflecting the above measurements which the plaintiff submitted on 18th December 2018.

That despite having submitted the adjusted plan as directed, the 1st defendant allegedly acting on the instruction of Erias Lukwago took no action in respect of the plaintiff's plans as they were forcing him to give the 2nd defendant free land thus it is the plaintiff's belief that he cannot get justice as long as the 2nd defendant is represented by ***m/s Lukwago & Co. Advocates*** who inadvertently stayed the approval of his plans since the Directorate of Physical Planning being a subordinate cannot act against the instructions of their boss.

The plaintiff averred that he has suffered tremendous negative consequences owing to delays by 1st defendant's Directorate of Physical Planning considering he has already purchased building materials, hired and paid contractors and that he has the expected income lost amounts to approximately ***Ug. Shs. 630,000,000/= (Uganda Shillings six hundred thrity million only).***

The plaintiff also particularized the details of breach of statutory duty by the 1st defendant but briefly they are that the 1st defendant acting under the instructions of m***/s Lukwago & Co. Advocates*** failed to take any action in respect of the plaintiff's building plans despite having submitted all the necessary requirements for approval of his plans.

In regards to the allegations of fraud, the particulars thereof as pleaded in the plaint are that the 2nd defendant claiming interest in the plaintiff's land contrary to the orders of court concealed

material information, misrepresented that the plaintiff had sold his land so as to deter the approval of the building plans and also claimed extra 7 feet of land from the plaintiff without payment having misrepresented to the 1st defendant that he had no access road.

In reply, the 1st defendant denied the allegations set out by the plaintiff. It stated that the plaintiff indeed submitted a request for development permission on ***Kyadondo Block 4 plot 68 Namirembe Hill Rubaga Division*** on 10th August 2010 which was registered under ***Reference No. R/0755/18 of 2018,*** and that upon receiving the same, the 1st defendant later received a complaint from the 2nd defendant's lawyers stating that the 2nd defendant owns a *kibanja* on the land, and an existing structure on the rear end of the plaintiff's land and that the approval of the plaintiff's building plans without considering access to the 2nd defendant's structure would affect the functionality of the structure.

That through its Technical Review Team, the 1st defendant reviewed and deferred the said application on 30th August 2018 for among other reasons the plaintiff's failure to submit a detailed survey report and that the notice of deferment was sent and received by the plaintiff on 12th September 2018.

That on 8th October 2018 the plaintiff through his lawyers wrote to the 1st defendant claiming to have submitted corrections to the notification of deferment but the 1st defendant on checking its record found no indication of any such submissions for corrections made, and that on 3rd December 2018, the 1st defendant having

failed to failed to trace the record of submissions of correction invited the plaintiff for a meeting.

That in the meeting held on 5th December 2018, it was agreed that the plaintiff would provide an adequate access of at least 3 meters as opposed to the 0.9 meters that had previously been agreed upon, and that the two would negotiate the terms of acquisition of the extra land without involving the 1st defendant but the plaintiff after a few weeks approached the 1st defendant to whom he intimated that the 2nd defendant had not taken any steps to discuss the terms of acquisition of land, and proposed to amend his plans so as to make it feasible to provide the said access whenever the 2nd defendant was ready to pay.

The plaintiff then submitted adjusted architectural drawings on 18th December 2018 which were registered and referenced as ***2432CR/18*** by the 1st defendant who found the same to be incompetent upon review, and deferred the same on 31st January, and also wrote to the law firm representing the plaintiff inquiring about the survey on 22nd February 2019 but there was no response from them.

That while the 1st defendant considered the plaintiff's request from development permissions and communicated its position within 30 days, the plaintiff was through the 1st defendant's online communication platform privy to the processes involved.

Further, that contrary to the plaintiff's allegations, he only submitted adjusted architectural drawings without a survey report to assist in reflecting the situation on ground and to show how the structure at the rear end could be accessed.

Additionally, that since the 1st defendant is a body corporate, independent in carrying out its legal mandate and neither acted under the instruction of ***m/s Lukwago & Co. Advocates*** nor those of the Lord Mayor His Worship Lukwago Erias thus this suit should be dismissed.

The 2nd defendant on his part partially admitted the allegations set out in the plaint. He objected to the suit on grounds that not only is the plaint frivolous, vexatious and misconceived but also bad in law as it discloses no cause of action against him hence the same should be dismissed with costs.

