



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 547 OF 2013

IRENE JOYCE KITUR CHUMO.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST DEFENDANT

EPCO BUILDERS LIMITED.....2ND DEFENDANT

JUDGEMENT

Background

1. The Plaintiff is the registered owner of LR No. Nairobi/Block 72/2263. This property was purchased from National Housing Corporation (NHC). At the time of purchase, there was a maisonette which had been erected on the property. The property had provision for construction of a detached servant quarter (DSQ) which was to be undertaken by the purchaser at a later time.

2. The Plaintiff undertook construction of a DSQ in or around 1990 upon obtaining approval from the Nairobi City Council the predecessor of Nairobi City county which is now named as the 1st Defendant. In 2007, the DSQ was razed down in a fire incident. The Plaintiff began the process of re-constructing the razed down DSQ. When the construction was about 95% complete, officials of Nairobi City Council came and demolished it on the ground that the Plaintiff had not sought building approvals from the council. This is what prompted the Plaintiff to file a suit against the Defendants in which she seeks the following reliefs:-

- a) The Plaintiff claims permanent injunction directed to the Defendant restraining her it and/or its employees and/or officers from demolishing, pulling down or in any way or in any manner interfering with the plaintiff's occupation, use quiet possession of her property located on Plot No. Block 72/2263 B175 Uhuru Gardens Estate Nairobi (hereinafter referred to as "the property" and or "the House".***
- b) The Plaintiff claims for declarations that the demolitions of the property by the 1st Defendant were illegal and unlawful and she is entitled to compensation for damages and loss suffered.***
- c) The Defendants to compensate the Plaintiff loss of rental revenue and/use at Kshs.25,000/= per month from the demolished servant quarters from December 2008 to date.***
- d) The 2nd Defendant to furnish to the Plaintiff the initial approved structural and architectural plans for the detached servant quarters and for the 1st Defendant to approve and allow her to reconstruct the detached servants quarter.***
- e) The 2nd Defendant to furnish to the Plaintiff her the initial approved structural and architectural plans for the sewer lines and for the 1st Defendant to approve and allow her to reconstruct the damaged main and adjacent sewer lines.***
- f) The Defendant to compensate the Plaintiff for the unlawful demolition of the detached servants quarter, perimeter wall, the sewer lines both the main and the one for the Plaintiff's House amounting to Kshs.2,450,000,000/.***
- g) In the alternative to (f) above the Defendants to be directed to pay and clear the loan which the Plaintiff had secured at National Housing Corporation to renovate and reconstruct the detached servant quarter when it had burnt down.***
- h) The Defendants to compensate the Plaintiff for value of the broken doors, locks, landscaping, damaged and stolen goods amounting to Kshs.400,000/=.***

i) The Defendants to compensate the Plaintiff loss of earnings and/or diminished revenue arising from the main and/or direct damaged sewer lines which prevents the Plaintiff from charging of the market rent value for the main of Kshs.15,000/= per month from 2008 to date.

j) The 1st Defendant to be directed to approve the structural and architectural plans for reconnecting and/or reconstructing the sewer lines, reconstructing of the detached servant quarter, erection of the damaged perimeter wall and damaged kitchen wall to the main house.

k) Interests on above claims at court rates.

l) Costs of the suit.

3. The suit against the 2nd Defendant was withdrawn vide a withdrawal notice dated 11th October 2017 and filed in court on 23rd October 2017. Though the 1st Defendant filed a defence to the Plaintiff's claim, there was no evidence adduced on its behalf during the hearing.

Plaintiff's case.

4. It is the Plaintiff's evidence that the DSQ was demolished on 3rd December 2008. She wrote a protest letter to the town clerk of Nairobi City Council over the harassment by the council officials who had been visiting her premises prior to the demolition and were demanding a bribe of Kshs.300,000/= to spare the DSQ from demolition . It is after she refused to budge that the DSQ was demolished.

5. The Plaintiff stated that the Nairobi City Council officials issued two enforcement notices after the DSQ had been demolished. The first one was undated and was to take effect on 1st October 2009 and the second one was issued on 31st March 2010. It is her evidence that during the demolition, part of her boundary fence was destroyed, the door to the main house broken and her personal belongings were stolen. Also stolen were construction materials which were in the DSQ which she was reconstructing.

6. It is her further evidence that the demolition interfered with the sewerage system which blocked resulting in raw sewage seeping on to the road and affecting her neighbours . This, she said devalued her property which she could not rent out at market value. It is on this basis that she is seeking the reliefs which have been enumerated hereinabove.

Analysis

7. The parties were directed to file written submissions on 25th June 2020. The Plaintiff was to file and serve submissions within 30 days. The 1st defendant was to file submissions 14 days after being served. The Plaintiff filed her submissions on 31st August 2020. As at the time of writing this judgement, the 1st Defendant had not filed any submissions.

8. I have considered the evidence adduced by the Plaintiff as well as her submissions. The issues which emerge for determination are firstly whether the demolition of the DSQ by the 1st Defendant was lawful. Secondly, is the plaintiff entitled to the reliefs in the Plaintiff. Thirdly which order should be made on costs.

9. In determining the first issue, this court will consider whether the 1st Defendant followed the law before it demolished the Plaintiff's DSQ. As I said herein-above, the 1st Defendant did not adduce any evidence. It is trite law that pleadings are not evidence. The Plaintiff testified that the DSQ was demolished on 3rd December 2008. Prior to the demolition, there was no enforcement notice issued by the 1st Defendant. The law governing issuance of Enforcement notices was contained in the Physical Planning Act of 1996 (Now repealed).

10. Section 30 of the repealed Act provided as follows:

“No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section”.

