



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 304 of 2007

GRACE WANJIRU.....APPLICANT

Versus

MUNICIPAL COUNCIL OF THIKA.....RESPONDENT

JUDGMENT

This is a petition brought pursuant to Sections 70 (a), 70(c), 74 (1), 75 (1) and 76(1) of the Constitution in which the petitioner, Grace Wanjiru seeks orders of prohibition and damages against the Municipal Council of Thika, the Respondent herein.

The orders sought are as follows:-

- (a) An interim or conservatory order of prohibition or injunction restraining the Respondent and or the Respondent's agents or servants from entering, destroying, damaging and wasting the petitioner's compound, house or the development or structures on the compound or the house being house No. 626, Bondeni Estate Thika;
- (b) An interim or conservatory order of prohibition or injunction restraining the Respondent and/or the Respondent's agents or servants from interfering with the Petitioner's possession, occupation and her peaceful and quiet enjoyment of House No. 626 Bondeni Estate Thika and its compound;
- (c) An order of prohibition stopping the Respondent and/or the Respondent's agents or servants from acting, destroying, damaging and wasting the Petitioner's compound, house or the development or structures on the compound or the house being House No. 626 Bondeni Estate, Thika and its compound;
- (d) An order of prohibition stopping the Respondent and/or the Respondent's agents or servants from interfering with the petitioner's possession, occupation, peaceful and quiet enjoyment of House 626, Bondeni Estate, Thika and its compound;
- (e) Special damages of Kshs.3,000,000/=;
- (f) General damages.

The petition was supported by the affidavit of Grace Wanjiru dated 21st March 2007 and a further affidavit dated 4th May 2007, skeleton

arguments were filed on 9th July 2007. The petition was opposed and Joseph Meshack Kimani, the Town Clerk of the Respondent swore an affidavit dated 27/4/07. The Respondent also filed skeleton arguments on 3rd December 2007.

Briefly, a factual back ground of the Petitioner's Case is that the Petitioner rented the Respondents house No. 626 Bondeni Estate Thika on 5th November 2003. The Respondent used to collect rent from the Petitioner till the National Housing Corporation took over the house as the developers and owners of the property in 2006. The Petitioner paid rent promptly and that since 2006 the Petitioner carried out developments on the compound and renovation of the house by constructing a garage, a fence, a steel gate, an extra room to improve her family's security. That on 8th March 2007, the Respondent through its agents or servants entered the said compound without prior notice and destroyed the structures put up by the Petitioner and removed the building materials that were on the compound. The Petitioner exhibited photographs showing the damage (GW 3). She estimates the damage to Kshs.3,000,000/=. That the removal of the fence has left her and her family to live in fear and that there are other tenants in the same

estate who have put up such fences and the Respondent is acting out of spite and in a discriminatory manner as against here. That her house is next to a highway and she is exposed to risk of insecurity and nuisances and trespass. That the Respondent did not serve her with a notice or proclamation declaring the structures as unauthorized, pursuant to Section 30 (4) of the Physical Planning Act Chapter 284 Laws of Kenya. She denied having been charged with any criminal offence under the above Act nor did she know those people allegedly arrested.

Ms. Aulo, Counsel for the Applicant submitted that by failing to serve a notice on the Petitioner, she was denied protection of the law under S. 70 (a) of the Constitution. That after the wall was brought down, the Petitioner was exposed to inhuman treatment to which S. 74 (1) offers protection. That the Petitioner's property is protected by S. 75 (1) of the Constitution and that the Respondent also trespassed on her property without redress. The Plaintiff therefore claims damages for violations of the above rights. Counsel relied on the case of **MARETE V AG (1987) KLR 690** and **PETERS V MARKSMANI & ANOTHER (2001) 1 LRC 1** where courts have awarded damages for breach and violation of fundamental rights.

In opposing the petition, the Town Clerk deposed that the House in question is owned by the Respondent as evidenced by the rent card (GW 1) and that the tenants are forbidden from constructing any structures to the existing house without authority from the Respondent in compliance with the Physical Housing Act Cap 286. That the Petitioner never sought any permission to carry out development on the said plot. That on 7th March 2007, his office received a report in respect of the Petitioner's activities and he instructed the building officers from inspectorate department to remove them and arrest any parties contravening the law. On 7th March 2007, Kiguru Ngugi and James Muchungu Kamau who were working for the Petitioner without approved building plans from the Respondent.