The 2nd defendant admitted that he wrote to the 1st defendant through his lawyers requesting that the approval of the building plans for land comprised in ***Kyadondo Block 4 plot 68 Namirembe Hill Rubaga Division*** be stayed pending the determination ***Revision Cause No.10 of 2017*** and that while it is true that he engaged the services of ***m/s Lukwago & Co. Advocates*** as a firm, counsel Medard Ssegona was counsel in personal conduct of his matters and not Counsel Lukwago Erias, who has never handled any of the defendant's files.

That the 2nd defendant only wrote to the 1st defendant seeking to halt the approval of the building plans but did not request an extra 7 feet and that it was during the meeting held on 5th December 2018 that the Acting Director of Physical Planning recommended that the access corridor be increased to 3 meters and that the parties would negotiate the terms but it is the plaintiff who refused to enter negotiations, not the 2nd defendant as alleged.

That the 2nd defendant only complained to the 1st defendant in order to protect his interest after receiving information that a one

Sebuliba had applied for building plans and that the 2nd defendant has no building plans because the plaintiff adamantly refused to avail him the mother file, mutation forms and transfer forms as required by the consent judgement.

The plaintiff also filed a reply to the defendants' written statements of defense. He stated *inter alia* that his suit not only has merit but also discloses a cause of action against the 1st defendant who unjustifiably failed to approve the plaintiff's building plans despite of him having fulfilled the requirements for approval and that although the issue of the 2nd defendant's access road was in ***High Court Civil Suit No.670 of 2004,*** the 1st defendant could not heed to the court order on account of the instructions of ***m/s Lukwago & Co. Advocates.***

That contrary to the 1st defendant's averments, the plaintiff submitted the detailed survey report to the 1st defendant who duly acknowledged receipt of the same and that while nothing regarding the detailed survey report was discussed in the meeting of 5th December 2018, the only issue discussed was the issue of the access road yet the same had already been concluded.

That the plaintiff in his effort to acquire a free access road instructed ***m/s Lukwago & Co. Advocates*** where Erias Lukwago the 1st defendant's mayor instructed the 1st defendant not to approve the building plans and that from the 2nd defendant's WSD, the issue in contention was about the extra land for an access road and not the survey under which the 1st defendant is hiding.

In addition, that ***m/s Lukwago & Co. Advocates*** could not legally represent the 2nd defendant as the same constitutes a conflict of

interest and influence peddling because the 1st defendant could not go against the instructions of their boss to halt the approval process because the issue of incompetent architectural drawings is not the reason for halting the approval of the plaintiff's building plans as it was never discussed in the meeting leave alone being raised at any one point but is being used as a hiding point to fulfill the interest of the 2nd defendant as instructed by Lukwago.

That the 1st defendant is acting illegally and in contempt of court by failing to honor the measurements in the court order.

Representation.

The plaintiff was represented by ***M/s Sanywa, Wabwire & Co. Advocates*** while the 1st defendant was represented by the ***Directorate of Legal Affairs KCCA,*** and the 2nd defendant was represented by ***M/s Lukwago &Co. Advocates***.

Issues for determination.

1. ***Whether the 1st defendant breached its statutory duty when it failed to approve the plaintiff's development plan.***
2. ***Whether Lukwago's representation of the 2nd defendant at KCCA amounts to conflict of interest and influence peddling.***
3. ***Whether the 2nd defendant's acts and omissions amount to fraud***
4. ***Whether the defendants abused the court decree in civil suit No.671 of 2004***
5. ***Whether the plaintiff is entitled to remedies sought.***

During the hearing of this matter, this court noted that since ***m/s Lukwago & Co. Advocates*** and **Lukwago Elias** were not sued as parties to the suit, they could not be condemned unheard and as such, the 2nd issue was dropped.

Issues 1 and 4 shall be resolved together.

1st Defendant's preliminary objection

Counsel for the 1st defendant in his submissions raised a preliminary objection under ***Order 6 rules 28 & 29 of the Civil Procedure Rules S.I 71-1*** to the effect that the suit is fatally and incurably defective as it is barred in law.

That plaintiff's claim as set out in *paragraphs 4, & 5 (i-iv)* of the plaint titled *'particulars of breach of statutory duty', paragraph 8,* and *paragraphs (a) & (d)* of the plaint all relate to breach of statutory duty.

Counsel referred the court to the case of ***David Melvin Aryemu Ochieng vs Umeme Ltd Civil Suit No.15 of 2016*** for the position that courts do not admit an action for breach of statutory duty where the claimant has other alternative remedies and that because in this case, the plaintiff has not exhausted the other remedies available to him, this suit was wrongly instituted against the 1st defendant and ought to be dismissed.