11. Section 38 of the repealed Act which dealt with the issue of Enforcement Notices provided as follows:-

“When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land”.

12. The evidence which was adduced by the Plaintiff is that the 1st Defendant purported to issue an Enforcement Notice after they had already demolished the DSQ. I have looked at the Enforcement Notice which is not dated but was expressed to take effect on 1st October 2009. As at the time the Enforcement Notice was expressed to have taken place, the DSQ had already been demolished. The Enforcement Notice required the Plaintiff to do three things; first stop any further construction, second, seek approval from Nairobi city council and third, demolish the said extension.

13. As at the time the Enforcement Notice was being issued, the DSQ had been demolished. The issuance of this Notice was therefore issued after the fact and was only meant to appear that the 1st Defendant had complied with the law but this was not the case as the DSQ had already

been demolished though the demolition was not complete. This is why another Enforcement Notice dated 31st March 2010 was issued requiring the Plaintiff to remove the remaining standing structure which posed danger to the plaintiff and her neighbors.

14. The law is there to be followed. The 1st Defendant did not follow the law before it demolished the DSQ. There being no evidence that an Enforcement Notice was issued upon the Plaintiff, I find that the demolition was unlawful. The plaintiff did not adduce any evidence to show that she obtained approvals from Nairobi City Council to re-construct the DSQ. She may have obtained approvals early on but there is no evidence that after the DSQ was razed down, she obtained approvals from the Nairobi City Council to re-construct. The Plaintiff was under obligation to seek fresh approvals for re-construction and she could not rely on the approvals which she had obtained before the DSQ was razed down. This however did not entitle the 1st Defendant to demolish the DSQ without following the law. It is on this ground that I agree with the finding in the case of **George Kamau wa Kanene & 2 Others Vs City Council of Nairobi (2017) e KLR** where the court found that demolition without evidence of service of an enforcement notice was illegal.

15. The Plaintiff is seeking for an injunction restraining the 1st Defendant from demolishing or interfering in any manner with her property. The evidence on record is that the 1st Defendant was only interested in the DSQ which was being constructed without the requisite approvals. The 1st Defendant had no issues with the main house. The DSQ has already been demolished. There can be no injunction to stop what has already happened. If the court were to grant a blanket injunction against the 1st Defendant regarding the Plaintiff's property, the Plaintiff may use that as a shield to go on to re-construct the demolished DSQ without seeking the necessary approvals. It is therefore clear that no injunctive relief can be granted in the circumstances.

16. The Plaintiff is seeking loss of rental revenue at the rate of Kshs.25,000/=from December 2008. As per the Plaintiff's submissions, the Plaintiff had rented out the DSQ to one Victor Wakumile Ndururu for Kshs.25,000/= per month. This is not the true position. Mr Ndururu had rented the main house which was going for Kshs.25,000/=per month. There is no evidence that the DSQ was being let out before and after it was razed out. The DSQ was under re-construction when it was demolished. There is therefore no basis upon which the court can award Kshs.25,000/= per month as loss of rental income or mesne profits as requested in the submissions.

17. As I have already said hereinabove, the suit against the 2nd Defendant was withdrawn. Prayer 4 and 5 of the amended Plaint was targeting the 2nd Defendant. The suit against the 2nd Defendant having been withdrawn, there is no relief which lies in favour of the Plaintiff.

18. The Plaintiff is seeking compensation for the unlawful demolition of the DSQ, perimeter wall and the destroyed sewer lines all amounting to Kshs.2,400,000/= . As I have already found, the demolition of the DSQ was unlawful. The Plaintiff is entitled to compensation for the same. The Plaintiff produced a valuation report by M/s Njihia Muoka Rashid Co.Ltd . The valuation report which was confined to the demolished DSQ, a compensation amount of Kshs.1,883,000/- was arrived at. I find this sum to be reasonable. There was no any other report given to contradict this one. I will therefore allow compensation of Kshs.1,883,000/= . There is no basis for awarding a sum higher than that contained in the valuation report as the valuer took into account the destroyed perimeter fence and the destroyed sewer line in arriving at the figure of kshs.1.883,000/= .

19. The Plaintiff seeks compensation for value of broken doors, locks, landscaping as well as damaged and stolen goods amounting to Kshs.400,000/= This is a special damage claim. There was no evidence of any of the alleged loss which was adduced. In any case, the valuer stated in his report that the main house was not affected. I therefore decline to award this amount.

20. The Plaintiff is seeking loss of earnings or diminished revenue arising from the damaged sewer lines. She claims Kshs.15,000/= per month. This amount is plucked from the air. The prayer which seeks this relief is not clear on what basis the plaintiff is seeking this sum. If it is a question of the broken or damaged sewer lines, this has been compensated under the head of unlawful demolition with its resultant effects. I therefore decline to grant this relief.

21. The plaintiff seeks an order compelling the 1st Defendant to approve the structural and architectural plans for the re-construction of the sewer line, DSQ , damaged perimeter fence and the damaged wall to the kitchen of the main house. There was no evidence given to show that the Plaintiff had prepared structural and architectural plans which she submitted to the 1st Defendant which the 1st Defendant refused to approve. There is therefore no basis for granting this relief which is hereby declined.

Disposition.

22. From the analysis hereinabove, I find that the Plaintiff has only succeeded in her claim for compensation for the unlawful demolition of the DSQ. I therefore grant compensation for the unlawful demolition of the detached servant quarter in the sum of **Kshs.1,883,000/=** . The Plaintiff shall have costs of the suit as well as the interest in the sum awarded which shall be calculated from the date of this judgement.

Dated, Signed and Delivered at **Nairobi** on this 21st day of **January 2021**.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

M/s Kadima for Mr Mbaluto for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE