



Ndindiri v Irimu & 3 others (Environment and Land Case Civil Suit E023 of 2022) [2023] KEELC 18438 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E023 OF 2022
EK WABWOTO, J
JUNE 29, 2023**

BETWEEN

MONICAH NYAKIRINGA NDINDIRI PLAINTIFF

AND

DR. MUNENE IRIMU 1ST DEFENDANT

PRISCILLA CHEGE 2ND DEFENDANT

DAVID MBIYU MUHIA 3RD DEFENDANT

EDWARD KIMANI NGANGA 4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed a plaint dated January 24, 2022 which she sought the following orders:
 - a. An order of permanent injunction against the Defendants whether by themselves, their agents, servants and/or employees from interfering with and/or denying the Plaintiff's contractors, employees and/or servants' access to the construction site on plot L.R. No. Nairobi Block 110/425 located at Garden Estate.
 - b. An order directing the Defendants to compensate the Plaintiff the losses incurred as a result of the suspension of the project for the period between September 11, 2021 to November 17, 2021.
 - c. In the alternative to prayer (b) above, a declaration that any losses incurred by the contractor due to the suspension of the construction on plot L.R. NO. Nairobi Block 110/425 located at Garden Estate for the period between September 11, 2021 to November 17, 2021 shall be shouldered by the Defendants.



- d. Cost of this suit together with interest thereon.
 - e. Any other remedy that this Honorable court may deem fit to award
2. The Defendants upon being served fled statement of defence dated February 14, 2022 wherein they denied the Plaintiff's claim in its entirety. They averred that they were strangers to the Plaintiff's averments in the plaint and that the Plaintiff was not entitled to the reliefs sought.

The Plaintiff's Case.

3. The Plaintiff averred that sometimes between September 2021, the Defendants who are the officials of an entity called Eastern Thome Self Help Group Filed A Suit At The Subordinate Court To Wit Cm Elc No E327 Of 2021 Eastern Thome Self Help Group –vs- Monicah Nyakiringa Ndindiri & 4 Others seeking orders to stop the Plaintiff from continuing with the construction of her town houses among other remedies. The Defendants managed to obtain exparte orders stopping the constructions which orders remained in place until November 17, 2021 when the suit before the subordinate court was dismissed in its entirety.
4. It was further averred that during the said period, the project stalled completely as the Plaintiff was only able to resume construction after the suit at the subordinate court had been dismissed. The Plaintiff averred that sometimes in November 2021, the project Quantity Surveyor qualified the loss as a result of the stalled project which losses they sought to recover from the Plaintiff. The Plaintiff was left with no option but to settle the claim which amounted to Kshs 31,172,537.59. The entire project was valued at Kshs 65,000,000/-
5. During trial, James Mathu Kanyua testified as PW1. He stated that he is a Director of Full Mark Building Kenya Limited who were engaged as the contractors in the Plaintiff's project. He told the court that he was contracted by the Plaintiff to develop the project located at Garden Estate. The works commenced in January 2021 after they had signed a contract dated November 18, 2020.
6. It was his testimony that they proceeded with the project uninterrupted for about 9 months until when the Defendants stopped the project on the account that it had no approvals. After the issue was sorted, they later resumed in January 2022 upon which they still faced some challenges from the Defendants on the account that there was an Enforcement Notice issued by Nairobi City County. The Enforcement Notice was later vacated. The project had been suspended for a period of 67 days which occasioned losses to the Plaintiff and the contractors together with the third parties who had been engaged by the contractors. He also testified that the contract could not be terminated because the project was yet to be completed. He stated that a loss of Kshs 31,172,537.59 had been quantified by the quantity surveyor for the entire period of 67 days that the construction of project had been suspended.
7. Benson Oire Onduso the project quantity surveyor testified as PW2. He stated that he did file a statement dated January 24, 2022 which he adopted as his evidence in chief.
8. Rose Wanjiru Ndindiri testified as PW3. He stated that she was acting on behalf of the Plaintiff and she produced a power of attorney dated October 25, 2016 which had been registered on October 27, 2016. She also adopted her witness statement dated January 24, 2022 as her evidence in chief and urged the court to grant the prayers sought in the plaint dated 24th January 2022.

The Defendants case.

9. The Defendant's save for filing a statement of defence dated February 14, 2022 and despite being served never participated in the trial nor did they call any witness to testify on their behalf. The court closed



the Defendants case without them calling any witnesses as they had been granted an opportunity to do so but failed to utilize the same.

The Plaintiff's submissions.

10. The Plaintiff filed written submissions dated April 14, 2023. The Plaintiff began her submissions by giving a brief background of the dispute and submitted that the Plaintiff had proved her case and was entitled to the prayers sought.
11. In respect to the prayers sought, it was submitted that the Plaintiff was entitled to prayers of permanent injunction because the Defendants have been unfairly and without any reason interfering with the Plaintiff's project by denying the Plaintiff's employees/servants and contractor from accessing her property in order for her to develop the same without any justifiable cause or reason under the law and hence therefore the prayer was necessary. Reliance was placed to the case of *Kasarani Mall Ltd v Daniel Otieno Miganga & 3 others* (2017) eKLR.
12. In respect to compensation for the losses incurred between September 11, 2021 to November 17, 2021, it was submitted that James Mathu Kanyua who testified as PW1, a director of Full Mark Building & Engineering (K)Limited had testified and produced evidence where he was denied access to the site under the instructions of the Plaintiff. It was also submitted that as a standard practice any losses incurred during any construction that is not in any way the contractor's fault shall be assumed by the developer and in the instant case, the quantity surveyor in charge of the project had quantified the same being Kshs 31,172, 537.59.
13. The Plaintiff also submitted that the evidence of Benson Onduso Oire PW2 who testified as the Project quantity surveyor had clearly demonstrated the losses incurred amounting to Kshs 31,172,537.59 which had been produced in the Plaintiff's bundle of documents. Reliance was placed in the case of *Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* (2019) eKLR.
14. It was also submitted that this court has powers to issue orders relating to damages and compensation as stipulated under section 13 (7) (c) and (d) of the *Environment and Land Court Act* 2012.

