



**Mburu v Nairobi City Council & another (Environment & Land Case  
67 of 2011) [2022] KEELC 2610 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2610 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 67 OF 2011**

**LC KOMINGOI, J**

**JULY 14, 2022**

**BETWEEN**

**DISHON GITAU MBURU ..... PLAINTIFF**

**AND**

**NAIROBI CITY COUNCIL ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS GICHOMO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 7<sup>th</sup> February 2011, the Plaintiff prays for judgement against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for:-
  - a. A permanent injunction restraining the Defendants by themselves, their servants or any person claiming title through them from trespassing on, constructing on, transferring, disposing of, alienating, demolishing, wasting or in any manner interfering with the parcel of land known as Plot No.A27/20 Umoja Innercore Section II Infill.
  - b. Special damages of kshs.2,593,050/=.
  - c. General damages from the date of illegal demolition by the Defendants to the suit date of hearing and final determination of the suit.
  - d. Quiet and peaceful enjoyment of the parcel of land known as plot No.A27/20 Umoja Innercore Section II Infill.
  - e. Costs of the suit and interest.
  - f. Any other relief that this Honourable Court may deem just to grant in the circumstances.
2. The Plaintiff averred that at all material times relevant to this suit, he was the *bonafide* allottee from the 1<sup>st</sup> Defendant of all that parcel of land known as Plot No.A27/20 Umoja Innercore Section II



Infill situated in Nairobi. He further averred that he took possession and commenced construction of a residential building thereon with the 1<sup>st</sup> Defendant's approval.

3. It is his case that on or about 3<sup>rd</sup> of January 2011, the 2<sup>nd</sup> Defendant in collusion with the 1<sup>st</sup> Defendant, their servants and /or agents moved to the suit premises and demolished developments thereon without regard to the law and with the intent to grab the suit plot. The Plaintiff contended that due to the Defendants' illegal actions, he suffered loss and damage. He particularized loss of ksh.2,593,050/= being expenses incurred on constructing the premises.

#### **The 1st Defendant's case**

4. A memorandum of appearance was entered by M/S Ojienda & Company Advocates for the 1<sup>st</sup> Defendant on 8<sup>th</sup> March 2011. The 1<sup>st</sup> Defendant filed the statement of defence dated 14<sup>th</sup> November 2012. It denied the allegations against it contained in the plaint and contended that it does not have any record of Plot No.A27/20 Umoja Innercore Section II Infill as claimed by the Plaintiff. It also denied approving construction of the residential building as alleged by the Plaintiff.

#### **The 2nd Defendant's case**

5. The 2<sup>nd</sup> Defendant filed the statement of defence and counterclaim dated 6<sup>th</sup> November 2012. He denied the allegations against him contained in the plaint. He averred that the Plaintiff's alleged Plot No.A27/20 Umoja Innercore Section II Infill is a forgery and is in fact a part of the 2<sup>nd</sup> Defendant's Plot No.CF 27 Umoja Innercore Sector 1 allocated for purposes of construction of a Nursery School. He averred that the illegal construction on the Plaintiff's property was pulled down by the 1<sup>st</sup> Defendant whose cost should be offset by the Plaintiff as per the law. He also averred that there is a Criminal case No.875 of 2010 at City Court in respect of the Plaintiff's construction of a building without approved architectural and structural drawings from the 1<sup>st</sup> Defendant.
6. In his counterclaim, he contended that the Plaintiff is the one trespassing on his property known as Plot No.CF 27 Umoja Innercore Sector 1 and that he has been prevented by the Plaintiff's aforesaid actions from developing his property by reason of which he has suffered substantial loss and damage.
7. He prayed that the Plaintiff's case be dismissed with costs and judgment be entered against the Plaintiff for:
  - a. A declaration that the Plaintiff's alleged Plot No.A27/20 Umoja Innercore Section II Infill is non-existent.
  - b. An injunction against the Plaintiff, his servants and /or agents from trespassing on the 2<sup>nd</sup> Defendant's Plot No.CF.27 Umoja Innercore Sector 1.
  - c. Damages.
  - d. Costs of the suit.