The Two were charged in CRC 1193/07 under S. 30 (1) and 30 (2) of the Physical Planning Act; they pleaded guilty and were fined. The proceedings before the court were exhibited and the building materials were impounded for purposes of being produced in court as exhibits. Mr. Kahonge, Counsel for the Respondent submitted that the reliefs sought cannot be granted because,

- 1) the prayer for special damages had to be strictly proved. Counsel was guided by **HAHN SINGH 1985 KLR 716** and **MUKUNYA V MBIJIWE (1989) KLR 761**;
- 2) That the Petitioner seeks an equitable remedy of injunction and he who comes to equity must come with clean hands but the petitioner is guilty of material non disclosure in that she failed to disclose that her servants/agents were arrested and charged under S.30 of the Physical Planning Act;
- 3) That the petitioner is trying to amend S.30 of the Physical Planning Act;
- 4) That the police have not been enjoined to these proceedings and there is a misjoinder of parties.

Lastly it was Counsel's submission that the facts are disputed as to whether or not the Respondent entered the compound unlawfully and whether there was unlawful destruction of property and so the matter should have been heard by way of viva voce evidence. Counsel urged the court to dismiss the petition.

The Petitioner complains that her rights guaranteed under the following Sections of the Constitution have been violated;

S. 70 (a) & (c) secure protection of the law

S. 74 (1) protection against inhuman and degrading treatment

S. 75 (1) protection against deprivation of property

S. 76 (1) protection against arbitrary search or entry

It is common ground that the house on which developments had been done by the Petitioner, the subject of this petition, belongs to the Respondent. The Petitioner is a tenant as admitted and evidenced by the tenancy card No. 1498 (GW 1) which forms the tenancy contract between the Petitioner and the Respondent. It contains conditions to be observed by the Petitioner. That agreement is dated 5th November 2003. The conditions are written in Kiswahili. The Petitioner should have endeavoured to have them translated to the English language which is the language of this court. However, from my understanding of condition No. 4 on what the tenant should not do, she is prohibited from carrying out any developments, any additional structures or extensions to the existing housing unit. The condition reads "**Hana ruhusa ya kujenga kibanda chochote ama kuongeza mjengo wowote katika nyumba hiyo.**"

The petitioner does admit that she carried out the developments to enhance the security of the house and health. She has not indicated whether she sought permission of the Respondent but from paragraph 12 of her Affidavit, she did it on the strength of her neighbours having put up improvements on their houses in the same estate. She annexed a photograph (GW 3) as evidence of the structures erected by the neighbours. The Petitioner has not demonstrated that she sought the authority of the Respondent to carry out the construction works development, that she had undertaken. Section 30 of the Physical Planning Act Cap 286 Laws of Kenya requires that for any development to be undertaken within a local authority, permission of that Local Authority should be sought. The Section reads;

"S. 30 (1) No person shall carry out development within the area of a Local Authority without a development permission granted by the Local Authority under S. 33.

(2) Any person who contravenes subsection -

(1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding 5 years or to both.

(3) Any dealing in connection with any development in respect of which an offence is committed under this section shall be null and void and such development shall be discontinued.

(4) Notwithstanding the provision of Subsection (2)

(a) the Local Authority concerned shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days;

(b) If on expiry of the ninety days notice given to the developer such restoration has not been effected, the concerned Local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer,

Section 33 provides that before any development is undertaken within a local authority, the Director has to approve the development plans. In the instant case, the Applicant has not indicated that she complied with Section 33. It seems there were no approved development plans before the Petitioner commenced the development nor was there permission from the Respondent to undertake the developments..

According to the Petitioner, the Respondent should have given her notice or a proclamation declaring the development to be unauthorized. Indeed there is no evidence that notice of 90 days was ever issued to the petitioner as required by S.30 (4)(a) of Cap 286.