That the plaintiff in his plaint challenges the 1st defendant's actions/decision regarding his application for development permission as per the particulars of breach of statutory duty while under *paragraph 6* of the plaint and on *page 5* of his submissions the plaintiff states that he exhausted all remedies available to him in vain based on ***PE5 & PE6*** which is a merely wrongly addressed

letter to the Executive Director and the Chairperson of the Physical Planning Board of Kampala Capital City Authority, not the Physical Planning Board as required by law.

That ***Section 48 (2) of the Physical Planning Act 2010*** requires any person aggrieved with the decision of the urban planning committee to appeal, in writing to the National Physical Planning Board within 30 days while ***subsection (3)*** thereof requires a person aggrieved with the decision of the National Physical Planning Board to appeal to the High Court within 30 days.
Citing the case of ***Kitgum Municipal Council & 4 others vs Susan Adokorach Civil Appeal No.83 of 2019*** counsel argued that this suit is irregularly based on the provisions of the ***Physical Planning Act*** and ought to be dismissed.

In reply, counsel for the plaintiff argued that the objection raised by the 1st defendant is misplaced, lacks merit and ought to be dismissed because there is no decision from the 1st defendant's Department of Physical Planning in respect of the plaintiff's submitted modified plans that would be appeal to the National Physical Planning Board and subsequently to the High Court, and that according to ***PE9*** the 1st defendant stated that it will proceed to consider the plaintiff's plans on its merits if the 2nd defendant did not make its input by 20th February 2019.
That ***48 (2) & (3) supra,*** and the ***Kitgum Municipal Council case (supra)*** do not apply to this case as there is no decision from the 1st defendant which would be appealed against to the National Physical Planning Board from 20th February 2019 while ***PE5 &***

PE6 are a clear reflection that the plaintiff exhausted all the available remedies by reaching the superiors of the 1st defendant who was served with the same and whose last response of 2019 as per ***PE9*** wherein the 1st defendant promised to act on the plaintiff's modified plans but no action was taken contrary to ***Section 36 of the Building Control Act*** which stipulates that the defendant had 30 days with which to make a decision.

Additionally, because the 1st defendant has never taken any decision since 20th February 2020, to either approve or defer the plans which could be subjected to an appeal, it was in breach of its statutory duty when it failed to take any action on the plaintiff's building plan hence this suit is properly before this court.

I find that this objection will be discussed in the first issue of whether the 1st defendant breached its statutory duty so I do not need to discuss it now.

2nd defendant's Preliminary objection.

Counsel for the 2nd defendant in his written submissions raised a preliminary objection to the effect that this suit discloses no cause of action against the 2nd defendant.

Counsel referred this court ***Section 19 of the Civil Procedure Act cap.98*** for the position that suits shall be instituted in a manner prescribed by the rules, and further cited the case of ***Kawuki v Commissioner General Uganda Revenue Authority Miscellaneous Cause No.14 of 2014 Hon. Justice Madrama*** observed that the rule strongly suggests that actions in courts of law are commenced by presenting a plaint to the prescribed officer appointed for that purpose, and that the exceptions to the

commencement of an action by way of plaint under ***Order 4 rule 1 (1) of the Civil Procedure Rules SI 71-1*** have to be prescribed by an enactment which prescribes the procedure for commencing an action in court.

The gist of the 2nd defendant's objection is that the plaintiff ought to have filed an application for judicial review because, in his prayers, he seeks declaratory orders regarding the actions of the 1st defendant which were not only illegal but also fraudulent and wants the court to compel the 1st defendant to execute its duties.

Counsel highlighted *paragraphs 5 (i),* of the plaintiff's pleadings, & *paragraphs 4 & 12* of the plaintiff's evidence wherein the plaintiff emphasized that he submitted construction plans for approval but the 2nd defendant applied for a stay of the same, while the 1st defendant refused to approve the plans, and also refused to take action to approve the plans contrary to a court order.

That the averments set out in the plaint disclose sufficient grounds for judicial review from which the applicant would have benefited but he opted to erroneously file this suit because he knew he was out of time to file the same which according to the ***Judicial Review Rules*** ought to have been filed within the statutorily stipulated period of 3 months thus the applicant only filed this suit to circumvent the rules of court.

That the plaintiff's actions amount to an abuse of the court process and as such the plaint discloses no cause of action against the 2nd defendant and ought to be dismissed.

