



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO.502 OF 2012

CHARLES MURUNGA.....1ST PLAINTIFF

VINCENT WANGOMBE.....2ND PLAINTIFF

GEOFFREY J.N. MUIRURI.....3RD PLAINTIFF

JAMES NGUO.....4TH PLAINTIFF

ROBERT NTOYAL.....5TH PLAINTIFF

LAWRENCE ASWANI.....6TH PLAINTIFF

=VERSUS=

JAMES CHEGE.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

JUDGEMENT

1. By a Plaint dated 13th August 2012 and amended on 23rd October 2012 and further amended on 23rd February 2015, the Plaintiffs seek judgement against the Defendants jointly and severally for:-

a) An order for a permanent injunction restraining the 1st Defendant, their servants, employees and /or agents from proceeding or howsoever continuing to build /construct and /or erect buildings and/or structures within the parcel of land currently known as block 72/233 Ngei PHASE II Estate Lang'ata in Nairobi which do not comply with the original planning of the houses and the estate which estate is for single dwelling houses.

b) A declaration that the purported approval issued by the 2nd Defendant through its city planning Department to the 1st Defendant to construct on block 72 /2333 (House No.217) Ngei Phase II Estate Lang'ata in Nairobi is illegal, null and void.

c) An order of mandatory injunction compelling the Defendants to demolish or cause to be demolished all the illegal and undesired structures built in the parcel of land currently known as block 72/233 Ngei Phase II Estate Lang'ata Nairobi at their own cost.

d) Costs of the suit and interest.

The Plaintiff's case

2. The Plaintiffs contended that they are home owners of maisonettes and bungalows in Ngei Estate Phase II. They stated that sometimes in July, 2012, they noticed an ongoing construction of extensions/buildings in houses in plots Block 72/233 of the estate. They stated that the said construction of structures was carried out with alleged approvals from the 2nd Defendant.

3. They contend that the 1st Defendant's constructions are illegal, unauthorized and unapproved by the relevant authorities, do not accord to approval plan of houses in the residential estate in question and are a health hazard and an infringement of the Plaintiff's rights of enjoyment

of private property. They also stated that the structures have caused them loss and damage.

The 1st Defendants case.

4. He filed the amended defence and counterclaim dated 8th November 2012. He contended that he obtained the necessary approvals from the relevant authority to construct on his property and as such was not under any obligation to terminate the construction. He further stated that prior to issuance of the approvals, officers from the 2nd Defendant's planning department visited his plot and inspected it to determine the suitability of construction of an extension.

5. He also stated that the Plaintiffs are aware that there are other numerous structures/extensions which have been constructed in Ngei Phase II and they have either acquiesced or condoned the constructions. He added that he was incurring losses in respect of timber and trappers at a cost of KShs.87,500/= from the date an injunction was issued in this matter. He prayed for orders that:-

a) The Plaintiff's suit be dismissed with costs. Judgment be entered against the 1st Defendant for KShs.87,500/= together with interest at court rates from 29th August 2012 till full payment.

b) Costs of this suit and the Counter claim.

c) Any other or alternative relief that this Honourable Court may deem fit and just to grant.

The 2nd Defendant's case

6. The 2nd Defendant denied allegations by the Plaintiffs vide its defence dated 24th June 2014. It also asserted that if indeed it had issued the alleged approvals, then the 1st defendant must have complied with the laid down procedures as per the Physical Planning Act Cap 268 (Repealed).

The Plaintiff's evidence

7. PW1, Charles Ambani Murunga the 1st Plaintiff testified on 5th October 2010. He adopted his witness statement and the list of documents dated 13th August 2012. He told the court that he resides in Ngei Phase 11 Lang'ata House No.216 which estate comprises of bungalows and mainsonettes for residential purposes only.

8. He stated that in July 2012, the Plaintiffs and other home owners made complaints that there was ongoing construction of extensions/buildings in the neighbouring plot Block 72/333 (House No.217) owned by the 1st Defendant.

9. He stated that the 1st Defendant's extensions were not approved and when he protested together with the neighbours, the 1st Defendant became violent. He further stated that the said construction is a direct infringement of the rights of the Plaintiffs as they are and will hinder light and air circulation to neighboring houses since they tower way above the neighbouring houses. He added that it would also compromise security and they are not according to specifications and standards of the estate. He also stated that they would devalue the economic status of the estate.

10. He stated that the structures resemble rooms for letting yet they are built in the middle of a middle class residential estate and as such they are not sanctioned by the relevant by-laws or by the residents and change of user from single-dwelling houses to multiple houses was not obtained.

11. When cross-examined, he stated that the 1st Defendant stopped construction after the Plaintiff obtained orders to stop it on 11th March 2013, but an unfinished two storey building still stands on the 1st Defendant's plot. He also stated that the 1st Defendant presented an approval from the 2nd Defendants. He added the Plaintiffs have no letter from the 2nd Defendant stating that it did not approve the construction and that they sued the 2nd Defendant because the construction was illegal.

12. When re-examined, he stated that in the suit plot, there is an open area for emergency services and that space is not meant for construction as it serves as a common area used by other residents. He also stated that all the other residents have only done extensions and not new separate buildings or additional dwellings as the 1st Defendant has done.

13. He further stated that the area has bungalows only and no multipole dwellings are allowed. He added that the 1st Defendant's construction exceeds 50% of the ground area.

14. On approvals issued to the 1st Defendant, he stated that residents were not invited to make objections, there was no gazette notice and no signage was displayed at the construction site as required thus proper procedure for obtaining approval was not followed.

15. PW2, Vincent Wangombe was the 2nd Plaintiff. He told the court that he bought his house No.178 on Plot 72/272 Phase II Ngei Estate in the year 2000 and he has resided thereon for over 18 years. He adopted his witness statement dated 13th August 2012 which mirrors PW1's written statement.

16. When cross-examined, he stated that there's a structure on the 1st Defendant's plot that has gone upto first floor and he prays that the

said construction be stopped. He added that the 1st Defendant was putting up another house and it was not an extension. He prayed that the approvals he obtained for the construction be declared null and void.

17. He stated that the construction in question was being undertaken at the 1st Defendant's backyard. However, it was being carried out as a distinct construction as opposed to an extension on the house. The 1st defendant was putting up a residential unit separately from his own house and the said structure was protruding into the 2nd plaintiff's property and also into a common area/passage/road reserve.

18. He added that the Plaintiffs wrote to the 2nd Defendant to complain about the construction then it responded saying that it would take action. He added that he is not aware of the procedure of the 2nd Defendant with regards to approvals of buildings.

19. He also stated that Lang'ata Ngei Phase 11 is a mixed development consisting of a one bedroomed Dsq and 3 bedroomed main houses. He added that there are no flats yet the 1st Defendant was building a maisonette with a ground average of 75% as opposed to the recommended 50% and that it extended to the fence. He stated that it puts pressure on the amenities like water, sewage, e.t.c.

20. He stated that while the 1st Defendant claimed to have gotten approval for construction from the 2nd Defendant, the 2nd Defendant ought not to have given approval to the 1st Defendant.

21. On re-examination, he stated that the 1st Defendant's extension is a danger as the architect who drew it was not certified and that it will make the property on the estate to be devalued and it will affect his enjoyment of his backyard.

The Plaintiff's submissions

22. They are dated 13th April 2021. Counsel for the plaintiff submitted on the following issues.

a) Are all the plaintiffs' home owners of maisonettes and bungalows in Ngei Phase II Estate Langata Nairobi?

b) Did the 1st defendant commence construction of extensions or buildings in house / block 72/233 which are illegal, unauthorized and unapproved by the relevant authorities?

c) Did the 1st defendant's actions of undertaking the said constructions infringe upon the plaintiff's rights?

d) Is the plaintiffs' suit incurably defective, bad in law, incompetent and an abuse of the process of the court?

e) Has the 1st defendant incurred losses in respect of timber and trappers at a cost of Kshs.87,500/= from the date the interim injunction was issued herein as pleaded in the counter-claim and if so, to whom is such loss attributed?

f) Do the plaintiffs have a cause of action against the 1st and 2nd defendants jointly and severally?

g) Are the plaintiffs entitled to the prayers in the amended plaint?

h) Who should bear the costs of the suit and counter-claim?

23. Counsel for the Plaintiff submitted that the production of certificates of leases by the plaintiffs is prima facie evidence that they are home owners within the suit estate since a lease is proof of proprietorship as per section 26 of the Land Registration Act, No. 3 of 2012.

24. He also submitted that the 1st Defendant commenced construction without obtaining a change of use as required under Section 30 section 30 to 37 of the repealed Physical Planning Act and the development applications awareness guide of the 2nd defendant.

25. He added that PWI testified that no notice was published at the construction site and had it been published, the plaintiffs would have objected to the grant of the approval because the 1st defendant's structures / extensions do not accord to the original planning of the estate. He further submitted that if the 2nd defendant issued approvals, it was illegally issued without following due process which involves advertisement of 14 days' notice of intention to change user and conducting environmental impact assessment as well as obtaining an environmental impact assessment report from NEMA as required under 58 (1) of the Environmental Management and Co-ordination Act, Cap 387 Laws of Kenya. He relied on the case of **Republic v County Government of Nairobi; Kilimani Project Foundation & 21 Others (Interested Parties) Ex Parte Cytonn Investment Partners Sixteen LIP [2020] eKLR** and on the case of **Republic v Nairobi City County & another Exparte Mugumo Villas Limited [2014] Eklr**.