The Respondent has denied that they ever destroyed the Petitioner’s developments but arrested the Petitioner’s agent/servants who were carrying out the construction and carried away the construction materials as exhibits. The Petitioner denies ever being arrested or that the two people who were arrested were doing her work. From the exhibited charge sheet ‘A 2’, the two accused, Kiguru Ngugi and James Ndungu Kamau were charged with carrying on development without permission granted by the Council. The house on which the development was being done was 626 Bondeni, similar to that of the Petitioner. They pleaded guilty and were convicted on their own plea. The Petitioner made her complaint on 8th March 2007, a day after the arrest of the two. Her house as per the card produced is 626 Bondeni and she makes the complaint that the development was destroyed and her materials carried away. It would be too much of a coincidence that the 2 people were carrying on different works which the Petitioner was unaware and I believe that the plot on which the 2 accused were arrested and charged and is as the Petitioner’s. What the court cannot ascertain on affidavit evidence is whether the Respondent’s agents caused damage to the developments or merely carried away the material to produce them as exhibits. Whatever the case, the Petitioner had a duty to make a full and frank disclosure that her workers or agents had been arrested and charged. Duty of full disclosure or candour is precedent to this court granting any orders so that if any party withholds any information from the court he disentitles himself to any orders. It is immaterial that the Petitioner was never charged with an offence. She knew her agents were charged and yet continues to deny it on oath. The law provides that apart from the owner of the development, those carrying out the actual development without approved plans were committing an offence and liable to prosecution. Failure to disclose such material facts is evidence of lack of candour and bad faith on the part of the Petitioner and this court would not grant her any orders even if she was entitled.

With the above background, this court will go ahead to consider the various allegations of violations under S. 70 (a) of the Constitution. The Petitioner alleges that her right to secure protection of the law was violated because the Respondent unlawfully damaged her development, removed her fence and building materials without giving the necessary notices under S.30 of the Physical Planning Act. Section 70 generally provides for protection under the fundamental rights provisions. It is the foundation of the Bill of Rights and summaries all the rights under Chapter of the Constitution and provides that the rights are not absolute but that the various provisions under S.71 to 83 specifically define the said rights and the manner of protection thereunder and the limitations thereunder which limitations are designed to ensure the enjoyment of those rights and freedoms subject to the rights of others and public interest. The said Section provides as follows:

“S. 70 whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect of the rights and freedoms of others and for the public interest, to each and all of the following, namely-

- (a) life, liberty, security of the person and protection of the law;**
- (b) freedom of conscience, of expression and of assembly and association; and**
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation;**

the provisions of this Chapter shall have effect for the purpose of offering protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest”.

This section being a general provision laying down the foundation of all the protection under the Bill of Rights, then can only be invoked alongside the other provisions in Ss. 71 to 83. There can be no violation under that Section alone.

Of Alleged Breach of S. 74 (1):

The Petitioner also complains that she was subjected to inhuman and degrading treatment by the Respondent's servants entering her compound and arbitrarily destroying her property. Longman Dictionary of contemporary English defines '**inhuman**' as very **cruel** or **without any normal feelings** or **lacking any human qualities in a way that seems strange or frightening**. '**Degrading**' is defined as unpleasant, makes one lose respect for oneself. The house in question belongs to the Respondent and the Petitioner is a mere tenant. The Petitioner was in flagrant breach of the law in putting up developments without approved plans from the Respondent or permission from the owner of the land. Though the Respondents may not have followed procedure of giving notice none of the parties can be deemed to have acted within the law. Besides, if at all the Respondents pulled down the wall they only dealt with structures outside the Respondent's house, not inside the house and I would find nothing barbaric cruel or bringing dishonour to the Petitioner. The actions of the Respondent may have caused her loss and some inconvenience, but their actions cannot be brought within contraventions under S. 74 (1) of the Constitution.

Of contravention under S. 75 (1), the Petitioner alleged that her rights to possess, occupy and live in house 626 Bondeni Estate or right to carry out development was breached.

Firstly, the Petitioner had absolutely no right to carry out developments on the premises under the tenancy conditions and the Physical Planning Act. She was in breach of the tenancy agreement and the Physical Planning Act. The Petitioner has not shown that any property has been compulsorily acquired from her to bring her within the protection availed under S. 75 (1) of the Constitution. That Section reads:

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied:

- (a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to provide the public benefit; and**
- (b) the necessity therefore is such as to afford reasonable justification for the cause of hardship that may result to any person having an interest in or right over the property; and**
- (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”**

The house in question belongs to the Respondent. The Petitioner's interest is limited and conditional that she abides by the tenancy agreement. She had breached the conditions of the tenancy agreement. There is no evidence of compulsory acquisition of that house and even if there was, it is only the rights of the Respondent that would be affected in respect to compulsory acquisition. Under the above Section compulsory acquisition of property only relates to land but not what was allegedly carried away by the Respondents. What the Respondent did does not amount to a violation under S. 75 (1) of the Constitution. If the Respondents were in breach of S.30 of Cap 286, or the terms of the contract, the only recourse the Petitioner would have is to sue the Respondent in an ordinary civil court under law of

contract.

