



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Suit 217 of 1992

FRANCIS MUTHEE MIGWI PLAINTIFF

Versus

MELLANIA NDUTA 1ST DEFENDANT

KARATINA TOWN COUNCIL 2ND DEFENDANT

JUDGMENT

The plaintiffs claim as seen in the plaint is that he being a lessee of plot KARATINA TOWN BLOCK 11/128 has suffered from the 1st defendant building protruding on to his plot. The first defendant property is KARATINA TOWN BLOCK 11/125. THE plaintiff claims that the building on that property has interfered with his property because its canopy is protruding on his plot. As a consequence of that protruding, he stated that he has suffered damage. He therefore prays for mandatory injunction for the first defendant to pull down the protruding canopy. The plaintiff's claim against the 2nd defendant is that it was negligence in its failure of supervising and controlling construction by the first defendant. The plaintiff's claim is denied by both defendants.

However on the day of hearing the 2nd defendant did not tender any evidence. The plaintiff in evidence said that on his a fore stated property he had built a one storey building. That the building is a residential building which is occupied by tenants. It was built in 1985. Before putting up that building, the 2nd defendant showed the plaintiff the beacons of his plot. On the left side of his plot is the first defendant plot. The first defendant began building on that property and when the building reached the first floor she constructed a canopy made out of stone. That canopy is hanging on the plaintiffs building. The plaintiff said that the roof of the first floor of the first defendants building hangs onto his plot. The effect of that hanging is that the rain drains into the plaintiff's property and that canopy prevents light coming into the plaintiffs building. This affects the plaintiff tenants who he said have to use electricity all the time.

In his case the plaintiff said that the second defendant had supervised the construction of his building. In doing that construction he had consulted architects and surveyors. Later when the first defendant encroached on his property he consulted the same experts who confirmed that the first defendant had encroached his property with a canopy. He in his evidence finally prayed that the court will order that the said canopy be removed. He said that his architect had confirmed that such removal of the canopy will not damaged the first defendant's property. On being cross examined the plaintiff said that there is no problem on the ground since both buildings are in their respective property on the ground. The problem he said was the canopy of the first defendant's. He said that in constructing the first defendant had failed to follow the building plan.

PW 2 is an architect by profession. He confirmed that he did measurements and concluded that the canopy of the first defendant was hanging on the plaintiff's property. He said that as he took those measurements the first defendant was still in the process of constructing a building. The canopy he said was a nuisance to the plaintiff because it blocks light. In his opinion the canopy can be cut without any defects to the building. He stated that the first defendant building did not conform to the approved plan. Further he stated that that building as it was being constructed was not supervised by the 2nd defendant. On being cross examined his witness confirmed that he did not check actual survey plan and neither did he take photographs of the building. That he had confirmed that the first defendant did not comply with the building plan from his search of the plan at the 2nd defendant's offices.

PW 3 was a land surveyor by profession. He said that on being given instructions to confirm whether the first defendant was encroaching on the plaintiff's land he had looked at map number 139/66. In consulting that map he was able to confirm that various persons in that vicinity had built their building outside their beacons. He was able to confirm that both the plaintiff and the first defendant had not built their building within their beacons. However he said that the first defendant constructed her building after the plaintiff had constructed his building. According to him she should have taken care to ensure that her canopy does not encroach the plaintiff's building. In his professional opinion he was of the view that the area needed to be resurveyed so that the beacons could be placed where each party's building was. In cross examination he said that the beacons were in the right places but that it was the buildings that were in the wrong places.

The first defendant in her testimony said that she began to construct her building in 1991 after getting clearance and approval from the 2nd defendant. Her building was constructed in accordance with that approved plan. She was shown the exact position where she should build by the 2nd defendant. During her construction she approached the plaintiff and informed him that she desired to put a stone wall around her property. On the plaintiff coming on to site and noticing that her building was higher than his, thereafter made a demand that she should stop interfering with his plot. As a result of that demand she consulted the 2nd defendant. The 2nd defendant invited the plaintiff and herself to attend a meeting to resolve the issue. The plaintiff failed to attend that meeting. She confirmed that her construction was supervised by the 2nd defendant who did not find any fault with her building. She also consulted a surveyor who confirmed to her that several buildings in the vicinity were not built on their plot. She denied that her canopy is protruding on the plaintiff's land. She said that she had intended to construct up to the 3rd floor but on reaching the first floor an injunction was issued in this matter which stopped the construction. In respect of the construction she had done she got from the 2nd defendant an occupational certificate.

Her witness was a surveyor who also confirmed that the property owners in that area had misunderstood where their beacons were. He did however confirm that the first defendant's canopy was hanging into the plaintiff's building but added that it did not cause much darkness into the plaintiff's building. He however did not go onto to the plaintiff's building to confirm the effect of that canopy.

As stated before the 2nd defendant did not tender evidence. What clearly comes out of the evidence before court is that several owners of buildings in that area had built on plots that are not theirs. This was the case in respect of the plaintiff and the first defendant. Indeed both surveyors the one called by the plaintiff and the other called by the first defendant confirmed that the area needed to be resurveyed. The uncontroverted evidence before court is that the plaintiff constructed his building before the first defendant and when the first defendant began to construct she caused her canopy to hang into the plaintiff's building. The plaintiff said that the canopy is causing him damage. The defendant's surveyor although acknowledging that the canopy does protrude, confirmed that he did not go on the plaintiff's property to see the effect of that protruding. After this court made an order that the two buildings be visited, by the Deputy Registrar of this court, that visit took place in the presence of the parties and their advocates on 21st of July 2006. the parties after the hearing of this case consented to the deputy registrars report being considered by the court in its judgment.

I have looked at that report where the deputy registrar confirmed that the two buildings do overlap in

both their canopies. The deputy registrar observed that that was common in that area. In considering the evidence before court, and the Deputy Registrar's report in my judgment I am of the view that justice of the case would be best served by ordering the 1st defendant to remove the area of the canopy that is protruding on the plaintiff's side. The plaintiff has proved on a balance of probability that the first defendant's canopy is overhanging his property by 2ft 7inches. The plaintiff's architect that the protruding part can be removed without damaging the building. The plaintiff did not prove his case against the 2nd defendant. He failed to show the 2nd defendant obligation to supervise construction. The case against the 2nd defendant will therefore be dismissed.

The judgment of the court is as follows:-

1. There shall be judgment for the plaintiff against the first defendant to the effect that the first defendant shall within 30 days remove the part of her canopy which is protruding on to the plaintiff's property that is, 2ft 7 inches. Failure to remove the said canopy the court does grant an order that the plaintiff will be at liberty to remove the protruding part of that canopy that is, 2ft 7 inches and such removal shall at the first defendant's cost. On the removal of that protruding part of the canopy the injunction granted herein against the first defendant shall automatically be discharged.

2. The case against the 2nd defendant is dismissed with costs.

3. The first defendant shall pay the plaintiff's costs of this suit.

MARY KASANGO

JUDGE

DATED AND DELIVERED AT NYERI THIS 14TH DAY OF NOVEMBER 2007

BY: M.S.A MAKHANDIA

JUDGE