



REPUBLIC OF KENYA



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Devlan Company Limited & another v City Council of Nairobi (Environment & Land Case 577 of 2009) [2025] KEELC 2855 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 577 OF 2009**

MD MWANGI, J

MARCH 14, 2025

BETWEEN

DEVLAN COMPANY LIMITED 1ST PLAINTIFF

ROCKVILLE INVESTMENT LIMITED 2ND PLAINTIFF

AND

CITY COUNCIL OF NAIROBI DEFENDANT

JUDGMENT

1. The Plaintiffs initiated this suit vide the plaint dated 12th November, 2009 which was subsequently amended on 17th October, 2011. The Plaintiffs assert that they are the registered proprietors of L.R 209/10172/14 and L.R No 209/10172/17 respectively (hereinafter referred to as ‘the suit property’). They assert that their applications for approval of building plans to construct flats on the suit property lodged in 2005 were approved by the Defendant on 17th February, 2005. Due to financial constraints however, they stopped the construction in 2007 for a while during which period the approvals expired. The Plaintiffs contend that upon expiry of two years, their application for renewal of building plans (which had since expired) was duly approved by the Defendant through its letter dated 17th June, 2008.
2. It is averred that on 31st July, 2009, the Defendant maliciously, illegally and unreasonably demolished the Plaintiffs’ building after they had commenced construction of the ground and first floors. According to the Plaintiffs, this demolition was influenced and instigated by one David Kinyanjui Gatimu, who was a senior an employee of the Defendant as well a neighbour to the Plaintiffs. They allege that the said David Kinyanjui Gatimu had vowed to frustrate their construction after they declined to offer him the professional consultancy to draw and prepare the building plans for them at a fee. The Plaintiffs allege that they incurred financial loss of Ksh. 10,564,225/= due to the Defendant’s actions of demolishing their buildings.



3. The Plaintiffs assert that even though they completed construction of residential flats on the suit property, the Defendant has refused to receive their application for an occupation certificate at the instance of David Kinyanjui Gatimu. In addition, their tenants are being harassed and intimidated by the Defendant yet its premises are in good shape and have been built in accordance with the duly approved building plans. Consequently, the Plaintiffs pray for judgment to be entered against the Defendant for the following orders;
 1. An urgent permanent injunction to restrain the Defendant by itself, its agents servants and or employees from trespassing on the suit premises, from harassing, evicting, and or interfering with the Plaintiffs' tenant's quiet enjoyment of the premises known as L.R. No. 209/10172/14 and L.R. No. 209/10172/17.
 2. An order directing the Defendant, its servants and or employees to issue the Plaintiffs with the occupation certificate in respect of the premises known as L.R. No. 209/10172/14 and L.R. No. 209/10172/17.
 3. Special damages in the sum of Kshs. 10,564,225/= pleaded hereabove with interest at the bank rate of 15% with effect from 31st July, 2009, the date when the Defendant demolished the Plaintiffs' premises as pleaded above.
 4. General damages for loss of income occasioned to the Plaintiffs because of the Defendant's illegal, malicious, spiteful and unreasonable demolition of its building on L.R. No. 209/10172/14 and L.R. No. 209/10172/17, the quantum thereof to be determined by this Honourable Court.
 5. Costs of the suit and interest thereof.

Response by the Defendant

4. The Defendant through a statement of defence dated 2nd December, 2021 vehemently denies the Plaintiffs' allegations in the amended plaint and puts them to strict proof. It pleads that the application for approval of the building plans was approved by Town Planning Committee on 17th February, 2005 in terms of minutes 70 and 76. However, its application for renewal was never approved due to changes in zoning laws where the suit property is situated. In addition, the Plaintiff had sufficient notice because it never had duly approved building plans prior to commencing the construction. It is averred that the Plaintiffs' allegations against Mr. David Kinyanjui Gatimu are outrageous because as an officer of the Defendant, he is mandated to ensure compliance with all relevant laws to enable it control, supervise and regulate construction of buildings within its jurisdiction.
5. The Defendant contends that it never issued the Plaintiffs with the occupation certificate because they commenced construction without duly approved building plans and the mandatory inspection of construction at all critical stages in accordance with the building code. Therefore, the Plaintiffs are not deserving of the equitable remedy of injunction because of want of compliance with the law and also approaching the court with unclean hands.
6. The Defendant asserts that bearing in mind that issuance of an occupation certificate is done upon successful completion and inspection of the building/construction, it could not have issued the certificate because of restraining orders against it in respect of the suit property. It is further pleaded that according to the zoning policy, construction of flats is only allowed if the subject area acreage is 'not less than 0.2 ha'. Regardless of this, the Plaintiffs undertook construction of flats on an area of 0.0535 ha and 0.0569 ha respectively. They failed to comply with the planning and environmental



requirements of the zone where their plot is located. The Defendant avers that its officers are yet to determine the integrity and workmanship of the building.