#### **Evidence of the Plaintiff**

8. PW1, Dishon Gitau Mburu, the Plaintiff testified on 23<sup>rd</sup> September 2021. His witness statement dated 7<sup>th</sup> February 2011 was adopted as part of his evidence in chief. He stated that he applied to the City Council of Nairobi to be issued with a plot at Umoja Innercore Section II Infills in the year 2002 and was successful in his application. He further stated that he was allocated Plot No.A27/20 vide a letter dated 14<sup>th</sup> October 2002 and also issued with the beacon certificate that identified his plot. He added that he paid the required fees and has been paying rates to date.



9. He stated that in the year 2006, he decided to put up a structure on the said plot and applied to the 1<sup>st</sup> Defendant for approval by way of forwarding the building plans and paying the requisite fees. He further stated that on 1<sup>st</sup> December 2006, he put in his first drawings which were evaluated by the 1<sup>st</sup> Defendant and returned on 8<sup>th</sup> March 2007 with corrections to be undertaken. He further stated that in 2008, he presented his second building plans which were approved by the 1<sup>st</sup> Defendant on 20<sup>th</sup> August 2008. He was issued with an approval.
10. He also stated that he contracted one Dismas Mutisya to undertake construction in 2010. He further stated that Dismas gave him a bill of quantity estimating that full construction would cost Kshs.4million and that he made a down payment of Kshs.385,200/=. He stated that the Said Dismas commenced construction upto the upper slab when on 3<sup>rd</sup> January 2011, he called him to inform him that the building had been brought down by the 1<sup>st</sup> Defendant and by that time he, had spent Ksh.2,170,204/= on the construction.
11. He stated that on 18<sup>th</sup> January 2011, Dismas informed him that a person by the name Francis Gichomo had approached him and informed him that the plot was his and had ordered him to remove the broken stones after demolition. He also stated that Dismas informed him that the said Francis Gichomo was present during demolition.
12. When he was cross-examined and referred to the 2<sup>nd</sup> Defendant's documents, he stated that he applied to the 1<sup>st</sup> Defendant for the suit plot and he was issued with a letter of allotment in October 2010 and after paying the necessary fees, he was issued with the beacon certificate. He further stated that his plot is Plot No.A27/20 and that it exists as it was issued to him by the 1<sup>st</sup> Defendant and he constructed on the plot issued to him.
13. He stated that his property was demolished by the 1<sup>st</sup> Defendant not because he built on the 2<sup>nd</sup> Defendant's plot. When referred to the lease agreement dated 11<sup>th</sup> April 1994 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, he stated that he does not know the difference between a lease and an absolute title and that he does not have a lease with the 1<sup>st</sup> Defendant but has a letter of allotment.
14. He stated that he paid kshs.385,200/= for the construction as deposit and also spent Ksh.2,170,304/= for the building and that he is claiming special damages since his building was demolished without notice. He also stated that it is the 1<sup>st</sup> Defendant who demolished his property since the tractor used to demolish was branded city council of Nairobi though he did not get the registration number of the said tractor.
15. When he was referred to the letter dated 1<sup>st</sup> October 2010 from the Town Clerk disapproving a proposed plan for construction of flats on Plot No.A27/20 Umoja Innercore, he stated that the said letter is addressed to George K Kang'ethe and not him. When referred to the Enforcement Notice dated 6<sup>th</sup> December 2010,he stated that he was not served with the said enforcement notice and that his contractor Dismas Mutisya was charged with an offence of constructing illegally and was acquitted after the matter was heard.
16. When he was re-examined, he stated that he has a letter of allotment and the beacon certificate for Plot No.A27/20 Umoja Innercore Section II Infill and that his property was demolished by the 1<sup>st</sup> Defendant. He also stated that he does not have a lease with the 1<sup>st</sup> Defendant but the lease between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant does not refer to his property.
17. PW2 Dismas Mutisya, a mason and contractor testified on 22<sup>nd</sup> November 2021. His witness statement dated 5<sup>th</sup> January 2011 was adopted as part of his evidence in chief. He stated that the Plaintiff instructed him to construct for him a house on Plot No.A27/20 Umoja Innercore Section II Infill



