



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 171 OF 2012

JULIUS KAMURU MWANGL.....PLAINTIFF

=VERSUS=

PERMANENT SECRETARY MINISTRY OF DEFENCE.....1ST DEFENDANT

PERMANENT SECRETARY MINISTRY OF LANDS.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

NAIROBI CITY COUNTY4TH DEFENDANT

JUDGEMENT

Background

1. By a Plaint dated 28th March 2012, the Plaintiff brought a suit against three Defendants in which he sought the following reliefs:-
 - a. Special damages at Kshs.228,799,056.55*
 - b. General damages*
 - c. Interest on (a) and (b) above*
 - d. Costs of this suit*
 - e. Any other or further relief that this Honourable Court may deem fit to grant.*
2. On 9th September 2014, the Attorney General filed a Chamber Summons in which he sought leave to enjoin Nairobi City County, as a 4th Defendant. Nairobi City County was enjoined as a 4th Defendant vide a ruling delivered on 21st May 2015. The 4th Defendant was granted 21 days within which to file defence, witness statements and supporting documents. Parties were given liberty to amend pleadings but it appears that no amended pleadings were filed.
3. Prior to the joinder of the 4th Defendant, the Plaintiff and one witness had testified. The 4th Defendant filed an application seeking to have the witnesses who had testified recalled for cross examination or in the alternative the case do start de novo. The Court directed that the case do start de novo. When the hearing started de novo, evidence of two witnesses was taken by Justice Gacheru . On 22nd March 2017, I took over this case, and directed that the case do proceed from where it had reached. I took evidence of one more witness before the Plaintiff closed his case. The Defendants called two witnesses before they closed their case. After submissions had been filed, Judgement was reserved on 24th July 2018 for 25th October 2018. As I embarked on writing judgement, I noticed that part of the proceedings had been taken by Justice Gacheru. I had to give the file for typing of proceedings. After proceedings had been typed, the file was brought back to me. I put the file in one of the drawers in my chambers and forgot about it. It is after the Plaintiff's Advocate Mr Maina enquired about it in open Court in or around November 2019 that I went back to look for the file. Once I found the file, I asked my court assistant to issue notices to Advocates. I sincerely apologize for this inadvertent mistake.

Plaintiff's Case.

4. The Plaintiff is the registered owner of LR No.36/111/144 situated at Eastleigh Section 3 in Nairobi (suit property). The Plaintiff had erected a four storey building which comprised of two and one bedroom apartments as well as bedsitters. The building was started in 1995 and was completed in 1997. The Plaintiff had secured a loan from Housing Finance Company of Kenya Limited (HFCK) to enable him to put up the building.

5. On completion of the building and after installation of water and electricity, he put in tenants and engaged the services of a property manager who used to collect rent on his behalf. The Plaintiff stated that he was getting a monthly rent of about **Kshs.421,750/-**. It is the Plaintiff's evidence that before he started constructing the building, he applied for and got approval from the then Nairobi City Council.

6. The Plaintiff testified that on 22nd and 23rd November 2011 personnel from the Kenya Defence Forces based at Moi Airbase in Eastleigh in company of police officers went and stood guard as bulldozers demolished his building. The demolition went on despite protests from him and other property owners which were too demolished. The Plaintiff stated that the demolition was done without notice and that it was selective in that there were other buildings which were taller than his which were spared the demolition. The Plaintiff further stated that in another estate called Biafra, there were buildings which were next to the fence of Moi Airbase but that these buildings were not affected.

7. The Plaintiff further stated that the reason given for the demolition that the building was a threat to the security of aircrafts landing at the Moi Airbase had no basis because the Airbase had been in existence for over 40 years before he put up his building. The Plaintiff stated that since he was not given notice, his personal items which were in the caretaker's office in the building were destroyed. The Plaintiff stated that the building was his only source of income which he used to educate his children who were in college. His children were forced to drop out of college and as a result he was shunned by people who thought that he was a grabber and a fraudster. He was the chairman of Catholic Men Association, Ngong Diocese. As a result of demolition, he was viewed as a man of bad morals, land grabber and fraudster. He stated that during the demolition, he was photographed and his photograph was flashed all over the world.

8. The Plaintiff stated that it is because of the callous actions of the Kenya Defence Forces Personnel that he suffered loss for which he is seeking the prayers in the Plaint. The Plaintiff stated that he was a dutiful rates and rent payer. He used to pay his taxes and used to file his tax returns. He called an accountant and a valuer who gave evidence in his favour.

1st, 2nd and 3rd Defendants.

9. In their defence, the 1st, 2nd and 3rd Defendants contended that if the Plaintiff's building was near the Moi Airbase and was demolished, then it must have been an illegal building which flouted the International Civil Aviation Organization (ICAO) which stipulates that buildings near aerodromes maintain certain heights. During the hearing, the 1st, 2nd and 3rd Defendants case was stated by DW1 Lt.Coln.Appollo Ogola Aloka, a pilot with the Kenya Airforce who also has immense experience in aviation safety. He was trained locally and in the United States of America (USA) on aviation safety and security. He stated that he has the highest ratings among the Kenya Airforce Pilots. He is among those who are allowed to fly VIPS including presidents.

10. In 2011, the witness was a Staff Officer II in charge of flight safety. His duties included ensuring that undertakings within the Airbase including flight and ground safety was up to standards. He stated that in flight safety, there are two obstacles. Some of the obstacles are manmade and others are natural. Man-made obstacles include buildings whereas natural obstacles include mountains. Eastleigh Airbase is an aerodrome and as per Annex 14 of ICAO which has been localised through the Civil Aviation Act Cap 394 Laws of Kenya, obstacles which are beyond a certain height and may endanger aircrafts are supposed to be removed.

11. This witness testified that the building in issue was very close to the approach surface of Moi Airbase. As per requirements, such buildings are not supposed to be more than 8 metres high. In the present case, the building was more than 8 metres in that it was about 25 metres high. On 22nd November 2011, about five buildings which in aviation language are called obstacles were removed. The obstacles were removed after research had been done and the relevant government agencies given reports.

4th Defendant's case

12. The 4th Defendant called DW2 Fredrick Ochanda Ondari who is from the City Planning Department of Nairobi City County. He stated that he had been in the department since 1999. He further stated that the department which deals with approval of buildings plans is called Development Control Section. This is the department which receives development plans, processes them and gives approval. He stated that the process entails a developer identifying an architect who makes drawings in accordance with the required conditions.

13. In the instant case, the Plaintiff was the developer and his architect was Mwaniki Njeru who filled an application dated 24th May 1994. The plot where the development was to be undertaken was LR No.36/111/144. The approval which was given was in respect of a block of 12 bedsitters. The declared area to be developed was 258 Metres square for ground floor and 247 Metres square for the second floor. According to the architectural plans which were annexed to the application, ground floor had 6 bedsitters and the upper floor had 6 bedsitters. The print area was 505 Metres Square.

14. The witness testified that instead of the Plaintiff putting up 12 bedsitters on two floors which were allowed, he proceeded to build four floors which were not approved. This witness disowned the purported approved plans which the Plaintiff relied on and said that these approvals were not in the county records and that if there were to be any amendments to the original approved plans, then the approval would have had a different date and not the same date as the documents which were relied on by the Plaintiff show.

Analysis of evidence and issues for determination.

15. I have carefully considered the evidence adduced by the Plaintiff as well as that which was adduced by the Defendants. There is no doubt that the Plaintiff's building and those of others were demolished on 22nd November 2011. DW1 an officer from the Kenya Airforce in

his testimony conceded that the Plaintiff's building and those of about four others were demolished on 22nd November 2011. The Plaintiff himself produced a copy of the Standard Newspaper of Wednesday 23rd November 2011 in which he is pictured in a caption where he was pleading with a driver of a bulldozer to stop the demolition. This therefore means that the demolition occurred on the previous day that is 22nd November 2011.

16. The Plaintiff contends that the building was demolished yet he had obtained approvals from the then Nairobi City Council which is the predecessor of Nairobi City County. The Plaintiff therefore argues that the building did not flout any regulations which would have led to its demolition. The Defendants on the other hand contend that the building was an illegal building which was not approved by the Nairobi City Council and that the building was a threat to the safety of the aircrafts at Moi Airbase Easteligh which had to be removed on grounds of safety concerns.

17. The issues which arise for determination are the following :-

a. Was the Plaintiff's title obtained fraudulently?

b. Who demolished the Plaintiff's building

c. Did the demolished building have the approvals from the relevant authorities?

d. Was the demolished building an illegal structure and if so was it a danger and obstruction to aviation safety and security?

e. Was the demolition of the Plaintiff's building legal?

f. Whether the demolition was malicious and selective?

g. Is the Plaintiff entitled to compensation for the demolished building?

h. Was the Plaintiff defamed and if so has he proved the alleged defamation as to qualify for damages?

i. Is the Plaintiff entitled to the prayers in the plaint?

j. Which order should be made on costs?

Was the Plaintiff's title obtained fraudulently

18. Though the 1st, 2nd and 3rd Defendants stated in their defence that the Plaintiff's title was obtained fraudulently, there were no particulars of fraud given and no evidence was adduced of the alleged fraud. In fact the same Defendants in their submissions conceded that there was nothing wrong in the acquisition and that the Plaintiff was at liberty to build on his land as long as he complied with the relevant requirements. I therefore do not consider that this is really an issue for determination.

Who demolished the Plaintiff's Building?

19. There is really no doubt as to who demolished the building. The witness for the 1st, 2nd and 3rd Defendant stated in his evidence that it is the Kenya Airforce personnel who demolished the Plaintiff's building and four other structures on 22nd November 2011. There was no evidence of any involvement of the 4th Defendant. The 4th Defendant was actually brought to the suit later on application of 1st, 2nd and 3rd Defendant to assist the court arrive at a fair decision.

Did the demolished building have the approvals from the relevant authorities

20. The evidence adduced by the witness of the 4th Defendant is that the Plaintiff sought for and obtained approval for construction of a two storey building comprised of a ground floor and one upper floor or first floor. Each floor was to have six bedsitters. The Plaintiff however went and constructed a four storey building which had 32 one bedrooms, 5 self-contained bedsitters and 5 single rooms totalling 42 units.

21. The witness called by 4th defendant adduced evidence that according to their records there was no amendment to the approved plans which would have allowed the Plaintiff to put up a four storey building. He stated that the approved plans were to cover an area of 505 Metres Square but what the Plaintiff finally built covered a plinth area of 840 Metre Square. The witness went on to state that if the approval was for a plinth area of 840 Metre Square, the payment would have not remained the same as for an area of 505 Metres Square. It is therefore clear that the four storey building which was put up by the Plaintiff was never approved by the Nairobi City Council which is the predecessor of the 4th Defendant.

Was the demolished building an illegal structure and if so was it a danger and obstruction to aviation safety and security.

22. The evidence adduced clearly shows that the Plaintiff's building was an illegal structure. It is the Nairobi City Council which had custody of all approved development Plans. The Plans for a four storey building are not in the custody of the 4th Defendant which is the successor of Nairobi City council. It is clear that the Plaintiff obtained approval for a two storey building but illegally proceeded to erect a four storey building. The Plaintiff did not obtain a certificate of occupation because it was an illegal building and no certificate of occupation

could be given to an illegal structure.

23. Section 10 of the Physical Planning Act Cap 286 (Now repealed) provided for the functions of the liaison committee which was inter alia to determine development applications relating to among other applications in respect of land adjoining or within a reasonable vicinity of safeguarding areas. In the Civil Aviation Act, Cap 394 Laws of Kenya, a safeguarding area is defined to mean any area adjoining any land owned or occupied by the Armed Forces of the Republic and which is decreed by the minister by notice in the Gazette to be a safeguarding area for the purpose of the Act.