Evidence adduced

7. The case proceeded to full hearing with the Plaintiff calling two witnesses. The Defendant did not call any witness.
8. PW1, Peter Kamau Warari a director of both Plaintiffs' companies adopted his undated witness statement filed in court on 13th November 2009 as his evidence in chief. He further produced the documents on the Plaintiffs' list and bundle of documents dated 14th October, 2011 as exhibits save for the report by the Quantity Surveyor that was produced later on by PW2 as an exhibit and documents number 46 and 47 which were marked for identification but not produced.
9. Responding to questions put to him in cross-examination, PW1 reiterated that he was a director of the Plaintiffs' companies even though he had not filed any CR 12 form to support this assertion. It was his evidence that the Plaintiffs were granted approvals for construction by the Defendant. The witness asserted that he had never received any stop order or notice from the Defendant prior to the demolition.
10. PW1 admitted that the photos produced as exhibits had not specified where the alleged demolition had happened. They could therefore not be used as proof of the alleged demolition.
11. As relates to his application for an occupation certificate, PW1 admitted that he had not attached it as an exhibit because his claim only related to loss occasioned by the demolition.
12. During re-examination, PW1 affirmed that notices were never issued to the Plaintiffs before demolition. It was his evidence that lack of an occupation certificate did not entitle the Defendant to destroy the properties. He further added that the Plaintiffs incurred significant losses because of the demolition.
13. PW2, Peter Kinyua Mbogo testified that he was a practicing quantity surveyor and a director of Shapa Consulting Ltd. He added that he had been practicing as such since 2010 when he was registered as a quantity surveyor.
14. He used to work under Patrick Keiru as an assistant quantity surveyor for two years before he obtained his own license. He was therefore familiar with Mr. Keiru's work.
15. PW2 asserted that he could remember receiving instructions from Devlan Company Ltd. They received the instructions from Mr. Joseph Gathoga, a director of Devlan Company Ltd in the year 2009. The instructions were in relation to a block of flats which they were to quantify. The flats had allegedly been demolished. They executed the instructions and submitted a report dated 15th June 2010 which he produced as an exhibit in support of his evidence. He affirmed that the report was authored by Patrick Keiru whom he worked under for two years before he was licensed to practice on his own.
16. Responding to questions put in cross-examination, PW2 stated that their work as quantity surveyors included costing in construction, tendering in construction and advising clients on costs of construction. He was producing the report because Mr. Keiru, the author of the report was deceased. Mr. Keiru had not been involved in the construction of the demolished flats. He could not tell if Mr. Keiru had sought any information from the County Government of Nairobi before compiling his report.



17. PW 2 stated that the reason for including materials spoilt on site was because the materials were indeed spoilt in the course of the demolition. The report does not however describe the nature and extent of the damage on the materials on site.
18. In re-examination, PW2 affirmed that the report was prepared by a qualified quantity surveyor after a site visit.
19. Responding to questions by the court, PW2 admitted that he had not attached evidence of death of Mr. Keiru. By the time Mr. Keiru died, PW2 was not working with him. He had opened his own company.
20. The Defendant did not call any witness. It had not filed any witness statements. At the time the suit was confirmed ready for hearing, the Defendant had not filed any statements. It did not at any time seek leave of the court to file statements either at the time of pre-trial directions or subsequently thereafter.

Directions by the Court

21. On 1st July, 2024, parties were directed to file their respective written submissions. Both parties complied and filed their respective submissions.

Submissions by the parties.

Plaintiffs' submissions.

