



**Siku v Wanjohi & another (Environment & Land Case E033 of 2023)
[2023] KEELC 20966 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E033 OF 2023
AA OMOLLO, J
OCTOBER 19, 2023**

BETWEEN

MATHII SIKU PLAINTIFF

AND

NAIROBI CITY COUNTY 1ST DEFENDANT

MUITUNG’U MWAI WANJOHI 2ND DEFENDANT

RULING

1. The Plaintiff filed an application dated 27th January 2023 seeking for the following orders;
 1. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an injunction restraining the Defendant from continuing with any construction on the plot number CPT AS 369 Kahawa West.
 2. That pending the hearing and determination of this application, this honourable court be pleased to direct the Defendant/Respondent to repair the Plaintiff’s house known as Kahawa West P.6 next to CPT AS 369, Nairobi County and provide accommodations while the repairs are ongoing
 3. That costs of the application be provided for.
2. The motion was based on the grounds that the Plaintiff is the owner of House P6 which is adjacent to plot number CPT as 369 Kahawa West where the 1st Defendant in 2019 started laying foundation of a building and the deep excavation resulted to the neighboring property structure being compromised.
3. The Plaintiff averred that the construction by the 1st Defendant has affected her house resulting to huge cracks on the wall making the house inhabitable and the deep excavation has caused the house to tilt to one side so that whenever it rains, it becomes hard to reside in the house due to flooding. In support



and as per the Court Orders issued on 27th February 2023, the Plaintiff annexed an engineer's report in a further affidavit sworn on 17th March 2023 by Mathii Siku.

4. The Plaintiff stated that the 2nd Defendant through the Planning, Compliance and Enforcement Department, granted the 1st Defendant license and authorization and the 2nd Defendant has neglected its duties to inspect the ongoing construction which has led to the Plaintiff suffering harm and on the brink of being rendered homeless. Further, it is deposed that the 2nd Defendant failed to enforce the terms of the construction approval and ensure the building is a 4-floor building; thus failed to enforce the notices issued to the 1st Defendant dated 2nd December 2022 and 16th December 2022 to stop the ongoing construction.
5. The Plaintiffs contended that she has children of tender age and aged sick parents who are adversely affected by the cold and water leakages putting their lives and health at risk. Further, that on 3rd November 2021, she wrote to the Director General Nairobi Metropolitan Services expressing the dire situation and the need for an immediate resolve and also sent a follow up letter on 15th November 2021.
6. The Plaintiff also stated that on 20th January 2022, she filed a complaint at the National Environmental Complaints Committee and to Director General of National Environmental Management Authority in an effort to stop the construction and further damage to the property. That on 21st January 2022 she wrote a letter to the National Construction Authority for a review of the Environmental Assessment of the Defendant's construction and on 10th February 2022 officers from the Nairobi Metropolitan Services went for a site inspection and vide a letter dated 15th February 2022 confirmed the damage caused to the Assistant Deputy Director (Public Transport).
7. The Plaintiff stated that she further wrote to the office of the Governor for the 2nd Defendant referencing the above letters and highlighted the damages occasioned by the continued construction and on 24th November 2022, she was served with an enforcement notice from the 2nd Defendant to move out of the house and vide letter dated 28th November 2022 wrote to the Officer of Governor for the 2nd Defendant to reverse its decision and on 2nd December 2022 and 16th December 2022 the 1st Defendant was served with a notice to stop the construction which they have not adhered to.
8. The Plaintiff stated that the 1st Defendant was arraigned and charged by the 2nd Defendant and Nairobi Metropolitan Services at City Court case Number 87B/22 for failing to adhere to the Enforcement Notice and that unless the prayers sought are granted, the Applicant will continue to be adversely affected on account of the financial loss and emotional anguish endured during the subsistent period of this suit.
9. The 1st Defendant vehemently opposed the application vide grounds of opposition dated 23rd February 2023 and replying affidavit sworn by Muitung'u Mwai Wanjohi on 21st March 2023. He stated that the Plaintiff's cause of action is for compensation for alleged damage to property arising from the construction on an adjoining property making it a civil in nature and does not relate to environment, use occupation or title to land therefore the court lacks jurisdiction to hear and determine the matter.
10. Further, the 1st Defendant contended that the Plaintiff has not exhausted the available procedural mechanisms for the resolution of the dispute herein before moving this court therefore offending the doctrine of exhaustion of remedies. Also, he added that the Plaintiff does not own Plot CPF AS 369, therefore the orders sought in respect to it should not be issued.
11. The 1st Defendant stated that the Plaintiff has not proved that she is the owner of Plot Number 6 therefore lacks the locus standing to seek the orders sought and that she is also guilty of non-disclosure of material information to the effect that the damages established on house erected on Plot Number