24. The Nairobi City Council was aware that the plaintiff's land was near Moi Airbase which is a safeguarding area. This is why there was approval for only two floors. The Plaintiff in his submissions submitted that there was no Gazettment for removal of the Plaintiff's building or its reduction as provided for in the Civil Aviation Act. The Civil Aviation Act provides that buildings extending vertically above 30 metres can only be done with permission of the Director of Civil Aviation. This may be so but evidence adduced by a witness from the Kenya Airforce is that the building which was demolished was more than 8 metres, which are permitted under the ICAO. Though each member to ICAO is granted liberty to vary the heights, the height of buildings near the Moi Airbase had not been varied.

25. The witness from the Kenya Airforce stated that there were other considerations taken into account in removing the building which is an obstacle according to Annex 14 of the ICAO. Under the Article 238 of the Constitution of Kenya, it is stated that National Security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace stability and prosperity, and their national interests. Section 6 (1) (a) of the Access To Information Act provides that pursuant to Article 24 of the constitution , the right to access To Information under Article 35 of the constitution shall be limited in respect of information whose disclosure is likely to undermine National Security.

26. During the hearing of this suit, the court visited the site. The demolished building was 10 metre away from the fence of the Moi Airbase. The Court was taken to the runway. From the middle of the runway to the demolished building is about 50 metres. The witness took the court through the heights which are to be maintained in the approach area of the runway. The obstacles in the approach area of the runway are supposed to be lower than the other areas. There were other information on safety which were not disclosed and this is permitted under the constitution and the Acts of parliament.

27. From what the Court was explained at the site, the building which was demolished was clearly an obstacle beyond the required height and was clearly an obstruction to the safety and security of the Aircrafts landing at Moi Airbase. The grant IR No. 61345 had special conditions. One of the special conditions was that no building was to be erected or additions or external alterations made to a building otherwise than in conformity with plans and specifications previously approved in writing by the commissioner of Lands and the local authority. I have demonstrated hereinabove that the approval granted to the plaintiff was for construction of two floors but he decided to construct four storeys which had no approval from the Nairobi City Council.

Was the demolition of the Plaintiff's building legal?

28. There is evidence that the building was an illegal building. There is nothing illegal in removing a building which is illegal and is a threat to aviation safety and security. The building was mainly brought down because it was a threat to the safety of aircrafts at Moi Airbase. It was too close to the Airforce fence and its height was above the required heights to be maintained near aerodromes. The court of appeal in **Kenya Airports Authority and 2 Others (2016) eKLR** underscored the importance of safety of Airports when they held as follows:-

“ In our considered view, subject to approvals and limitation authorised by law , the security and safety of flight paths is not negotiable . Article 24 of the constitution recognizes that a right or fundamental freedom shall not be limited except by law and such limitation must be reasonable and justifiable in an open and democratic society. In our view, the security and safety of flight paths is a limitation on enjoyment of the right and freedoms in the Bill of Rights; such a limitation is permitted by law and is reasonable and justifiable in an open and democratic society”.

Whether the demolition was malicious and selective

29. The Plaintiff in his evidence had stated that the demolition was malicious and that it was selectively carried out. He had stated that there were buildings in front of his which were left standing and that there were other taller buildings which were left standing. When the court visited the site, it turned out that there was actually no building which was in front of his building that was left standing. The Plaintiff's building was on the 2nd row and the building immediately in front of the Plaintiff's touched on the fence of Moi Airbase and had been pulled down.

30. When the court was at the site, the Plaintiff changed his story and pointed to Biafra Estate on the opposite side of Moi Airbase. The witness from the Kenya Airforce explained that some of the buildings which were standing was because of injunctions given by courts. The witness pointed out to a huge building which was more than six floors and informed us that due to injunctions by courts, the Moi Airbase had to change the runway as the building was directly on the flight path and at the take-off of the runway. There were other buildings which had been demolished. There was therefore no malice on the part of the people who removed the obstacle. The demolition was not carried out in a selective manner as alleged.

Is the Plaintiff entitled to compensation for the demolished building?

31. There is evidence as can be seen from the preceding paragraphs that the Plaintiff deliberately put up an illegal building which had not been approved by Nairobi City Council. The 4th Defendant in its defence stated that there was no approval of a building as averred by the Plaintiff . This averment by the 4th Defendant was in reference to the four storey building. The truth of the matter was that the Nairobi City Council did not approve any four storey building in 1995. What was approved was a two storey building. There is therefore no basis for the

Plaintiff to argue in his submissions that the 4th Defendant had departed from its pleadings.