22. The Plaintiffs identified two issues for determination in their submissions as follows;
 - a. Whether the acts of the demolitions committed by the Defendant against the Plaintiffs on L.R. 209/10172/14 and L.R. No. 209/10172/17 were illegal and unlawful.
 - b. Whether the prayers sought in the amended plaint amended on 17th October 2011 should issue.
23. On the first issue, the Plaintiffs submitted that it is not in dispute that they are the registered owners of the premises known as L.R No. 209/10172/14 and LR No. 209/10172/17 respectively. Their building plans were duly approved by the Defendant and they commenced their construction after the approval. A renewal of the approval was issued in 2008. They allege that they obtained all the requisite approvals before commencing the construction.
24. It is the Plaintiffs' case that having obtained all the approvals, there was no justification for the Defendant to demolish their buildings. The demolition was therefore carried out without notice and due regard to the law. The Plaintiffs aver that the alleged zoning policy prohibiting construction of flats in an area of less than 0.2 ha was not in place by the time they submitted their drawings for approval way back in the month of February 2005. The same came into force vide Town Planning Committees Minutes of 7th July 2006. They argue that the policy could not have been meant to apply retrospectively.
25. The Plaintiffs cite the Supreme Court of Kenya decision in Samuel Kamau Macharia and another – vs- Kenya Commercial Bank Limited and 2 others (2012) eKLR, where the court held that for non-criminal legislation, the general rule is that all statutes other than those that are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature.
26. The Plaintiffs accuse the Defendant of acting in blatant and sheer violation of the basic tenets of the rules of natural justice. The Plaintiffs were not at any time whatsoever served with any notices. The enforcement notice contemplated under Section 38 of the Physical Planning Act (now repealed) was not issued; neither did the Defendant obtain a court order to authorize the demolition.



27. On the 2nd issue, the Plaintiffs submit that they are entitled to the orders sought in their amended plaint, being a permanent injunction, special damages of Kshs. 10,564,225/-, general damages for loss of income, issuance of an occupation certificate and costs of the suit.

Submissions by the Defendant

28. The Defendant's submissions are dated 26th August 2024. On its part, the Defendant identified 3 issues for determination as follows.
- a. Whether the acts of demolition allegedly committed on L.R. No. 209/10172/14 and LR. No. 209/10171/17 were null and void.
 - b. Whether the Plaintiffs are entitled to the prayers sought in the amended plaint.
 - c. Who should bear the costs of the claim.
29. The Defendant submits that the burden of proof was upon the Plaintiffs to prove their claim against it. It affirmed that no evidence was adduced by the Plaintiffs to prove the allegation that the structures on the suit property were actually demolished by the Defendant. Again, the Plaintiffs did not adduce evidence to demonstrate that Mr. David Kinyanjui Gatimu who had allegedly instigated the demolitions was an employee of the Defendant's City Planning Department as alleged by the Plaintiffs.
30. The Defendants cited the case of Daniel Toroitich Arap Moi- vs- Mwangi Stephen Mureithi & ano (2014) eKLR, where the Court of Appeal affirmed the position that even where a Defendant has not denied the claim by filing a defence or even where the Defendant does not appear, the Plaintiff still has the burden to lay evidence on the table and the trial court has the duty to examine that evidence and satisfy itself that the claim has indeed been proved. If the evidence falls short of the required standard of proof, the claim must be dismissed.
31. The Defendant submits that the Plaintiffs are therefore not entitled to the orders sought.

Issues for determination

32. Having considered the pleadings filed by the parties, the evidence adduced and the submissions analyzed above, the issues for determination in this case are;
- A. Whether the Plaintiffs have proved the alleged demolitions, if at all were carried out by the Defendant or its authorized agent(s); and
 - B. Whether the Plaintiffs are entitled to the reliefs sought

Analysis and determination

33. In spite of the fact that the Defendant did not call evidence, the burden of proof which was on the Plaintiffs was no lesser. As the Court of Appeal stated in the case the case of Daniel Toroitich Arap Moi- vs- Mwangi Stephen Mureithi & ano (2014) eKLR,

