



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

CASE NO. 439 OF 2008

ANJU CHANANDIN.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

JANE MUGO.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiff at the institution of this suit on 12th September 2008 was a co-proprietor of the property described as **LR No. 7752/65** situated in Kibagare Valley within Nairobi (hereinafter referred to as the “**suit property**”). The 1st Defendant is a body corporate constituted under the provisions of the Local Government Act Chapter 265 of the Laws of Kenya. The 2nd Defendant works for gain with the 1st Defendant.

2. The Plaintiff commenced the instant suit against the Defendants by way of a plaint dated 12th September 2008 and claimed that on 22nd August 2008 the Defendants broke into the Plaintiff’s premises and unlawfully damaged the Plaintiff’s properties. The Plaintiff averred that the acts of the Defendants constituted trespass. The Plaintiff sought judgment against the Defendants for:-

a) Special damages in the sum of kshs.925,600/=.

b) A permanent injunction restraining the Defendants by themselves and/or servants and/or agents or anyone claiming through them from trespassing, interfering, damaging the Plaintiff’s properties.

c) A declaration that the demolition and/or destruction was illegal and in breach of the Plaintiff’s constitutional rights.

d) General damage.

e) Cost of the suit.

f) Any other relief as the court may deem fit to grant.

3. The 2nd Defendant filed her Statement of Defence on 8th October 2008 and denied the allegations of the Plaintiff and averred that the plaint did not disclose any reasonable cause of action against the 2nd Defendant. On 17th October 2008 the 1st Defendant filed its Statement of Defence claiming that on 25th July 2008 it issued to the Plaintiff an Enforcement Notice requesting the Plaintiff to remove illegal conversion of use from residential to commercial (restaurant) without any approval; and addition of extension without approval. The 1st Defendant averred that the Enforcement Notice served on the Plaintiff expired 14 days from the date of service. The 1st Defendant further averred that if there was any breakage it was occasioned pursuant to the implementation of a lawful Enforcement Notice under the Physical Planning Act Cap 286 of the Laws of Kenya (“**the Act**”). The 1st Defendant further stated that under Section 33 and 38 of the Act the 1st Defendant’s officers are authorized to be escorted by armed police officers while performing their duties as mandated under the Act.

4. At the hearing of the case, the Plaintiff testified as the sole witness in support of her case and relied on the witness statement dated 8th November 2018 and reiterated the averments in the plaint. She testified that she is the co-owner of **LR No. 7752/65** Nairobi Kibagare and told the court that the 1st Defendant broke into her property and caused damage. She produced in evidence the photographs of her destroyed home. She testified that at the time of entry, she was not home but received a call from her workers whereupon she proceeded home and on arrival found the 1st Defendant’s officers and 2nd Defendant destroying her property. The 1st Defendant claimed her structures were illegal. She testified that she had sought approval before building the said structures and the 1st Defendant issued her with a formal approval in October 1998. Upon the extensions being completed the 1st Defendant issued a Certificate of Occupation. She told the court that the

construction was not illegal as alleged by the 1st Defendant as she had sought and had obtained approval. She testified that the extensions were built for her family needs and stated she was not running a bar and restaurant as alleged. She asked the court to grant her prayers against the Defendants as per her plaint.

5. The Defendants did not call any witness at the trial. The parties were directed to file and exchange their written submissions within 60 days but none of the parties filed any submissions and the file was forwarded to me to prepare the judgment. In preparing the judgment therefore it is only the pleadings, the documents filed by the parties and the evidence by the Plaintiff that the court will have recourse to. In a situation such as in the instant case where the Defendants did not offer any evidence, the Court has a duty to evaluate the evidence on record to determine whether the Plaintiff discharged her burden of proof to be entitled to judgment. As it was the Plaintiff who made allegations against the Defendants, the burden rested on her to prove the allegations in terms of Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.

6. Where a party offers no evidence at the trial in support of their case, such party's pleadings remain mere statements of fact which are unsubstantiated. That was the holding by the Court in the case of **Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 Others [2009] eKLR** where the Court held as follows:

“The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statement of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged.”

7. I am conscious that the standard of proof in civil cases is on a balance of probabilities. In the case of **Kirugi & Another -vs- Kabiya & 3 Others [1987] KLR 347**, the Court of Appeal held that:

“The burden was always on the Plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof. Likewise, failure by the Defendants to contest the case does not absolve a Plaintiff off the duty to prove the case to the required standard.”

8. The Plaintiff testified that she applied for approval for residential extensions through her architects and on 12th October 1998 the City Planning and Architecture Department of 1st Defendant approved the Plaintiffs application. An excerpt of the approval letter reads as follows:-

Dear Sir/Madam,

LOCAL GOVERNMENT (ADOPTIVE BY-LAWS) (BUILDING) ORDER 1968 L.N 15/1969, CITY OF NAIROBI (UILDING) BY-LAWS 1948 G. N 313/1948

Your plan registration No. D1495 for the proposed Domestic Building - Amendments to approve plan Reg. DD435 to be erected on LR No. 7752/65 was approved at the Town Planning Committee meeting held on the 18th day of September 1998 subject to:-

a) Submission of satisfactory structural details including lintols and trusses.

a. All debris and excavated materials to be dumped on sites approved by the City Engineer.