32. The Plaintiff is seeking Kshs.228,799,056,55 which is made up of loss of rental income at the rate of Kshs.421,730x12 x82 years which is the unexpired period of the lease. This amount comes to Kshs.415,000,000/=. He discounts this amount by Kshs. 175,713,669 as per the auditor's report. He then claims 50,000,000/= which is the value of the building and Kshs.3,085,487,55 being the loan balance as at the time the building was brought down which brings the total special damage to Kshs.228,779,056,55.

33. The building being an illegal building, the Plaintiff cannot seek to be compensated. If the plaintiff had constructed a two storey building of 12 bedsitters and the same were demolished, then he would have had basis for claiming but this is not the case. In **Nesco Services Limited and another Vs City Council of Nairobi (2017) eKLR** Lady Justice Bor in denying compensation to the Plaintiffs observed that the Plaintiffs were seeking an equitable remedy yet they had not followed the law. She observed that equity followed the law.

34. In the instant case, the Plaintiff is seeking compensation on the basis of an illegal building which he had erected without following the law. The Plaintiff is clearly the author of his misfortune. Had he followed the law, he would not have been where he is now. Having found that there is no basis upon which the Plaintiff can claim compensation, it will be superfluous to delve into the issue of whether he has proved the claim or not.

Was the Plaintiff defamed and if so has he proved the alleged defamation as to qualify for damages?

35. The Plaintiff is seeking general damages of Kshs.50,000,000/= for pain ,shock and trauma and defamation . He is also seeking exemplary damages of Kshs.10,000,000/= . To begin with, the Plaintiff did not plead the claim for defamation as required. He did not also prove the alleged defamation. The Plaintiff in his claim and evidence stated that he was a catholic by faith and he was a leader in the Catholic Men's Association. When the members heard that his building had been demolished, they shunned him terming him a fraudster, a grabber and a man without morals. He stated that the people understood him to be a grabber because his building had been demolished.

36. The Plaintiff did not plead any words which were defamatory in his claim. He did not call any person from the Catholic Church to give evidence about his character and how they viewed him after his building was demolished. The newspapers only published his photograph which showed him pleading with a bulldozer driver to stop demolishing his building. The publication of this photograph was not defamatory. In **Cosmas M Nzau & 2 Others Vs The Attorney General (2013) eKLR Justice Waweru** had this to say:-

“ It is the Plaintiffs’ case that the malicious prosecution caused injury to their credit , character, reputation , particularly because it was reported in newspapers. The Plaintiffs also alleged that they suffered considerable pain and mental anguish, trouble, inconvenience, anxiety and unnecessary expense during the trial. It must be borne in mind that this is not a case based on defamation.... Defamation arises when false words of someone tending to injur his character or reputation are published. The publication may be oral (slander) or written (libel) . The actual words complained of must be pleaded...”.

37. As I have said hereinabove, the Plaintiff neither pleaded the alleged defamatory words nor proved them in evidence. The mere fact that his photograph was published in papers on 23rd November 2011 does not amount to defamation. I therefore find that the Plaintiff was not defamed as to call for an award of general damages or exemplary damages.

Conclusion.

Is the Plaintiff entitled to the prayers in the plaint?

38. From the analysis herein above, it is clear that the Plaintiff is not entitled to any of the prayers in the Plaint. The upshot of this is that I find that the Plaintiff has not proved his case. The same is hereby dismissed.

Which order should be made on costs

39. It is said that costs ordinarily follow the event. Grant of costs is however within the discretion of the Court. Considering that the Plaintiff has already suffered for putting up an illegal building, it will not be fair to order him to pay costs. I will therefore order that each party do bear their own costs.

Dated, Signed and delivered at Nairobi on this 11th day of December 2019.

E.O. OBAGA

JUDGE

In the presence of:

Mr Maina for Plaintiff

Mr Motari for 1st to 3rd Defendants and

Mr Mokuu for 4th Defendant

Court Assistant: Hilda

E.O. OBAGA

JUDGE