- on 5<sup>th</sup> May 2010. He further stated that he gave him the required documents including the plans and the application for approval from City Council of Nairobi. He also prepared a bill of quantities of Ksh.4million. He further stated that the Plaintiff gave him a down payment of Kshs.385,200/= and he commenced the work on 6<sup>th</sup> May 2010. He stated that he engaged ten (10) laborers and eight (8) technicians to assist in the construction at the cost of Kshs.1000/= and Kshs.600/= per day respectively. He added that they did the basement for two continuous weeks, then foundation, then the slab and the main wall until the upper slab.
18. He stated that on 3<sup>rd</sup> January 2011, he had left the site for lunch but on coming back, he found that the building had been demolished by City Council officials. He reported the matter to the owner. He further stated that on the same day, he received a call by a person who introduced himself as Francis Gichomo and whom he had seen on 3<sup>rd</sup> January 2011 when the building was demolished and had the same United Nations Motor vehicle registration number 105 UN 62K. He stated that the said Francis informed him that he was the owner of the plot and ordered him to remove the broken stones from the premises as he wanted to fence the it. He also stated that at the time of demolition, ksh.2,170,304/= had been used on the construction.
19. When he was cross-examined, he stated that he was charged by the 1<sup>st</sup> Defendant with building without approval plans at city court and that he was acquitted. He further stated that he was in charge of the Plaintiff's construction which was supervised by Engineer Mburu. He added that the Plaintiff showed him the approved building plans which have a stamp of approval from the City Council. He further stated that he does not know the steps taken to acquire approval and that he did not see the minutes approving the plans. He stated that he was putting the second slab at the time of demolition and that the floor was 25ft by 70ft with the house having seven (7) rooms.
20. He also stated that he prepared the bill of quantities and that he was paid a down payment of ksh.385,200/=in cash to cater for labour costs. He added that as at the time of demolition, he had spent Kshs.2million. He stated that materials would be supplied to the site and he would forward receipts to the owner. He also stated that he was shown a Letter of Allotment by the Plaintiff. He added that the construction was demolished by the 1<sup>st</sup> Defendant as the tractor that did the demolition had green number plates. He further stated that there was no notice to demolish and that the demolition was supervised by the 2<sup>nd</sup> Defendant who was in a Motor vehicle with United Nations number plates.
21. When re-examined, he stated that there is no warrant of arrest pending against him and that he was acquitted on the charge of building without approved plans. He also stated that there were approved plans and the building was supervised by Engineer Mburu from the 1<sup>st</sup> Defendant. He added that he had spent kshs.2million by the time of demolition.

#### **The 1st Defendant's case**

22. The 1st Defendant did not call any witnesses.

#### **The 2nd Defendant's case**

23. DW1, Francis Gichoma, the 2<sup>nd</sup> Defendant testified on 8<sup>th</sup> March 2022. His witness statement dated 6<sup>th</sup> November 2013 was adopted as part of his evidence in chief. He told the court that he owns Plot No.CF.27 Umoja Innercore Sector 1 measuring  $\frac{3}{4}$  of an acre. He further stated that it was for the purpose of constructing a nursery school and that it has never been subdivided. He told the court that in a separate suit being ELC No.292 of 2011, one Michael Abuonji also claims a portion of his plot. He stated that he did not participate in the demolition and only notified the 1<sup>st</sup> Defendant.



24. When he was cross-examined, he stated that Plot No.A27/20 does not belong to the Plaintiff and that is why he made a complaint to the 1<sup>st</sup> Defendant because someone was building on his plot. He added that he was not present during demolition. He further stated that the Plaintiff's documents were forgeries and that he had put up a small structure on the suit land. He stated that Michael Abuonji sued the 1<sup>st</sup> Defendant and himself in ELC No.292 of 2011 and that judgement was entered in favour of the said Michael Abuonji but he has appealed against the judgement as Michael was building on his plot.
25. When he was referred to the charge sheet against Dismas Mutisya, he stated that he was charged with erecting a building without approved plans, released on bond but absconded. He stated that he has documents from the 1<sup>st</sup> Defendant which show that the said Dismas was building without approved plans. He also stated that he does not seek anything from the 1<sup>st</sup> Defendant.
26. At the close of the oral testimonies, parties tendered final written submissions.

