



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 21 OF 2015**

**RASSUL N. MWADZAYA.....PLAINTIFF**

**VERSUS**

**THE SECRETARY, COUNTY GOVERNMENT OF KILIFI**

**THE COUNTY GOVERNMENT OF KILIFI.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated and filed herein on 12<sup>th</sup> February 2015, the Plaintiff Rassul N. Mwadzaya prays for Judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for:-

*a) An order of injunction preventing the Defendant's agents from demolishing and/or illegally dealing in any way with the Plaintiff's private property situate on LR No. 11492/350 at Mariakani;*

*b) An order of certiorari to issue against any decisions/resolutions passed by the Defendants herein which led to the issuance of the demolition notice dated 4<sup>th</sup> February 2015;*

*c) Costs of and incidental to this suit; and*

*d) Any other or further relief as the Honourable Court may deem fit and just to grant.*

2. The Plaintiff's suit arose from the fact that by a demolition notice dated 4<sup>th</sup> February 2015, the County Government of Kilifi (the 2<sup>nd</sup> Defendant) issued through its Secretary (the 1<sup>st</sup> Defendant) a 14 day notice to the Plaintiff requiring him to demolish his property situated on LR No. 11492/350 on the purport that the same had encroached onto a road reserve.

3. In the Defendants Written Statement of Defence filed herein on 9<sup>th</sup> June 2015 the Defendants deny that they approved any plans as alleged by the Plaintiff. It is their case that the structure erected by the Plaintiff was done without relevant final approvals, were never inspected and were occupied by the Plaintiff before a Certificate of Completion was issued.

4. The Defendants further accuse the Plaintiff of contravening the County Government Building Laws as well as the Physical Planning Act and urge that the Plaintiff's case be dismissed with costs.

**The Plaintiff's Case**

5. At the trial herein the Plaintiff called three witnesses who testified in support of his case.

6. Testifying as PW1, the Plaintiff told the Court that he is the registered owner of Plot No. 11492/350, Mariakani. He also owns Plot No. 11492/349 adjacent to the said Plot. The original numbers for the two Plots were 79 and 80 respectively. PW1 told the Court that he has erected a Commercial building on Plot No. 80 while he has a residential building on Plot no. 79.

7. PW1 told the Court that he has been in occupation of Plot No. 80 since 1994. Sometime in February 2015, he received a letter dated 4<sup>th</sup> February 2015 from the County Government giving notice of demolition of his building. The Defendants accused him of building on a road

reserve. According to PW1, he has never encroached on a road reserve.

8. Upon receipt of the notice, PW1 engaged one Edward Kiguru, a surveyor who assessed the land and prepared an appropriate Report dated 10<sup>th</sup> February 2015. The Surveyor confirmed that there was no encroachment and the demolition notice was hence not in order.

9. PW1 stated that he applied for approval in writing but no response ever came back from the Defendants. He therefore sought approval verbally. It is his case that his building is not on a road reserve.

10. On his part PW2-Ali Hassan Mwazahu told the Court that the Plaintiff was his younger brother. He knew the suit property very well and it has never encroached on the road.

11. PW3- Edward Marenye Kiguru –was the Land Surveyor who was commissioned by the Plaintiff. He told the Court that the aim of the survey was to relocate the boundaries of the said properties and to survey the physical developments thereon. It was his finding that the houses were all entirely within the property and there was no encroachment on the road reserve. He produced the Survey Report as Pexh 2.

### **The Defence Case**

12. On the date fixed for hearing the Defendant did not turn up to testify. Their case was accordingly closed without the testimony of any witness.

### **Analysis and Determination**

13. I have considered the pleadings filed herein, the testimony of the Plaintiff's witnesses and the evidence placed before the Court. I have equally perused and considered the written submissions of the Learned Advocates for both parties.

14. It was not in contention that the Plaintiff is the registered owner of LR No. 11492/350 (also known as Plot No. 8) Mariakani. On 4<sup>th</sup> February 2015, the Defendants herein issued a Notice to the Plaintiff directing him to demolish the structure on the suitland. The said notice read as follows:-

***“RE: CONSTRUCTION ON THE ROAD RESERVE AND PUBLIC AREA AT MARIAKANI MARKET***

***Whereas you are the Developer on public area/road reserve,***

***Further to earlier notice served to you,***

***Your site was visited by Athuman-Surveyor, and Ezekiel Ngwaite- Building Inspector wherein the following was found:***

***Contrary to the physical planning act of 1996, and the building codes-by –laws 252(1), 42 You have erected a Commercial building on a public road reserve.***

***I, The Chief Officer, Physical Planning and Urban Development do order you to demolish the structure and remove the debris from site, within 14 (fourteen) days-***

***Note that failure to do so, the County Government of Kilifi will prosecute you and demolish it at your own cost without further reference to you.***

15. Aggrieved by the said notice, the Plaintiff came to Court praying for the orders sought in his Complaint, among them the order of injunction restraining the Defendants agents from demolishing and/or illegally dealing in any way with the suit property.

16. At the trial herein the Plaintiff testified that he had put up a commercial building on the suit property which building the Defendants were by the said notice threatening to demolish. It was further the Plaintiff's testimony that his building does not encroach on a road reserve and that, since the suit property was allocated to him he had always paid rates as and when they fell due.

17. According to the Plaintiff the demolition order was not proper as his building was within the beacons marking the boundary of his land. The Plaintiff testified that prior to putting up the building, he had applied in writing for the Defendants approval but the Defendants never responded. He then sought approval verbally and proceeded to construct the building.

18. In my view, I think it may as well have been that the Plaintiff's commercial building falls within the beacons of his property as he contends by virtue of the Survey Report prepared by PW3. Section 29 of the Physical Planning Act however provides as follows:-

***29. Powers of local authorities Subject to the provisions of this Act, each local authority shall have the power –***

***a) To prohibit or control the use and development of land and buildings in the interest of proper and orderly development of its area;***

***b) .....***

*c) To consider and approve all development applications and grant all development permissions;*

*d) To ensure the proper execution and implementation of approved physical development plans;*

*e) .....and*

*f) To reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan;*

19. That being the case, other than demonstrating ownership of the suit property, it was incumbent upon the Plaintiff, given the location of the property, to demonstrate that he had sought and obtained approvals from the relevant authority.

20. The above provisions is further buttressed by Section 30 of the Act which stipulates that:-

***“30(a) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under Section 33.***

***(b)Any person who contravenes sub-section 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 five years or to both.***

21. Arising from the foregoing, it is clear that the 2<sup>nd</sup> Defendant has the legal mandate to regulate the use and development of land within its jurisdiction and in particular is required to approve any building before its construction. In the matter before me, even though the notice issued was not worded in the clearest manner the Plaintiff has not shown any evidence that he infact sought and obtained approval of the commercial building he has developed on his Plot of land aforesaid.

22. An injunction as it were is an equitable remedy. In light of the regulations aforesaid and the failure on the part of the Plaintiff to prove that he had complied therewith, it is difficult to see how an order of injunction can be justified herein. Granting the orders sought herein would be tantamount to sanctioning the Plaintiff's breach of the relevant provisions of the Physical Planning Act.

23. The mushrooming of informal settlement and slums in many of the local authorities can to a large extent be attributed to lack of proper planning and non-compliance with building bye-laws and the appropriate statutory provisions. This Court will not be seen to be sanctioning such non-compliance with the rules and regulations.

24. In the circumstances of this case, I do not find merit in the Plaintiff's case. The same is dismissed.

25. Each party shall bear their own costs.

**Dated, signed and delivered at Malindi this 14<sup>th</sup> day of March, 2019.**

**J.O. OLOLA**

**JUDGE**