26. He also submitted that the purported approval was issued by the City Council of Nairobi (now defunct) on the strength of alleged Architectural drawings made by one Simiyu B. Nakitare but Plaintiff's Exhibit No.1 which is a letter from the Architectural Association of Kenya shows that Simiyu B. Nakitare is not a recognized architect hence the purported approval (if any) was issued illegally.

27. On the issue whether the 1st Defendant's action breached the 1st Defendant's rights, he submitted that the 1st defendant's action of putting up an extension which towers way above the plaintiffs' compounds hence hindering air and light circulation is an infringement of the plaintiffs' right to peaceful and quiet enjoyment of their property.

28. He further submitted that the extension/construction in question amounts to change of user of the estate from its previous single -

dwelling to multi - dwelling and this will exert pressure on the existing sewerage system, dumping sites, human and vehicular traffic which will in turn lead to serious environmental issues which will violate their rights to a clean and healthy environment and the obligation placed on each individual under Article 69 (2) to protect the environment.

29. On the 1st Defendant's claim for special damages of Ksh. 87,500/= in the counterclaim he submitted that while it is trite law that special damages must be specifically proved, the 1st Defendant did not produce any evidence whatsoever to back up his claim for Ksh. 87,500/=He relied on the case of **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR**.

30. He also submitted that if this court finds that the 1st Defendant's structures are illegal, the 2nd Defendant is obliged to demolish it as provided under Section 30 (3) and (4) of the Physical Planning Act Cap 286 Laws of Kenya (Repealed).

31. I have considered the pleadings and the evidence on record. I have considered the submissions filed by the Plaintiffs and the authorities cited. The issues for determination are:-

(i) Whether the 1st Defendant obtained approvals from the 2nd Defendant for the construction.

(ii) If so, was it procedural?

(iii) Whether the said construction infringes on the Plaintiffs' rights.

(iv) Who should bear costs of this suit?

32. In his defence and counter claim the 1st defendant stated that he obtained the necessary approval from the Director of Physical Planning. In his documents he annexed an approval by the Director of City Planning dated 24th May 2012. It is for approval of proposed maisonette but subject to certain conditions. It should be noted that the 1st Defendant who was duly served neglected to attend the hearing hence did not defend his counterclaim. The Plaintiffs' case therefore is uncontroverted.

33. It is the Plaintiffs' case that it was resolved by Ngei Phase II Lang'ata Residents Association in their bylaws that any additional construction must be approved by the Association and formalized by the City Council and such construction had to blend with the existing structures.

34. It is further the Plaintiffs case that the 1st Defendant's construction amounts to change of user of the estate to multi dwelling and this will exert pressure on the existing sewerage system, dumping sites, human and vehicular traffic. This will in turn lead to violation of their rights to a clean and healthy environment.

35. The 2nd Defendant did not tender any evidence neither did it file written submissions.

36. I find that the approval obtained by the 1st Defendant from the 2nd Defendant were not obtained procedurally. It did not take into account the character of the estate.

37. I find that the Plaintiffs have demonstrated that their right will be infringed if the 1st Defendant is allowed to complete his construction. In the case of **Kiriinya M. Mwenda vs Runda Water Ltd & Another [2014] eKLR** cited in **James Irungu Mwangi & 2 Others vs Laban Macharia Muiruri & Another [2018] eKLR** it was held that:-

“...I wish to point out that the petitioner's right to own, use and develop his property is not absolute. He lives in a community of other property owners who have voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life by making provisions for certain services. The Petitioner as a resident of the area cannot insist on exercising his rights without regard for the rights of others and or benefit from services without paying for them”.

38. All in all, I find that the Plaintiffs have proved their case as against the Defendants on a balance of probabilities. The 1st Defendant's counterclaim is dismissed.

39. Accordingly I enter Judgment in favour of the Plaintiffs as against the Defendants jointly and severally as follows:-

(a) That an order for a permanent injunction is hereby issued restraining the 1st Defendant, his servants, employees and /or agents from proceeding or howsoever continuing to build /construct and /or erect buildings and/or structures within the parcel of land currently known as block 72/233 Ngei PHASE II Estate Lang'ata in Nairobi which do not comply with the original planning of the houses and the estate which estate is for single dwelling houses.

(b) That a declaration is hereby issued that the purported approvals issued by the 2nd Defendant through its city planning Department to the 1st Defendant to construct on block 72 /2333 (House No.217) Ngei Phase II Estate Lang'ata in Nairobi is illegal, null and void.

(c) That an order of mandatory injunction is hereby issued compelling the Defendants to demolish or cause to be demolished all the illegal and undesired structures built in the parcel of land currently known as block 72/233 Ngei Phase II Estate Lang'ata Nairobi at their own cost.

(d) That costs of the suit be borne by the 1st Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Ngessa for the Plaintiffs

No appearance for the 1st Defendant

Mr. Obed for the 2nd Defendant

Steve - Court Assistant