### **The Plaintiff's submissions**

27. They are dated 17<sup>th</sup> March 2022. Counsel for the Plaintiff submitted that the following issues arise for determination;
  - a. Whether the Plaintiff is the owner of the suit property?
  - b. Whether the Defendant demolished the Plaintiff's house which he had put up on the suit property?
  - c. Whether the Plaintiff is entitled to the reliefs sought in the plaint?
28. On the issue whether the Plaintiff is the owner of the suit property, it was counsel for the Plaintiff's submission that the Plaintiff proved ownership by the evidence of the allotment letter, beacon certificate and receipts issued by the 1<sup>st</sup> Defendant on account of stand premium, survey fees and ground rent. He added that the said evidence was not contested by the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant did not place any material evidence that rebutted the Plaintiff's claim.
29. He further submitted that the issue of demolition was admitted by the 2<sup>nd</sup> Defendant and also proved in evidence by PW2 and as such, the Defendants should be found liable for demolition. He urged the court to consider that the contractor herein Dismas Mutisya was acquitted after trial in SPCC Criminal Case No.875 of 2010 *Nairobi City County v Dismas Mutisya*. He also urged the court to consider the judgment in the case of *Michael Abuonji v Nairobi City Council & Francis Gichomo* ELC No.292 of 2011(unreported) where Okong'o J found the 1<sup>st</sup> Defendant liable for demolishing Michael Abuonji's house (the Plaintiff's neighbor), dismissed the 2<sup>nd</sup> Defendant's counterclaim and ordered the Defendants to pay costs of the suit and the counterclaim.
30. He relied the case of *Losingo Ole Kinyi v Nairobi City Council* HCCC No.1294 of 2005, *Francis Kimuni Njoroge v Municipal Council of Limuru* [2010] e KLR and the case of *Muiruri Gakombi v Special Steel Missls Limited* [1993] eKLR.

### **The 2nd Defendant's submissions**

31. They are dated 25<sup>th</sup> April 2022. It was counsel for the 2<sup>nd</sup> Defendant's submission that the Plaintiff's documents are forgeries and an attempt to duplicate the 2<sup>nd</sup> Defendant's documents but they are flawed.
32. He pointed out that the Plaintiff has no lease with the 1<sup>st</sup> Defendant and his documents imply a sub-division of the 2<sup>nd</sup> Defendant's Plot No.CF.27 Umoja Innercore Sector 1 yet fails to show a consent