- 6 was occasioned by the weak structural designs on the extension made to the house and subsequent demolition of the adjacent house on Plot number 5.
12. The 1st Defendant produced Engineer's report by Engineer J.W Macharia and contended that construction on Plot number 14 has not affected the house erected on Plot Number 6 and that all the requisite approvals for the construction that near conclusion had been obtained hence granting reliefs sought in the application will subject him to suffer substantial loss thus the balance of convenience tilts in his favour.
 13. He added that the Plaintiff began complaints in March 2021 when the construction was at first floor and that whereas the initial approval was for six floors (ground plus five floors), he initiated the development amendment process with the 2nd Defendant to cover the extra floor which is on course as allowed.
 14. The 1st Defendant objected that there were massive excavations during construction of the column bases on Plot Number 14 which has a ground tie beam interconnecting all the columns at the ground level and therefore there was excavation that was carried out between the columns along the length of the plot more so at the boundary with Plot number 6 as illustrated by the Plaintiff's Engineer report.
 15. The 1st Defendant also contended that the Enforcement Notices issued by the 2nd Defendant on the construction are a subject of Nairobi Civil Suit No MCCC /E6524/2022-Muitungu Mwai Wanjohi v County Government of Nairobi where temporary orders of injunction restraining the 2nd Defendant from acting on the notices were issued in favour of the 1st Defendant on 15th December 2022. Further, that the only column base on Plot Number 14 which lies within the breadth dimensions of the house on Plot number 6 is at the last quarter of the house while the other column base is close to 2.5 metres away from the edge of the house and considering that the dimensions of the column bases are 2.0 metres by 2.0 metres and were dug 0.3 metres away from the boundary, it is unlikely that such a process would lead to the damages on the house more so since only hand tools were used.
 16. Also, the 1st Defendant contended that the house erected on Plot Number 6 consists of two units which are structurally independent and constructed under different times and workmanship which design contributed to the damages on the house which were further aggravated by the demolition of the house in the adjacent plot.
 17. The Plaintiff and 1st Defendant filed submissions dated 24th April 2023 and 16th May 2023 respectively.
 18. The Plaintiff while citing the decision in *Giella v Cassman Brown* (1973) EA 358 as was reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR submitted that she should be granted the orders sought in the application.
 19. The Plaintiff submitted that in the report filed by the 1st Defendant, he acknowledges that the Plaintiff's house is damaged and allege that the cracks were caused by oversaturation of the soil with water yet that conclusion was not supported by a geological report to show that the soil where the suit house sits on was tested to prove it and that the neighboring houses that are built on the same type of soil have no cracks.
 20. The Plaintiff submitted that where there is a conflict of opinion on the experts, it is for the court to come to a decision after analyzing all the evidence before it and cited the case of *Rylands v Fletcher* [1861-73] ALL ER REP 1 to support that damage occasioned to her house because of the construction by the 1st Defendant, therefore it does not matter how careful he may have taken to prevent the damage.
 21. She submitted that she will suffer irreparable injury if the 1st Defendant is not restrained as her house had no cracks before the 1st Defendant began construction on the adjacent plot but it is now in a



deplorable situation, at the risk of collapsing and relied in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR.

22. The 1st Defendant submitted that this court has no jurisdiction in the matter and in support cited the case of *Petro Somoni Motoki v Jeremiah Matoke Nyang'wara & 2 others* [2021] eKLR where ELC court upheld a preliminary objection on jurisdiction in a suit for damages arising out of construction in an adjacent building and struck out the case.
23. The 1st Defendant submitted that the Plaintiff has not established a prima facie case as she has not produced any document to establish ownership of House P6. He submitted that the reports by the Engineers are technical in nature and in the absence of a consensus, it is premature to attribute the damage on house P6 to the construction by the 1st Defendant on house P14 noting that it is not even known whether the damage pre-existed before the construction or not.
24. The 1st Defendant also submitted that from the relief sought by the Plaintiffs in their amended plaint, it is clear that there exists an open remedy to them and therefore the injury, if at all, is repairable. Further, the remaining construction is unlikely to change the injury complained of by the 2nd Plaintiff, therefore, they have not satisfied the condition on proof of irreparable damage.
25. The Plaintiff has brought a motion for injunctive relief against the 1st Defendant who is constructing to the property adjacent to her house on the grounds that the ongoing constructing is damaging her house and that the same is ongoing without the requisite approval and inspection by the 2nd Defendant. The 1st Defendant has contended that this court does not have the jurisdiction to hear and determine the matter, the Plaintiff has not proved that she is the owner of House P6 and that his construction has not caused damage to her house. The court directed that both parties produce engineer reports with regard to the damage and which was done, each supporting their case were submitted.
26. Two issues arise before this court for determination; Jurisdiction of this court and whether the temporary injunction should be granted.
27. In the famous case of "*Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) IKLR dealing on jurisdiction stated: -