The Defendants submissions.

15. The defendants despite serve never filed any written submissions in respect to these proceedings despite being granted an opportunity to do so. However this court is still bound to consider the entire pleadings and evidence adduced in rendering its judgment.

Analysis and Determination.

16. The court has considered the pleadings filed, written submissions filed by the Plaintiff and the oral and documentary evidence tendered by the witnesses and is of the view that the following are the main issues for consideration herein.
 - i. Whether the Plaintiff has proved her case to the required standard.
 - ii. Whether the Plaintiff is entitled to the orders sought.

Issue No. 1

Whether Plaintiff has proved her case.

17. During trial, the Plaintiff led evidence that she is the registered proprietor of L.R. No. Nairobi Block 110/425 located at Garden Estate which had a project whose construction was suspended due to



reasons occasioned by the Defendants. The Plaintiff also produced evidence to the effect that as a result of the suspension of the said project for 67 days from September 11, 2021 to November 17, 2021 she incurred huge losses which was quantified as Kshs 31,172,537.59. The Plaintiff was also tendered evidence to the effect that the defendants without any colour of right and or reason had occasioned the suspension of the said project and hence liable for the losses incurred.

18. The Defendants never called any witness to testify on their behalf. No witness was called on behalf of the Defendants to controvert the averments and or testimony adduced by the Plaintiff. Therefore, the Defendants' defence remains mere allegations as the Plaintiff's testimony was never rebutted. See the case of *Bilsah Matiangi v Kisii Bottlers Limited & another* (2021) eKLR.

“where a Plaintiff gives evidence in support of her case, but the Defendant fails to call any witness in support of its allegations then the Plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations.”

19. However, uncontroverted evidence is not automatic evidence and the Plaintiff still has an obligation to prove her case to the required standard. In the case of *Kirugi and another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that: -

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a Plaintiff of the duty to prove the case to the required standard.”

Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the court held that: -

“It is not automatic that instances where the evidence is not controverted the claimants has his way in court. He must discharge the burden of proof. He must proof his case, however much the opponent has not made a presence in the contest.”

20. In the instant case, it is not disputed that the Plaintiff is the registered owner of L.R. No. Nairobi Block 110/425. It is also not disputed that the Plaintiff's project was stopped without any justifiable reason by the Defendant upon which she suffered losses amounting to Kshs 31,172,537.59.
21. Therefore, this court finds that no cogent explanation has been offered by the Defendants for their actions and as such the Plaintiff has proved her case against the Defendants to the required standard.

Issue No. 2

Whether the Plaintiff is entitled to the prayer's sought in her plaint.

22. The Plaintiff prayed for orders of permanent injunction and compensation for the losses incurred as a result of suspension of the project between September 11, 2021 to November 17, 2021.
23. The evidence adduced by the Plaintiff shows that the Defendants through their servants and agents have previously blocked her contractor from accessing her property and undertaking her project. These actions have resulted to the construction of the project being halted, consequences of which losses have been incurred. This therefore shows that the Plaintiff is entitled to the order of permanent injunction against the actions of the Defendants.
24. In respect to the orders sought for compensation, the Plaintiff's witnesses were able to adduce sufficient evidence of the losses suffered by the Plaintiff as a result of the Defendants actions. The said loss was quantified for Kshs 31,172,537.59. In the absence of any controverting evidence, this court is satisfied that the Plaintiff has proved her case to the required standard. The court sits to administer



justice. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. In the circumstances I see no basis of not granting the reliefs sought.

25. On the issue of costs, section 27 of the *Civil Procedure Act* gives the discretion to the court and considering that the Defendant did not participate in the trial herein, I will direct each party to bear own costs of the suit.

Final orders

26. In conclusion, it is clear that the Plaintiff has proved her case on a balance of probabilities. I hereby make the following orders, I enter Judgment for the Plaintiff against the Defendants as follows: -
- a. A permanent injunction is hereby issued against the Defendants, whether by themselves, their agents, servants and or employees from interfering with an or denying the Plaintiff's contractors, employees and or servants' access to the construction site on plot L.R. No. 110/425 located at Garden Estate.
 - b. Payment of Kshs 31,172,537.59 to the Plaintiff by the Defendants in respect to compensation for losses incurred as a result of suspension of the project for the period of September 11, 2021 to September 17, 2021.
 - c. Each party to bear own costs of the suit.

- 27 Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH JUNE 2023.

E.K WABWOTO

JUDGE

In the presence of:-

Mr. Majimbo for Plaintiff.

No appearance for Defendants.

Court Assistant – Caroline Nafuna.

