



**Mutisya v Mwanzia (Environment & Land Case 214 of 2017)
[2022] KEELC 3806 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 214 OF 2017**

**LL NAIKUNI, J
JULY 28, 2022**

BETWEEN

GRACE KASENGE MUTISYA PLAINTIFF

AND

WILLY MWANZIA DEFENDANT

JUDGMENT

I. Preliminaries.

1. On June 15, 2017, the Plaintiff filed this case through a Complaint dated even date against the Defendant. He averred that at all the material times of this suit he was the lawful registered owner of residential Plot Allotment No. 166 Maganda (Miritini) S.S, Block C 296 within the Maganda Settlement Scheme (hereinafter referred to as “The Suit property”) what the Defendant had unlawfully set up structures, buildings and development particulars of which were well known to the Defendant.
2. She further pleaded that over the years, her family and her had been occupying her property until the Defendant forcibly, illegally and unlawfully began setting up foundation of structures, buildings and development on the said suit property. As a result of the Defendant’s actions, the foundation and existence of the suit property was at extreme risk as there was emergence of cracks within the walls.
3. As result, the Plaintiffs usage quiet enjoyment and access to the suit property would be and shall be violated by the unlawful actions of the Defendant who had since refused to stop the intended and ongoing development despite being informed of their illegal actions.
4. Consequently, the illegal actions by the Defendant was furious to the Plaintiff same of which the Plaintiff stood to suffer irreparable harm not capable of being compensated by money damages due to the violation of his right to own and access property as the intended building structures shall unlawfully threaten and violate the Plaintiff’s right to quiet possession, access and usage of her lawfully acquired property.



5. Despite of service having been effected, the Defendant never entered appearance. On November 16, 2021, being a land matter it proceeded for hearing by way of formal proof under the provision of Order 10 Rule 4 and 10 of the Civil Procedure Rules. The Plaintiff summoned two witnesses and testified through examination in chief. The Plaintiff then closed its case. The submission were filed and hence this Judgement thereof.

II. The Plaintiff's Case.

6. The Plaintiffs prays for Judgment against the Defendant for:-
 - a. An order of permanent injunction restraining the Defendant his servants, workmen agents employees and/or otherwise whosoever from encroaching, putting up structures building and in any way modifying the Residential plot No. 166 Maganda S.S.
 - b. An order of mandatory injunction compelling the Defendants to demolish he structures the Defendants have set up on the said Plot.
 - c. Damages (Kshs. 2,000,000/=).
 - d. Costs of the suit.
 - e. Any other and further remedy that this Honorable Court may deem just fit to grant.

PW - 1- Examination in chief of PW – 1 by M/s Kiboss

7. PW – 1 is called Grace Kasema MutisyA who was sworn and testified in the English language. Her national identification bears No. 7xxxxxx. She lived at Miritini Makandai Scheme. She was a nurse aid. She was here because of one Willy Mwanzia - the Defendant herein. They were neighbours. She stated that she had a Letter of Allotment given to her by the Government. It was for Plot No. 166 Maganda – Miritini Scheme. She produced it and marked as Plaintiff Exhibit No. 1.
8. Thus, based on this, she held being the absolute and legal owner to the suit property. He built on her plot. The Defendant continued to build on his land but the structure started permeating onto her land. One morning upon getting up, she found out that he had gotten into her plot. When she asked him to stop the construction, he blatantly refused. Instead, he asked her to remove her iron sheet, and which wherever it rained it got into her land. It affected her house. It started getting damaged. Her plot was worth between a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/) to Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=).
9. She testified that she had no access road. She informed Court upon getting frustrated, she approached an Advocate. He advised her to seek the services of a Land Surveyor to ascertain the exact size, the beacons and the boundaries of her Plot. She engaged a Land Surveyor called Kimoland Surveying Services and who prepared a Surveying report dated May 17, 2017. She produced it and Marked as Plaintiff Exhibit No. 2. She testified having recorded a witness statement dated October 4, 2021. She urged Court to allow her adopt it as part of her evidence of the case.
10. She applied to have the List of documents filed on 15th June, 2017 be adopted as evidence in support of the case. They were all produced and Marked as Plaintiff Exhibits No. 1 to 5 and Supplementary List of documents dated January 16, 2021. It bears a map plus photographs. She prayers were for the Defendant to move out from her plot. He should demolish his house from her house. She also prayed for the costs of the suit.



Examination in chief of PW - 2 James Nguta Mwazoti

11. His Huduma card bore numbers 1xxxxxxx. He lived at Miritini, within the County of Mombasa. He was an artisan. They knew each other with Grace. He is the one who constructed a house for her. It was a Swahili structure. She bought the Plot which they measured. The house measured 60 X 35 Feet. He had to reduce the land in order to retain an access road.
12. According to him the County By Laws required all occupants and Plot owners to retain a 3 feet radius in between buildings for access. But the Defendant used the place they had left and build on it. Hence, he utilized 6 feet. As a result, rain and storm water would pass through the veranda. There was a very narrow access road. He had recorded a statement and filed in court on October 18, 2021. He adopted it to be part of his evidence in support of the Plaintiff's case. That marked the close of the Plaintiff's case.

III. Submissions.

13. On November 16, 2021 upon the closure of the Plaintiff's case, the Plaintiff was directed to file written submissions. On February 9, 2022 upon compliance, the Honorable Court reserved a date for the delivery of its Judgment accordingly.

A. The written submissions by the plaintiff.

14. On March 9, 2022, the Learned Counsel for the Plaintiff, the Law firm of Messrs. H.N Njiru & Company Advocates filed their written Submissions of even date. M/s. Kiboss Advocate commenced by providing to detail all the background leading to the filing of this case. She summarized all the evidence adduced by all the witnesses summoned by the Plaintiff and the Exhibits produced and Marked as Plaintiff Exhibit 1 to 7 hereof. She submitted that the Defendant constructed a house on his property but in total contravention of the Physical Planning Act and Building Code which made it mandatory for builders to leave three (3) feet space in between structures. It was her contention that as a result it caused cracks onto the house of the Plaintiff and also blocked the natural light forcing her to be using electricity during the day. The Counsel held that in order to prove her case the Plaintiff produced a floor Plan as Plaintiff Exhibit No. 2, Surveyors report as Plaintiff Exhibit No. 3 and Photographs as Plaintiff Exhibit No. 7 which manifested the extent of damage to her house. According to her, all these were caused by the negligence by the Defendant.
15. The Counsel averred that the Defendant's house was so close thus restricting access of the Plaintiff and her family to the house. It obstructed drainage making storm water to flow through to her veranda which caused further damage to the foundation of the house and water stagnation on her compound. That the continuous construction of the house by the Defendant posed great risk to the existence of her residential house as she had been forced to cause repairs to the emerging cracks on the wall resulting from violation of the three (3) feet space permitted by the County Government of Mombasa on Swahili Houses.
16. The Counsel submitted that it was the testimony by the Plaintiff that despite warning the Defendant had continued to disregard it. Indeed, the Defendant had violated the provisions of Physical Planning Act and Building Codes in respect to erecting a partly/residential building of the structure resulting to damages to the property by the Plaintiff. He had violated the provisions of Article 40 of Constitution of Kenya and several others of Physical Planning Act and Building Code. Further the Defendant failed to seek relevant approval from the County Government of Mombasa as per the revised Building Code 2006 – meaning the design and construction of the Defendant's building contravened Clause Article 5 of the said revised Code and AA33 whereby he fa to take into consideration the next building or the right of way or even right to passage within that area. Further, the Counsel held that



Clauses BB55 of the Revised Building Code 2006 sets the measurement upon which residential houses shall be build next to another. Additionally, she argued that Clause BB56.1 gives the measurement of 1.5 M for open space between two residential houses.

17. it was the Counsel's contention that the Defendant encroached into the allowed 3 Feet which translated to 0.914M allowed by the County Government of Mombasa on Swahili houses thereby casing cracks onto the Residential House of the Plaintiff. To buttress her point on the implication of failing to erect a building without comprising with the existing Building Code regulations to the case of "*Kiogora Mutai v Chartwell Holdings Limited & Fred N. Ojiambo* [2017] eKLR where court echoed the sentiments of the Arbitrator that any Builder Property Developer in every aspect of construction must strive always to be in compliance with the Building Code.
18. The Counsel submitted that the Plaintiff was entitled to general damages taking that the house by the Defendant had been built so close to the door of the Plaintiff's – blocking the flow of natural light and making her house dark during the day compelling her to be using electricity. The building had limited access to her house. The Counsel averred that she was compelled to be doing repairs to her cracked wall and also a threat to her foundation drainage and water system were broken. She estimated the damage to a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) for the nuisance caused. To support her point she relied on the cases of *Tim Mwai & 2 others v Extra Mile Limited* [2018] eKLR and *Loyford Gitari Leonard v Weru Tea Factory* [2017] eKLR where an award of Kshs. 2,000,000/= was made as general damages for nuisance caused by trees, animals, smoke, dust.

In conclusion she urged Court to grant Judgement in favour of the Plaintiff who had established her case with Costs.

IV. Analysis & Determination.

19. I have keenly assessed all the pleadings filed by the Plaintiff, both the oral and documentary evidence adduced in Court, the written submissions, the cited authorities by the Learned Counsel for the Plaintiff herein, the relevant provision of *the Constitution* and Statutes.
20. To enable this Honorable Court reach an informed, reasonable, fair and just decision, it has framed the following four (4) issues as guide in its determination. These are:-
 - a. Whether the Plaintiff has met the threshold for granting an order of permanent injunction restraining the Defendant from encroaching, putting up structures building and in any way modifying the suit property.
 - b. Whether the Plaintiff should be granted an order of mandatory injunction compelling the Defendants to demolish the structures built by the Defendants on the said Plot.
 - c. Whether the parties are entitled to the relief sought.
 - d. Who will bear the Costs of the Suit.

ISSUE No. a) Whether the plaintiff has met the threshold for granting an order of permanent injunction restraining the defendant from encroaching, putting up structures building and in any way modifying the suit property.

Brief Facts

21. Before proceeding further with the analysis of the above framed issues, it is significant that I extrapolate on the facts of this case briefly. From the filed pleadings, the Plaintiff is the bona fide legal and rightful owner of the suit property. She purchased it from one Beja through a sale agreement dated 10th



September, 2006 and was issued with a Letter of Allotment dated September 30, 2011. She did produce all these prerequisite legal documents to support this fact. There was no dispute over this issue at all. She constructed a Swahili structure on it for residential purposes. The suit property is adjoining the property belonging to the Defendant for this purpose known as Plot Block B. It's alleged that, for no apparent good reason or justifiable cause, all of a sudden the Defendant decided to illegally and unlawfully set up foundation of structures and development on the perimeter wall of the residence belonging to the Plaintiff.

22. This was extremely dangerous as it was risking the foundational structure and existence of the Plaintiff's house in Block C. He breached the laid - down requirement under the Physical Planning Regulations and Building Code for all these settlements for occupiers to main at least a three (3) feet distance to avoid congestion, interfering with other peoples foundation, to allow free flow of rain storm, sewage and access. It also blocked access of natural light into the house of the Plaintiff taking that the house for the Defendant was so close to the door of the house of the Plaintiffs. This compelled her to be using electricity supply during the day an unnecessary expense. Unfortunately, despite being served with all the pleadings and summons, the Defendant never entered appearance nor Defence to the case. Thus, the substantive suit was undefended.
23. Now turning to the issue under this sub – heading. For clarity sake, it is important to critically assess the two forms of injunctions herein. A mandatory injunction is different from a prohibitory injunction. While a prohibitory injunction the Applicant must, as was stated in the celebrated case of “*Giella v Cassman Brown & Co. Ltd* [1973] EA 358, establish the existence of a prima facie case with high chances of success, and that he would suffer irreparable loss/damage which could not be adequately compensated by an award of damages if the injunction was not granted, and further that the balance of convenience tilted in his favour. For the orders of mandatory Injunction, an Applicant must in addition, establish the existence of special circumstances. Furthermore, the applicant must prove the case on a standard higher than the standard in prohibitory injunctions.
24. Generally speaking, an Applicant is entitled to be granted the Permanent and/or Mandatory Injunction restraining the Defendant herein on his suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.
25. Legally, permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the [Civil Procedure Code](#) if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.
26. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “[Malier Unissa Karim v Edward Oluoch Odumbe](#) [2015] eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella v Cassman Brown case* which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “*Kenya Breweries Limited v Washington Okeyo* [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory



Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

Further the same Court of appeal in the case of “*Jay Super Power Cash and Carry Limited v Nairobi City Council and 20 others* CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

27. In the case of ‘*Kenya Breweries Ltd & another v Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The above-cited cases lay down the principles of law to be considered in both an application for a prohibitory injunction and mandatory injunction, the difference that stands out between these two orders is that for mandatory injunction, the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction.

26. In this instant application, the Plaintiff through the filed pleadings and the testimony adduced in Court and which was never rebutted, she demonstrated that she was the registered owner to the suit land. Clearly, she has “a prima facie” case. In the course of time, she undertook several development activities on the suit land which included the construction of a residential Swahili house on it in compliance with the law. She left a three (3) feet space in between her property and the others. Her plot is adjacent to that of the Defendant.
27. For no apparent good reason at all, the Defendant started constructing which encroached into the plot belonging to the Plaintiff and also occupying the three (3) feet space reserved and as required by law. His construction was done upto the door and verandah of the Plaintiff’s house. As a result, she is denied access road, blockage of stormy and rain water, sewage, emission of natural light causing her to use electricity during the day as the house gets dark, fresh air and so forth. Her wall has cracked compelling her to incur substantial loss and expense which were not anticipated. He is in breach of the law. Despite all efforts made to make the Defendant stop the constructions and/or demolish the illegal structures have been to no avail. The state of affairs necessitated the filing of this suit against him. In the given circumstances, therefore, it is my view that the balance of convenience tilts towards favouring



the Plaintiff. In summary, all the conditions for the grant of prohibitory injunction and mandatory injunction have been fully met.

ISSUE No. b) Whether the plaintiff should be granted an order of mandatory injunction compelling the defendants to demolish the structures built by the defendants on the said plot.

26. Without wanting to belabor the point, the Plaintiff has already demonstrated before this Court the issue of the ownership of the suit land. She has established having suffered substantial loss, injury and expense at the behest of the Defendant's illegal acts of omission and commission. Further, that the balance of convenience tilts to her favour. Despite all efforts made the Defendant has refused to cooperate with the Plaintiff. He never bothered to file any defence to the case making the suit go undefended. In my view, these are very special circumstances whereon the granting of Mandatory injunction orders need be considered.
27. The Plaintiff is entitled to protection of her private property at all costs as provided for under the provision of Article 40 (1), (2) and (3) of *the Constitution*. The provision of Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules, 2010* on the preservation of property comes in handy. In the given circumstances, therefore, in the interest of natural justice, equity and conscience, its just fair that the Plaintiff is granted the mandatory injunction orders sought. There should be an order of demolition of the illegal structures caused onto the perimeter wall and property of the Plaintiff by the Defendant in accordance with the laid - down procedures and laws – The Physical Planning Act and the Building Code whatsoever. .

ISSUE No. c) Whether the parties are entitled to the relief sought.

30. Under this Sub heading and having considered all the surrounding facts and inferences made out here, the Court has concluded that the Plaintiff is entitled to all the relief sought. This conclusion is justified by the fact that the Defendant constructed a house on his property but in total contravention of the Physical Planning Act and Building Code which made it mandatory for builders to leave three (3) feet space in between structures. As a result it caused cracks onto the house of the Plaintiff and also blocked the natural light forcing her to be using electricity during the day. She produced a floor Plan as Plaintiff Exhibit No. 2, Surveyors report as Plaintiff Exhibit No. 3 and Photographs as Plaintiff Exhibit No. 7 which manifested the extent of damage to her house. All these were caused by the negligence by the Defendant.
31. It was attested that the Defendant's house was so close thus restricting access of the Plaintiff and her family to the house. It obstructed drainage making storm water to flow through to her veranda which caused further damage to the foundation of the house and water stagnation on her compound. That the continuous construction of the house by the Defendant posed great risk to the existence of her residential house as she had been forced to cause repairs to the emerging cracks on the wall resulting from violation of the three (3) feet space permitted by the County Government of Mombasa on Swahili Houses. It was the testimony by the Plaintiff that despite warning the Defendant had continued to disregard it. Indeed, the Defendant had violated the provisions of Physical Planning Act and Building Codes in respect to erecting a partly/residential building of the structure resulting to damages to the property by the Plaintiff. He had violated the provisions of Article 40 of Constitution of Kenya and several others of Physical Planning Act and Building Code. Further the Defendant failed to seek relevant approval from the County Government of Mombasa as per the revised Building Code 2006 – meaning the design and construction of the Defendant's building contravened Clause Article 5 of the said revised Code and AA33 whereby he fa to take into consideration the next building or the right of way or even right to passage within that area.