In order to prove a cause of action, the plaint must show that the plaintiff enjoyed a right and the right has been violated by the

defendant. see **Tororo Cement Co Ltd versus Frokina International Ltd. Civil Appeal no 2 of 2001.**In determining whether a plaint discloses a cause of action, court must look at the plaint and its annexures if any and nowhere else. This was held in the case **of Kapeka Coffee Works Ltd versus NPART CACA no 3 of 2000.**

In instant case in paragraph 5 plaintiff alleged he submitted his building plans to 1st defendant for approval. The 2nd defendant through his lawyers wrote to 1st defendant who halted their approval. That even when he modified the plans to grant extra land for the access road, the plans where not approved.
It is my finding that there are triable issues between the 2nd defendant and plaintiff from the above plaint.

Judicial Review is considered an oversight role that courts perform in regard to the processes by which public bodies and officials exercising statutory functions make decisions. It's usually not of a personal and individual nature but a public one enjoyed by the public at large. **See Sekaana Musa Public law in East Africa pg 37 (2009) Law Africa Publishing Nairobi**.

I find that the plaintiff can bring an ordinary suit in breach of a statutory duty where he claims no decision was taken by 1st defendant, and where it infringes on his private rights and it's not only by judicial review.
I thereby find that the plaint discloses a cause of action against the 2nd defendant.

The preliminary objections are hereby over ruled.

The court proceeds to address the substantive issues in the suit.

SUMMARY OF ARGUMENTS OF COUNSEL

Counsel for the plaintiff's submissions

Counsel submitted that the 1st defendant failed under its obligation to approve, refer, or reject the plaintiff's modified plans submitted to it on the 18th/01/2019 thereby acting unjustly and unfairly to the prejudice of the plaintiff. Counsel stated that this obligation is provided to the 1st defendant Under Regulation 4(1) of Town and Country Planning Regulations s.1246-1._Counsel further stated that_the decision by the 1st defendant to the plaintiff's building plan if any ought to have been in writing and communicated. Therefore, the obligation of the 1st defendant to make a decision in writing and communicate the same to the plaintiff was breached.

In regard to fraud, Counsel stated the 2nd defendant made a false representation by letter to the 1st defendant with misleading allegations which concealed important material facts leading to the 1st defendant to halt the approval of the plaintiff building plans. That the complaint letter was not served on the plaintiff neither does it indicate that the plaintiff was copied of the same yet it affected his plan approval. The letter claims access road but does not mention the consent judgment in civil suit No.671/2007 which settled the dispute of his access. Alleging that the plaintiff sold his land to one Ssebuliba who is applying for a building plan whereas not. Failure to disclose in the complainant letter that Mengo Civil Suit No 3199 of 2010 between the 2nd defendant and the plaintiff was dismissed on grounds of res judicata as it was settled in the consent judgment.

Counsel further argued that a consent judgment and decree in civil suit No. 671 of 2004 between the plaintiff and the 2nd defendant in which the matter of access footpath was resolved has never been challenged in any way and the defendants acted

contrary by still contesting the measurements stated in the consent which is 3 feet.

Counsel for the 1st defendant's submissions

Counsel stated that 1st defendant imposed duty by Regulation 4 (1)of the Town and Country Planning Regulations s.1246-1. derive basis from section 31 of the Town and Country Planning Act Cap.246 which was repealed.

Counsel submitted the defendant's exhibit IDE3 is evidence of the deferment notice dated 31st 01 2019 following submission of the plans on the 18th 01 2019. That the 1st defendant witness gave evidence that the modified plan did not meet the required benchmarks because it was intruding on the neighbor. That the 1st defendant cannot be accused of breach of statutory duty when it took all caution based on S.34(3) and 39(1) of the Physical Planning Act 2019.That Regulation 28 of the Public Health (Building) Rules prohibits a building on any plot without proper and sufficient access.

In regard to abuse of court Decree in Civil Suit No.671 of 2004 Counsel stated that whereas the decree provided for a 3ft footpath, the Plaintiff on his volition foliation following a meeting between the parties agreed to provide for a 3- meters access.

Counsel further submitted that The National Physical Standard and Guidelines 2011 require an access road of 3 metres which is also provided for under Section 28 of the Public Health (Buildings)Rules SI No.281.

That the Plaintiff has not adduced evidence to entitle him to damages. The plaintiff having bought and assembled the alleged materials at the suit land well knowing he had not obtained development permission ought to bear his loss.

That Under 37 of the Building Control Act, a person aggrieved by a decision of a Building Committee may appeal to the Board within thirty days after the date on which he or she receives notice of the decision of the Building Committee.

Further, where a Building Committee fails to issue a building permit within the period specified in section 36, the applicant may appeal to the Board. See section 37 (3) of the Building Control Act.

That the Plaintiff did not make an appeal to the board which ought to be in writing but resorted to filing the instant suit.

Counsel for the 2nd defendant's submissions

Counsel submitted that PEX4, Complaint letter to the 1st defendant, is a clear document and there is no specific format upon which a letter should be written as the words of a letter are not set down in stone. That the Plaintiff was invited to a meeting and he raised all these issues with the 1st Defendant.
Further, he submitted that the contents were honest beliefs of the 2nd Defendant at the time and the same cannot possibly amount to fraud or bad faith.
Counsel also stated that the consent judgment was not based on a building plan submitted to the 1st Defendant for an access road. That what was taken to the 1st Defendant's offices, was a need for an access road and not a footpath which was what the consent decree (PE2) was about. That these, are two different things. Therefore, in delving into the matter, the parties were not in contempt of the orders of the court in any way since they were delving into the laws that require buildings to have access roads and not footpaths.

Submissions in rejoinder.

In rejoinder counsel for the plaintiff stated that since 20th /02/2019, the 1st defendant has never taken a decision either approving or deferring plans thus the 1st defendant took no decision within the required period of 30 days as per section 36(1)of the building control Act of 2013 and reiterated all his earlier submissions

Determination of issues.

Section 101(1) of the Evidence Act provides that whoever desires any Court to give judgment as to the legal right or liability

defendant on the existence of facts that he or she asserts must prove that those facts exist.

In the present case, the onus lies on the plaintiff to prove his claim against the defendants.

Issue one and four

whether the 1st defendant breached its statutory duty when it failed to approve the plaintiff's development plan ,*Whether the defendants abused the court decree in civil suit No.671 of 2004*

According to **Winfield and Jolowicz on tort 17 the edition at pages 352 -354** breach of statutory duty constitutes the following elements,

a) The statute must impose a duty.

b) There must be a breach of duty.

c)The breach must result into damage to the claimant.

d)There must be a breach or connection between the breach of a statute by the defendant and the damage the claimant has suffered.

The 1st defendant is established under ***section 5 of the KCCA Act*** and under ***section 7 1(k).*** It is charged with the duty to carry out physical planning and development control.

Additionally, ***Section 46 (2)*** stipulates that the 1st defendant shall in addition to its own procedures work according to the procedures prescribed under the National Planning Authority.

Relevant Regulations, ***including Regulation 6 of the Public Health (Building) Rules S.I 281—1*** *which require* every person who intends to erect or construct a building to give notice of such intent as well as a description of construction to the local authority.

Regulation 13 prohibits the construction or execution of any construction works before approval of building plans by the local authority.

Under ***Regulation 10 (1) and under S.38(1)(b) of the physical Planning Act 2010*** a local authority may withhold approval or disapprove plans on grounds that they do not comply with the rules.

Regulation 28 further stipulates that every plot ought to have an access road and according to ***Guideline 2.5*** of the ***National Physical Planning Standards and Guidelines*** *which is also in the* ***Physical Planning Act*** such an access road ought to be at least 3 metres wide while a footpath is 1 metre in width.

It is undisputed that the plaintiff initially applied for approval of his building plan sometime in 2004 but the 1st defendant later on stopped construction, and instructed the plaintiff to apply for fresh approval.

It is also not in dispute that the 2nd defendant through his lawyers informed the 1st defendant that there was a dispute between him and the plaintiff and that the same was in court. He sought that the approval of the plaintiff's plans be halted pending the

determination of ***Revision Cause No.10 of 2017*** which has since been disposed of.

It is evident from the record that the 1st defendant invited both the plaintiff and the 2nd defendant to a meeting on December 5, 2018, by letter dated 3rd December 2018 which was admitted in evidence as ***PE.7.*** While the details of the meeting were not documented, it is clear that an agreement was reached for the plaintiff to provide 3 metres of access to the 2nd defendant, as opposed to the initial 1 metre footpath agreed upon in a consent judgment.

This is further corroborated by subsequent correspondence, including a letter dated February 22, 2019,(***PE.11)*** which indicated that the 1st defendant acknowledged the agreement to increase the access corridor to 3 metres (10 feet) and that negotiations regarding the acquisition of the extra 2.1 metres would take place between the parties. The 1st defendant also noted that the 2nd defendant had not taken any steps to negotiate the acquisition of the access road as agreed, and that the plaintiff had submitted his plans.

The 1st defendant in *paragraph 5* of the letter indeed acknowledges receipt of the plaintiff's modified plans that had been adjusted to ensure that the 2.1 metres needed to make the 3 metres of the 2nd defendant's access road was available but the same was to only be made available upon acquisition of the strip by the 2nd defendant.

In light of these facts, it is clear that the 1st defendant refused to approve the plans and conditioned the approval on the adjustment of plans to accommodate the extra 2.1 meters required by the 2nd defendant as a wider access road. The 1st defendant contends it was in an email **DEx5** dated 24th June 2019 to Arch Masamba from Anthony. He stated ***'To adjust the layouts as per the***

resolution in the meeting dated 03/12/2018 to allow for the 3m offset off the cadastre boundary and treat the new boundary as plot boundary line and design your structure considering it as such. Pending structural review.'.

This email states that submissions were made on 17th April 2019.This is contrarily to a letter dated 22nd February 2019 from KCCA (**PEx 11)** indicating that modified plans had been submitted by the applicant and KCCA had received them. They cannot now turn around and say they did not receive the modified plans.

I thus find that no decision was made by KCCA after 20th February as indicated in that letter. There was thus no decision to appeal against to the board and the plaintiff had no other remedies available to him to exhaust.

I thereby agree with counsel for the plaintiff that this email was in regards to the plan to construct a perimeter wall which was submitted after. This is clearly indicated in the sketch plan attached to the email were parts of the wall were to be demolished. This application to build a wall was the one deferred by the 1st defendant.

Under **Section 39 of the Physical Planning Act 2010,** a physical planning committee may defer the consideration of the application and give period and reason for the deferment notice.

The plaintiff contends that 1st defendant breached its statutory duty when it did not approve his development plans and also the defendants abused the court decree in civil suit no 671 0f 2004.

In the case of **R versus Commission for Racial Equality exp Hilling don LBC 1982 QB 276 Griffiths** LJ stated that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith, then it's another way of saying that the power was not being exercised within the scope of the statutorily authority given by Parliament. Of course it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and its within consideration that the courts have been occupied in the many disputes.
Also in the case of **Sharp versus Wakefield 1891AC 173,** court observed that discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice not according to private opinion. It is to be not arbitrarily, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.

It is worth noting that in ***Civil Suit No.671 of 2004,*** it was ordered that the plaintiff herein was to allow a footpath measuring 3 feet at the boundaries.

Indeed when court visited the locus in quo, it found when plaintiff had provided the said footpath of 3 feet.
This was the earlier agreed on position by the parties in their consent Judgment. This positon changed as discussed earlier and plaintiff consented after advice had been given to create an access road of 3 metres. The defendants thus did not abuse the court decree in civil suit no 671 0f 2004 but the parties agreed.

The 1st defendant also had the authority not to approve the building plan and also had the authority to defer it and give reasons. In taking its decision the 1st defendant had discretion to exercise its authority justly to all the parties. It communicated that it will consider the plans on merits if 2nd respondent fails to give a response by 20th February 2019.It did not do so and only deferred the subsequent application to construct a wall to cater for the acquisition of the 3 metres by the 2nd defendant.
No evidence is shown that the 2nd defendant took any step to acquire the 2.1 metres strip as agreed in the meeting. The plaintiff testified that 2nd defendant was to pay for that strip but failed. The 2nd defendant said they are still negotiating and he wanted to pay 10 million but the plaintiff wants 75million.

In the case of **Paddy Musoke versus John Agard and 2 others Civil Appeal 1046 of 2016 and Civil Appeal no 134 of 2017** Justice Elizabeth Musoke notes that the common law developed principles to the effect that a land owner had the right to use a road passing through an adjoining piece of land owned by another. Such a right was deemed to constitute an easement.

Under Section 62 of the Roads Act 2019 the minister shall before granting leave to construct an access road, ensure that the applicant compensates the adjoining landowner. This is equivalent to the old **section 4(b) of the Access to Roads Act** where before granting the applicant leave to enter adjoining land to construct a road there had to be payment of such compensation in respect of the use of the land, destruction of crops or trees and such other property as the land tribunal may determine.

It seems the 1st defendant is still waiting for 2nd defendant to acquire the land. This is unfair to the plaintiff who submitted modified plans. The offset of 3metres is subject to their acquisition and payment by the 2nd defendant who has failed to pay for the same since 2019.The meeting of 3rd December 2018 left a gap in that the price of the additional metres was not agreed upon but left to the parties, unlike the consent for the foot path. In the letter dated 22nd February 2019 (PE11) the 1st defendant was aware that 2nd defendant had not taken steps to acquire the 2.1 metres strip but it did not take a decision. Instead it deferred the structural review in the subsequent application to build a boundary wall. This is contrarily to the rules of reason and justice. It should have approved the modified plans which were catering for the 2.1 metres as it had received them per PE11.

I thereby find that the 1st defendant breached its statutory duty when it failed to approve the plaintiff's development plan, though the defendants did not abuse the court decree in civil suit no 671

0f 2004 as parties agreed to change terms to cater for the access road.

Issue two: <u>Whether the 2nd defendant's acts and omissions amount to fraud</u>

In his submissions, counsel for the plaintiff argued that the 2nd defendant by letter made false misrepresentations to the 1st defendant with misleading allegations which concealed material facts leading to the 1st defendant to halt the approval of the plaintiff's building plans.

Counsel cited the case of ***Fredrick Zzabwe vs Orient Bank & others SSCA No.04 of 2006*** wherein fraud was defined to mean the intentional pervasion of the truth by a person for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or her to surrender a legal right. It is a false or misleading allegation or concealment of that which deceives and is intended to deceive another so that he/she shall act upon it to his or her legal injury. That fraud can either be imputed, actual or constructive.

Counsel referred the court to *paragraphs 5, 6, 10, & 12* of ***PW1's*** witness statement and argued that the 2nd defendant maliciously lodged a complaint to the 1st defendant with knowledge of frustrating the plaintiff's activities on his land.

Exhibit PE4 which is a letter of complaint dated 13th August 2018 demonstrates that the 2nd defendant halted the approval of the building plans and that the same was concealed because it was never brought to the attention of the plaintiff yet it affected his plan approval.

In addition, that because of the said letter, the 2nd defendant claimed an access road over the land owned by the plaintiff but made no mention of the consent judgement in ***Civil Suit No.671 of 2004*** which settled the dispute concerning the access road. That the same amounts to concealment of information and was an act of dishonesty and so does the failure to disclose that ***Mengo Civil Suit No.3199 of 2010*** between the plaintiff and the defendant was dismissed.

Further, to this that the 2nd defendant in bad faith alleged that the plaintiff had sold the land to a one Sebuliba whereas not and further alleging that the plaintiff did not provide him an access road, claiming to have running legal battles and requesting for the halting of the plans all amount to fraud.

I agree with Counsel for the Plaintiff that fraud denotes any act of dishonesty and the same was ably defined in the case of ***Zabwe Fredrick (supra)*** which was rightly cited by the plaintiff. Court in that case noted that;

> ***An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.***

Further in ***Kampala Bottlers Ltd vs. Damanico (U) Ltd, SCCA No.22 of 1992***, it was also held that fraud must be strictly proved, the burden being heavier than one on the balance of probabilities generally applied in civil matters and that in order to succeed on an action based on fraud, the Plaintiff must attribute the fraud to the defendant that is; by showing that defendant is guilty of some dishonest act or must have known of such act by somebody else and taken advantage of such act.

In the case before me, the plaintiff alleges that the 2nd defendant in his letter dated 13th August 2018 made several misrepresentations regarding his land and requested for the halting of the approval of the plaintiff's plans.

According to the said letter marked ***Exhibit PE4,*** the 2nd defendant sought to halt the approval of the plaintiff's building plans on grounds that the 2 had running legal battles to wit ***Revision Cause No.10 of 2017*** arising from ***Civil Suit No.3199 of 2010*** which was still pending before this court.

He further submitted that one Sebuliba had applied for a building plan without consideration of his access road.

It is settled that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts.

It is not in dispute that the 2nd defendant had in fact filed ***Revision Cause No.10 of 2017*** as the same is admitted by the plaintiff.

Upon further investigation, this court ascertained that the said application was indeed filed before the High Court Civil Division on 20th March 2017, and according to the Electronic Court Case

Management Information System, the same was dismissed on 3rd December 2022.

It follows therefore that contrary to counsel for the plaintiff's submissions, the 2nd defendant indeed had a matter pending determination.