- to subdivide from the 1<sup>st</sup> Defendant. He further submitted that the 2<sup>nd</sup> Defendant's ownership of Plot No.CF.27 Umoja Innercore Sector 1 was confirmed by the 1<sup>st</sup> Defendant's letter dated 19<sup>th</sup> June 2021. He submitted that the 1<sup>st</sup> Defendant's letter dated 1<sup>st</sup> October 2010, the enforcement notice dated 6<sup>th</sup> December 2010 and the fact that the Plaintiff's contractor was charged is proof that the Plaintiff's alleged building plans were not approved. He relied on the case of *Republic v Minister for Transport & Communication & 5 others Ex parte Waa Ship Garbage Collector & 15 others* Mombasa Hcmca No. 617 of 2003 [2006]1 KLR (E&L) 563 and the case of *Alberta Mae Gacci v Attorney General & 4 others*[2006]e KLR.
33. It was counsel for the 2<sup>nd</sup> Defendant's submission that the Plaintiff's claim fell short of the standard that requires it to be specifically pleaded and strictly proved. He pointed out that there is no proof that the Plaintiff paid the contractor and that the figures sought contradict with the plaint and the bill of quantities. He submitted that on the map produced by the Plaintiff, the neighbouring plots are non-existent while on his map, the neighbouring plots exist.
  34. He submitted that ELC No.292 of 2011 is distinguishable from this case. He further submitted that the 2<sup>nd</sup> Defendant has filed an appeal of the judgement therein .He pointed out that in that suit, the court found that there was missing link between the Plaintiff's plot and the 2<sup>nd</sup> Defendant while in this matter, the 2<sup>nd</sup> Defendant confirmed that the Plaintiff was building on plot Plot No.CF.27 Umoja Innercore Sector 1 as did the Plaintiff and his witnesses and that it is in the 2<sup>nd</sup> Defendant's possession but he has been prevented from developing it due to litigation.
  35. I have considered the pleadings, and the evidence on record. I have also considered the written submissions and the authorities cited. The issue for determination are:-
    - i. Whether the Plaintiff is the beneficial owner of Plot No A27/20, Umoja Innercore Section II Infill.
    - ii. Whether Plot No A27/20 Umoja Innercore Section II Infill is hived off from Plot No CF/27 Umoja Innercore Sector I.
    - iii. Whether the 1<sup>st</sup> Defendant demolished the Plaintiff's premises which were under construction?
    - iv. Is the Plaintiff entitled to the reliefs sought?
    - v. Is the 2<sup>nd</sup> Defendant entitled to the reliefs sought in the counterclaim?
    - vi. Who should bear costs of this suit?
  36. PW1, Dishon Gitau Mburu, the Plaintiff told the court that he is the owner of Plot Number A27/20 Umoja Innercore Section II Infill. He told the court that he was allotted the said plot by the 1<sup>st</sup> Defendant by a letter of Allotment dated 14<sup>th</sup> October 2002. From the Letter of Allotment he was to pay stand premium of kshs.7,200/- and ground rent of Kshs.1,440/- to make a total of Kshs.8,640/-. He was to pay within 30 days. He produced the Letter of Allotment as exhibit in this case. He has produced receipts to confirm that he paid the amount stated in the Letter of Allotment.
  37. He was also issued with a Beacon Certificate after being shown the plot on the ground. This confirms that Plot NO. A27/20 Umoja Innercore Section II Infil existed on the ground. He has also produced several receipts as exhibits showing the various payments he made to the 1<sup>st</sup> Defendant. It is his case that in the year 2006, he decided to put up a structure on the suit plot. He applied to the 1<sup>st</sup> Defendant for approval by forwarding building plans and paid the required fees. He produced the approved building plans dated 20<sup>th</sup> August 2008 as exhibits in this case.