9. On 9th October 1998 the Plaintiff was issued with a Certificate of Occupation signed by the Director of City Planning and Architecture. It was the Plaintiff's assertion that her application for approval of the extensions was duly given and that the Defendants invasion of her premises was without justification. The importance of obtaining development permission was stressed in the case of **Wainaina Kinyanjui & 2 Others -vs- Andrew Nganga[2013] eKLR**, where the Court held that:-

“Section 30(1) of the Physical Planning Act provides that no person shall carry out development within the area of local authority without a development permission granted by the local authority. Development is defined under Section 3 of the Act to include the making of material change in the use of density of any building or land.”

Section 30(1) of the Physical Planning Act provides for approval for development permission by the relevant Local Authority before any development is undertaken. It provides as follows:-

30(1) 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.

10. The evidence adduced by the Plaintiff establishes that she made an application for development permission vide an application dated 18th February 1997 and approval was given by the Town Planning Committee at its meeting on 18th September 1998. An application for occupation certificate was made on 30th September 1998 and was duly given by the 1st Defendant on 9th October 1998. The development permission sought was for **“Domestic Building Extensions”** and the Certificate of Occupation signified that the certificate was for domestic building extensions. The Plaintiff was authorized to occupy/make use of the same. This evidence by the Plaintiff was not rebutted by the Defendants. The Defendants did not tender any evidence and in those circumstances the Plaintiff's evidence stood unchallenged. The

allegations made by the 1st Defendant remained just allegations without any substantiation. On the basis of the evidence, I am satisfied that the Plaintiff's developments on the suit property were duly approved and authorized by the 1st Defendant.

11. Having come to the finding that the developments by the Plaintiff were approved by the 1st Defendant, it follows that the Enforcement Notice dated 25th July 2008 issued by the 1st Defendant on the basis that the domestic extensions were effected by the Plaintiff without approval was without any justification and constituted trespass on the Plaintiff's property. The enforcement notice was unlawfully issued and the invasion of the property by the Defendants purportedly in enforcement of the notice was unlawful and was highhanded. I hold that the Defendants unlawfully trespassed onto the Plaintiffs property.

12. The Plaintiff has prayed for special damages in the sum of kshs. 925,600/= on account of damaged properties as itemized under paragraph 8 of the plaint and for general damages for trespass. In support of the special damages claim the Plaintiff testified that the Defendants wantonly destroyed and damaged her properties and she exhibited photographs to depict the Defendants agents in action. It is trite law that a claim for special damages must be specifically pleaded and specifically proved. While it may be true that the Plaintiff's properties were damaged there is no proof of the properties damaged. The Plaintiff merely listed items which she claimed were damaged but there is no proof they were on the property or they were damaged. The bundle of receipts the Plaintiff produced through her supplementary bundle of documents filed on 9th November 2018 are of no use. The receipts appear to have been collected on diverse dates from 2010 to 2018. It is not possible to relate or connect them to the damage said to have been caused in 2008. They are of no probative value in the proof of special damages. The Plaintiff would have been better placed if she had obtained the services of a loss adjustor who would have inspected the premises immediately after the damage was caused and prepared a report that would have assessed the loss and damage. The special damages claim is unproven and I disallow the same.

13. As pertains to the claim for general damages for trespass, the law is equally clear that trespass is actionable per se and a party is not required to prove damages once trespass is established. In the present matter, I have found and held that the Enforcement Notice issued by the 1st Defendant was unlawful. The entry of the 1st Defendant's agents onto the Plaintiff's property constituted trespass for which the 1st Defendant would be liable in damages. The evidence by the Plaintiff establishes that the Defendants forcibly descended on the property with armed security officers with the objective of enforcing the unlawful and illegal Enforcement Notice. The evidence points to the fact that in the process of enforcing the notice the Defendants turned the Plaintiff's premises "**upside down**" resulting in substantial damage being occasioned to the Plaintiff's property. In the circumstances of this matter, I award general damages to the Plaintiff in the sum of kshs. 500,000/= as against the 1st Defendant. The evidence has not proved the culpability of the 2nd Defendant and the suit against her is dismissed but with no order for costs.

14. The net result is that I find and hold the Plaintiff has proved her case against the 1st Defendant on a balance of probabilities and I enter Judgment in favour of the Plaintiff as against the 1st Defendant in the following terms:-

a) General damages in the sum of kshs.500,000/= together with interests at court rates from the date of judgment until payment in full.

b) Costs of the suit awarded to the Plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2019.

J. M MUTUNGI

JUDGE

In the presence of:

Mr. Mugo for Mrs. Wambugu for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Musyoki Court Assistant

J. M MUTUNGI

JUDGE