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.
28. The 1st Defendant argues that this court does not have jurisdiction to entertain the dispute under the doctrine of exhaustion. I have analyzed the pleadings and discerned that before the plaintiff filed the suit, she approached the relevant bodies to resolve her complaint. The plaintiff has displayed copies of letters lodging a complaint with National Construction Authority, NEMA and the Physical Planning department of the Nairobi County Government.
29. She deposed that the Nairobi County proceeded to issue the 1st defendant with enforcement notices dated 2nd and 16th December, 2022 respectively. The 1st Defendant acknowledges receipt of the notices and he proceed to file MCCC E6524/2022 to challenge the enforcement notices. The plaintiff also lodged on 20th January, 2022 a complaint with the National Environment Complaints Committee and on 21/1/2022 wrote to National Construction Authority. Thus, she exhausted the available mechanisms but she has not got the dispute resolved. The plaintiff could have approached this court



by way of appeal only if her claims before the respective bodies were heard and determined. As it were, there was no order/decision reached by the institutions approached to appeal against. I find the claim as filed in properly before the court.

30. The plaintiff has sought to be granted injunctive reliefs. On the other hand, the 1st Defendant argues that the construction complained of is near complete and the damages if any suffered by the plaintiff can be compensated by an award of damages hence there is no basis to allow the application.

31. I have considered the arguments for and against the application. I am alive to the purpose of orders of temporary injunction as set out under order 40 rule 1 of the *Civil Procedure Rules* thus...

“to preserve any property in dispute in a suit that is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of decree.”

32. The Plaintiff filed a further affidavit dated 17th March, 2023 which enclosed a report by their engineer pursuant to a site survey conducted on 8th March, 2023. The report at page 5 gives findings and observations by the engineer inter alia; several structural damages observed along points B-1-F where the wall meets roof rafters; external metal doors at points B & F have suffered structural damages such as deformed frames, buckled shutter and closing difficulty.

33. The report went further to annex photos showing the damages on the house lot P.6 at pages 7 and 8. Further, it is discernable from the parties’ pleadings that the excavation complained of was completed before the filing of the current application and the impugned construction works is near completion. For instance, in ground 3 of the application, the applicant states that

“the 1st Defendant in 2019 started laying the foundation of the building at plot number CPT AS 369 Kahawa West. The deep excavation for building resulted to the neighboring property structure being compromised which resulted to deep cracks on the wall. There are cracks in the walls and floor of the house making it inhabitable to reside in. whenever it rains the Plaintiff/Applicant has found it hard to reside in the house due to flooding.”

34. This Court draws an inference that, even if the orders sought are issued at this stage to stop the construction, the orders will not undo the alleged damage already occasioned to house P.6. Although I am persuaded that the plaintiff has demonstrated that she has a prima facie case (by demonstrating that damages occurred to the house), issuing the orders of temporary injunction in terms of prayer 2 and 3 cannot undo the harm complained of to house No 6. The recommendations by the engineer does not include stopping the developments now as one of the ways to forestall further harm.

35. In regard to prayer 4 which required an order directing the Defendant to repair the house known as Kahawa West P.6 next to CPT AS 369 is a mandatory order. The principle for granting mandatory orders were laid out in the case of *Kenya Breweries Ltd v Washington Okeyo* (2002) eKLR that;

“a mandatory injunction can be granted at an interlocutory stage in special circumstances; and where the case is clear and which the court thinks should be decided at once.”

36. This court has reviewed the pleadings and find that the circumstances are special in view of the dangers the damages to the house will expose the occupants to. However, the case is not clear in so far as exact cause of damages complained of in view of the two reports are conflicted. Whether or not the construction of the 1st Defendant damaged house P.6 is the crux of this dispute which can only be determined after hearing both parties. Therefore, making an order for repairs at this stage would infer that the court has drawn conclusions on the matter. The losses that are incurred by the Plaintiff in



terms of alternative accommodations or repairs of the damaged house are all ascertainable and can be compensated if proved by way of damages.

37. It is my considered opinion and I so hold that the prayers sought in the application in particular prayer 2 and 3 if granted will be in vain. Prayer 4 is not available since the issues are not clear. The best interest of the plaintiff will be to have the suit heard expeditiously. The application fails and an order that costs of the application to abide the winner of the suit.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

A. OMOLLO

JUDGE