It provides that:-

“Throughout the progress of any work to which these regulations apply, every person is responsible for the erections of a building, shall ensure by suitable means the safety and protection of all person and property liable to be effected by the work”.

32. This provision was intended to ensure that any building being erected must conform to the regulations put in place by an authority. In the present case, the County Government of Mombasa regulations on Swahili Houses was that they must be with a space of three (3) feet in between them to allow right of way and most importantly to avoid occasioning risk to the foundation structure of the next house. I also add also to avert other nuisance such as fire, sewage water drainage, rainfall, passage and so forth. Clause BB55 of the Revised Building Code 2006 sets the measurement upon which residential houses shall be build next to another. It provides: -

“A Domestic building shall be so sited as to leave an open space immediately in front thereof which extends along the whole width of the front building and is not less than 6.0M wide measured at right angles therefrom provided that if the building fronts on street of a less width than 6M the width of the street plus one half of the difference between that width and 6.0M

33. Further Clause BB56.1 gives the measurement of 1.5 M for open space between two residential houses. It provides: -

“A Building which is designed either wholly or in part for residential purposes shall be provided on at least one side with an open space 1.5m or more in width measured from the boundary of the nearest plot facing that side at right angles to the nearest point of the building thereto”.

The Defendant encroached into the allowed 3 Feet which translated to 0.914M allowed by the County Government of Mombasa on Swahili houses thereby causing cracks onto the Residential House of the Plaintiff. I am persuaded by the legal ratio on the implication of failing to erect a building without comprising with the existing Building Code regulations and the case of *“Kiogora Mutai v Chartwell Holdings Limited (Supra)”*

Where court echoed the sentiments of the Arbitrator that any Builder Property Developer in every aspect of construction must strive always to be in compliance with the Building Code.

34. The Plaintiff is entitled to general damages. The house by the Defendant had been built so close to the door of the Plaintiff’s – blocking the flow of natural light and making her house dark during the day compelling her to be using electricity. The building had limited access to her house. She was compelled to be doing repairs to her cracked wall and also a threat to her foundation drainage and water system were broken. She estimated the damage to a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) for the nuisance caused. She will be granted the general damage as prayed. I have appreciated all the authorities cited by the Learned Counsel for the Plaintiff being:- *Tim Mwai & 2 others (Supra)* and *Loyford Gitau Leonard (Supra)*; where an award of Kshs. 2,000,000/= was made as general damages for nuisance caused by trees, animals, smoke, dust.

ISSUE No. d) Who will bear the costs of the suit.

36. It is trite law that costs are at the discretion of the Honorable Court. Costs mean the award a party is granted at the conclusion of any legal action, process, cause or proceedings of any litigation. The



proviso of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides that the costs follow the events. By events it means the results of the legal action, process, cause or proceedings.

37. In the instant case, the case has been decided in favour of the Plaintiff herein. Therefore, it will be unfair not to award the Plaintiff who has spend a lot of time on this matter from filing the suit, preparing and conducting it upto its logical conclusion awaiting this Judgement. This also includes the numerous Court attendances undertaken by them. It is my informed view that the Defendant has to bear this Costs.

V. Conclusion & Disposition

36. In conclusion and after conducting an indepth analysis of the framed issues herein, this Honorable Court arrives at a decision that Judgment be entered in favour of the Plaintiff against the Defendant. For avoidance of any doubt, pursuant to this decision the following are the orders of the Court. These are:-
- a. THAT an order of permanent injunction in favour of the Plaintiff be and is hereby granted restraining the Defendant his servants, workmen agents employees and/or otherwise whosever from encroaching, putting up structures building and in any way modifying the Residential plot No. 166 Maganda S.S.
 - b. THAT an order of mandatory injunction in favour of the Plaintiff be and is hereby granted within the next fourteen (14) days from this date compelling the Defendants to demolish the structures built by the Defendants on the suit property.
 - c. THAT the Plaintiff be awarded general damages for a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=).
 - d. THAT the costs of the suit to be borne by the Defendant.

JUDGEMENT DELIVERED, SIGNED AND DATED THIS 28TH DAY OF JULY 2022.

HON. JUSTICE MR. L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant
- b. M/s. Kiboss Advocate for the Plaintiff
- c. No appearance for the Defendant.