Plaintiff's counsel also submitted that there was concealment of information regarding civil suit no 621 0f 2021 and civil suit no 3199 of 2010.Its true these cases were not mentioned in 2nd defendants letter but since letter was requesting for a meeting which meeting was eventually held and plaintiff attended then I find that no fraud was committed by not including the information in the letter and issues were discussed. The 2nd defendant also alleged he was under a mistaken belief that Sebuliba had bought the land. I thus cannot treat this as amounting to fraud.

I thereby find that the plaintiff has not proved fraud against the 2nd defendant

Issue 4. Whether the plaintiff is entitled to the remedies prayed for.

Section 33 of the Judicature Act cap.13 enjoins this court to grant all such remedies to enable the final determination of all matters of controversy between the parties.

I have found that the 1st defendant breached its statutory duty since 2019 when it failed to approve the plaintiff's building plans I thereby

1.Declare that the 1st defendant breached its statutory duty to have the plan approved.

2.An Order is given compelling the 1st defendant to perform its duty and approve the plaintiff's building plans within 60 days.

3.Government valuer to value the extra 2.1 meters of land which leads to the 2nd defendants house and 2nd defendant to pay for the same within 30 days.

4 Compesation

Counsel prayed for compensation of shs 7,560,000,000 as total loss. That plaintiff averred that he suffered loss as he had brought building materials on site and hired contractors. He thereby incurred lost income of shs 630,000.000 .

The 1st defendant counsel submitted in reply that plaintiff has not brought receipts or evidence of payment and he assembled building materials on site without building plans. That he ought to bear the loss as its of his own making.

It true from the record that plaintiff did not bring enough evidence to prove the value of the materials bought. Court found few building materials on site but he had the burden to prove how much he bought them. I also agree with counsel for 1st defendant that he ought not to have bought materials or engaged site engineers without a building plan.

Plaintiff has thus not proved the shs 7,560,000,000 prayed for and the loss of income and how he arrived at it.

5 General damages.

Counsel for plaintiff prayed for general damages on grounds that plaintiff was inconvenienced to execute his commercial building from 2018 and he lost opportunity. He also suffered mental anguish from 2nd defendant who opened up unauthorized access in his land. Further to this his building materials were stolen and some confiscated by 1st defendant's agents. In reply counsel for 1st defendant submitted that plaintiff has not proved any damages.

The law on general damages is that the damages are awarded at the discretion of court and the purpose is to restore the aggrieved party to the position they would have been in had the breach not occurred. See **Hadley Baxendale 1894 (9) Exch 341 and Kibimba Rice Ltd versus Umar Salim, SC Civil Appeal no 17 of 1992.**
In the assessment of general damages, the court should be guided by the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See case of **Uganda Commercial bank versus Kigozi (2002) 1 EA.**

In instant case I find that the plaintiff was inconvenienced as he could not build on his land from 2019 and 1st defendant was not approving his plans yet the 2nd defendant had failed to acquire the land for the access road. I thus find an award of shs 100,000,000 (one hundred million shillings only) appropriate as general damages.

6 Aggravated damages.

Counsel for the applicant prayed for shs 200,000,000 as aggravated damages. He submitted that the 1st defendant halted the plaintiff's commercial activities on his land and was reluctant on side of the 2nd defendant who was constructing on his portion without any approved building plans.

Aggravated damages are awarded by the court in form of an extra compensation for injury caused by the defendant. In **Obongo versus Kisumu council 1971 EA Page 96 SPRY VP** made the following statement regarding aggravated damages. 'It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this injury suffered by the plaintiff as for example by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.' See also **case of J.K.Zaabwe versus Orient Bank and others Supreme Court Appeal no 4 of 2006.**

In the case before me, no further such aggravating factors or circumstances exist to justify any further award of damages beyond the general damages granted.

7 The plaintiff is awarded costs of the suit.

In the final result judgment is entered for the plaintiff in the terms.
1)Declaration that the 1st defendant breached its statutory duty to have the plan approved.

2)An order is given compelling the 1st defendant to perform its duty and approve the plaintiff building plans within 60 days.

3)Government Valuer to value the extra 2.1 metre land which leads to the 2nd defendant house, and the 2nd defendant to pay for the same within 30 days.

4)Plaintiff is awarded general damages of shillings 100,000,000(one hundred million only) payable by both defendants.

5) Defendants to pay the plaintiff costs of the suit.

DATED AT KAMPALA THIS ----30th-----DAY OF ----October----2023.

KANYANGE SUSAN

AG JUDGE LAND DIVISION.