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of



proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

34. The Plaintiffs’ claim against the Defendant is premised on the amended plaint, amended on 17th October 2011. At paragraph 9 of the amended plaint, the Plaintiff allege that on 31st July 2009, the Defendants employees without any notice whatsoever went to the suit premises and demolished the buildings built thereon with a bull dozer.
35. The Plaintiffs plead further at paragraph 11 that the Defendant in demolishing their structures were influenced by one David Gatimu who is a very senior employee in the Defendant’s City Planning Department and who is also a neighbour of the Plaintiff. They allege that David Gatimu had declared enmity and hostility against them after they declined to offer him professional consultancy to draw and prepare the building plans for the suit premises for a fee. The Defendant according to the Plaintiffs acted at the whim of Mr. David Gatimu.
36. In spite of the very serious allegations against the said David Gatimu, he was not joined as a Defendant in this suit. From the pleadings, David Gatimu was the principal actor in the alleged demolition of the Plaintiffs’ buildings. I wonder how the Plaintiffs hoped to prove their case against the Defendant without joining the principal actor in the alleged saga.
37. Having said so, the burden of proof was on the Plaintiffs to prove their case as pleaded against the Defendants. The Court of Appeal in the case of Anthony Francis Warcham t/a AF Warcham & 2 others –vs- Kenya Post Office Savings Bank (2004) eKLR, stated that;

“We are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules (now Order 15 of the Civil Procedure Rules, 2010). And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support that fact pleaded, the party with the burden of proof should fail.”

38. Section 107 and 108 of the [Evidence Act](#), CAP 80 cited provides as follows,

“107. Burden of proof.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”



39. In *Gichinga Kibutha -vs- Caroline Nduku* (2018) eKLR, the court emphasized on this point stating that,

“It is therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.”

Having carefully analyzed the evidence presented before this court, it does not prove that the alleged demolition was carried out by the Defendant. Responding to a direct question put to him in cross-examination, PW1 stated that he had no evidence that the alleged demolition was carried out by the Defendant. PW1 too admitted that the photos produced as exhibits had not specified where the alleged demolition had happened. There were of no use to his case. There was further no evidence at all to demonstrate how David Gatimu influenced the Defendant to carry out the demolition. The Plaintiffs did not present any evidence to confirm that David Gatimu was actually an employee of the Defendant who was acting in the course of his duties as such as alleged and that the Defendant was responsible for his actions.

40. I must point out that PW2 was a witness called to produce a valuation report that he did not make on the allegations that the maker was dead. No evidence was presented to the court to prove the allegation of death of the maker of the report. That erodes the evidential value of the report.

41. On this finding I would dismiss the Plaintiffs’ claim. The Plaintiffs have not proved the alleged demolitions, if at all were carried out by the Defendant or its authorized agent(s).

42. Consequently, it goes without saying that the Plaintiffs are not entitled to the orders sought.

43. There is one prayer in the amended plaint that I would specifically seek to address. The prayer for an order directing the Defendants, its servants and or employees to issue the Plaintiffs with the occupation certificate in respect of the suit premises known as L.R No. 209/10172/14 and L.R. No. 209/10172/17.

In the first place, the prayer is misplaced in this suit. PW1 himself in his testimony stated that he did not consider it necessary to exhibit the application for an occupation license because this suit in respect of the demolitions. Secondly, the Plaintiffs have not laid a proper basis for the court to grant the prayer. The Defendant has submitted that the Plaintiffs are not entitled to the prayers sought because construction of its flats was not carried out in accordance with the laid down procedures. They further submit that it is on this basis that the Plaintiff’s do not deserve to be issued with occupation certificate in respect of dwelling notwithstanding their occupation by tenants. Accordingly, it accuses the Plaintiffs of approaching the court with unclean hands. No evidence was led by the Plaintiffs to prove compliance with the approved plans, inspections and certification of compliance to justify the grant of this order.

44. More importantly, the court’s jurisdiction to issue an order to compel the Defendant to perform its statutory duty; a mandamus, has not been properly invoked. That in essence is what the Plaintiffs are seeking for by praying for an order directing the Defendant to issue them with an occupation certificate.

45. As explained in the Court of Appeal decision in *KNEC –vs Republic Ex Parte Geoffrey Gathenji*, the order of mandamus is a command issuing from the High Court directed at any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.



46. An order of mandamus will ordinarily issue in Judicial Review proceedings or in a constitutional petition under article 23 of *the Constitution*. The prayer by the Plaintiffs is therefore declined.
47. The upshot is that the Plaintiffs' case against the Defendant fails. It has not been proved on a balance of probabilities. It is hereby is dismissed.
48. On the issue of costs, considering the peculiar circumstances of the case, the court directs that each party bears its own costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 14TH DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kinyua for the Plaintiffs

Mr. Kinuthia for the Defendant

Court assistant: Mpoye

M.D. MWANGI

JUDGE