38. The Plaintiff has been able to demonstrate that he was allocated Plot No A27/20 Umoja Innercore Section II Infil by the 1<sup>st</sup> Defendant. he told the court that he continues to pay rates to the 1<sup>st</sup> Defendant in respect of the said plot.
39. The 2<sup>nd</sup> Defendant DW1, Francis Gichomo, told the court that he is the owner of Plot No CF/27 Umoja Innercore Section I. He stated that he was allocated the plot by the 1<sup>st</sup> Defendant by a Letter of Allotment dated 22<sup>nd</sup> November 1993. He was later issued with a beacon certificate on 3<sup>rd</sup> January 1994. All the documents produced by the 2<sup>nd</sup> Defendant are in respect of Plot No CF/27 Umoja Innercore Section I. In my view this is a different plot from that claimed by the Plaintiff.
40. I find that the 2<sup>nd</sup> Defendant has failed to demonstrate Plot A27/20 Umoja Innercore Section II Infills is the same as Plot CF/27 Umoja Innercore Section I. I therefore find that the Plaintiff is the beneficial owner of Plot No. A27/20 Umoja Innercore Section II Infills.
41. The 2<sup>nd</sup> Defendant, stated that he is the owner of Plot No CF/27 Umoja Innercore Section I. He told the court that sometime in 2010 he noticed that the plot had been subdivided by unknown persons without consent from the 1<sup>st</sup> Defendant. He stated that he alerted the Director of City Planning Department who issued an enforcement notice to stop the construction on the said plot.
42. The 2<sup>nd</sup> Defendant did not call any witness. The 1<sup>st</sup> Defendant did not avail any witness either. I find that the 2<sup>nd</sup> Defendant has failed to demonstrate that the Plot No A27/20 Umoja Innercore Section II Infills was hived off from Plot CF/27 Umoja Innercore Section I.
43. It is the Plaintiff's evidence that he decided to start development on the plot. He contracted an Architect who prepared building plans which he submitted for approval by the 1<sup>st</sup> Defendant and they were duly approved. The Plaintiff engaged a contractor Dismas Mutisya (PW2) to start construction work on the suit property. On 3<sup>rd</sup> January 2011 the 1<sup>st</sup> Defendant demolished the Plaintiff's structure. The photographs showing the debris after the building was demolished were produced as exhibits in this case.
44. PW2 Dismas Mutisya, the contractor confirmed that the construction had gone up to the upper slab. He confirmed that the building was demolished by the 1<sup>st</sup> Defendant's officers. He also told the court that he found the 2<sup>nd</sup> Defendant on site. The 2<sup>nd</sup> Defendant claimed the plot was his. He then informed the Plaintiff of the demolition. PW2 stated that he was charged in City Court with the offence of building without approved plans but was acquitted because the approved building plans were there.
45. The 1<sup>st</sup> Defendant tendered no evidence. I find that it is responsible for the demolition of the Plaintiff's construction. The Plaintiff's evidence has not been controverted. No enforcement notice was served on the Plaintiff before the demolition. I find that this demolition was wrong and unlawful. The Plaintiff is entitled to damages for trespass. It is clear from the evidence on record that the demolition was instigated by the 2<sup>nd</sup> defendant who was claiming ownership of the suit plot but he did not take part on the demolition.
46. The Plaintiff claims Kshs.2,593,050 being damages for the demolition. Special damages must not only be pleaded but must be proved. PW2 Dismas Mutisya stated that he was paid Kshs.385,200/- being down payment for his work. The Plaintiff produced several receipts as exhibits. I award Kshs.2,593,050/= being special damages. As stated earlier the 1<sup>st</sup> Defendant entry on the Plaintiff's suit plot and carried out the demolition amounted to trespass. I award Kshs.300,000/= being general damages for trespass.



47. The 2<sup>nd</sup> Defendant claimed he is the owner of Plot No CF/72 Umoja Innercore Section I. In his counterclaim he prays that the Plaintiff's plot be declared to be non-existent. I find that the 2<sup>nd</sup> Defendant has failed to prove that the Plaintiff's plot is non-existent. The 1<sup>st</sup> Defendant who ought to have set the records right did not tender any evidence. I find that the 2<sup>nd</sup> Defendant's counterclaim fails as against the Plaintiff. The 2<sup>nd</sup> Defendant's counter claim is dismissed.
48. I find that the Plaintiff has proved his case against the Defendants on a balance of probabilities. Judgment is therefore entered for the Plaintiff as against the Defendant as follows:-
- a. That a permanent injunction is hereby issued restraining the Defendants by themselves, their servants or any person claiming title through them from trespassing on, constructing on, transferring, disposing of, alienating, demolishing, wasting or in any manner interfering with the parcel of land known as Plot No.A27/20 Umoja Innercore Section II Infill.
  - b. Special damages of Kshs.2,593,050/=.
  - c. General damages for trespass for Kshs.300,000/=
  - d. Quiet and peaceful enjoyment of the parcel of land known as plot No.A27/20 Umoja Innercore Section II Infill.
  - e. Costs of the suit and interest.
  - f. Any other relief that this Honourable Court may deem just to grant in the circumstances.
- It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 14<sup>TH</sup> DAY OF JULY 2022.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

Ms Oduru for Mr. Nyakoe advocate for the 1<sup>st</sup> Defendant

Ms Njue for Mr. Njeru Nyaga advocate for the 2<sup>nd</sup> Defendant

Steve - Court Assistant