Of alleged breach under S. 76 (1) of the Constitution; The Petitioner alleges breach of S. 76 (1) of the Constitution in that the Respondent trespassed on her compound interfering with her quiet, peaceful enjoyment of the property. Section 76 (1) stipulates; **“S.76 (1) Except with his own consent, no person shall be subjected to the search of his person, his property or the entry by others on his premises, (2). Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question makes provisions-**

(a) that is reasonably required in the interests of defence, public morality, public health, town, country planning the development and utilization of mineral resources or the development and utilization of any other property in such a manner as to promote the public benefit;

(b) ...

(c) that authorizes an officer or agent of the Government of Kenya, or of a Local Government authority, or of a body corporate established by law for public purposes, to enter on the premises of a person in order to inspect those premises or anything thereon for the purposes of a tax, rate or dues or in order to carry out work connected with property that is lawfully on those premises, and that belongs to that Government, authority or body corporate, as the case may be; or

(d)

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

It is not disputed that the Petitioner was carrying on unauthorized developments on the premises. As the owner of the premises, the Respondent has a right to enter the premises to carry out work or inspect them. Besides, under Section 29 of Cap 286, the Respondent has the powers to approve all development plans and grant permission, ensure their proper execution, control the use and development of land. In this case, having received a report of unauthorized developments being carried out by the Petitioner, the Respondent had a right to enter the premises and inspect or carry out the necessary work. Though the Respondents may have deviated and acted otherwise than how they were required to proceed under S. 30 of the Physical Planning Act Cap 286 Laws of Kenya, they had the right to enter the said premises. S.76 (1) (c) limits the petitioner’s right under S. 76 (1) because the protection under S. 76 (1) is not absolute and the rights must be balanced as between the parties. All of them are equal before the law. The Respondent too has a right to protect his property and that is justifiable in a democratic society.

The Respondent did not require the consent of the Petitioner to enter on the premises since the Petitioner was contravening the law. What happened thereafter and what is contravened by the Respondent is in my view immaterial. Both the Petitioner and the Respondent blame each other for flouting of the law. He who comes to equity must come with clean hands. The Petitioner’s hands are soiled and she does not expect this court to overlook her sins and only see those of the Respondent. The Petitioner cannot so flagrantly violate the law and yet seek protection from the same law.

The Petitioner excuses her failure to seek permission from the Respondent to carry out development for the Reason that nor neighbours have carried out similar developments. That is no excuse to flout the law and the petitioner cannot confirm whether or not the neighbours sought permission of the Respondent before the developments were done. I will find that the Petitioner’s rights were not absolute but subject to the rights of the Respondent and the public interest at large. The Petitioner’s rights were not violated and the claim must fail.

In prayer (a) of the petition, the Petitioner seeks a conservatory order of prohibition or injunction restraining the Respondent or their servants from destroying, damaging and wasting the Petitioner’s compound or developments on the house No. 626 Bondeni Estate. That prayer is overtaken by events because that is an interim order that could only have been granted during the pendency of the Petition.

Similarly, prayer (b) seeks an interim conservatory order or injunction restraining the Respondent from interfering with the Petitioner's possession or peaceful and quiet enjoyment of house No. 626 Bondeni Estate. That prayer is overtaken by events as it could only have been granted during the pendency of the petition.

Besides, the Petitioner having been guilty of material non disclosure and the fact that she was herself in breach of the law, she cannot be entitled to the equitable remedy of injunction or any remedy at all because of her conduct. If she has any claim, it may be in the civil court.

The Petitioner prays for special damages of Kshs.3,000.000/=. It is trite law that special damages must be specifically pleaded and strictly proved (**HAHN V SINGH 1985 KLR 717**). Out of the blues the Petitioner comes up with a claim for the special damages without laying any basis. She alleges that her structures were damaged and material carried away but there has been no evidence of the loss suffered. What is the cost of the materials, the labour etc? There has been no basis laid for the award of both special and general damages and they can not be granted. In any event having found that the Respondent did not violate any of the Petitioner's rights as alleged this petition lacks merit and it is hereby dismissed with costs to the Respondent.

Dated and delivered this 30th day of May 2008.

R.P.V. WENDOH

JUDGE

Ms. Aulo for Petitioner

Mr. Kahonge for Respondent

Daniel: Court Clerk