



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC. CASE NO. 236 OF 2013**

**NAOMI NGARE.....PLAINTIFF**

**VERSUS**

**1. MUNICIPAL COUNCIL OF MOMBASA**

**2. JAMES TITUS KISIA.....DEFENDANTS**

**JUDGEMENT**

1. The plaintiff brought this claim against the two defendants vide her plaint dated 14<sup>th</sup> September 2010 later amended on 29<sup>th</sup> May 2018 seeking judgment as follows;

**(a) Compensation from the defendants for general and special damages incurred by the plaintiff.**

**(b) Costs and interests.**

2. The 1<sup>st</sup> defendant filed its statement of defence on 30<sup>th</sup> September 2010. It is pleaded that the 1<sup>st</sup> defendant is mandated to give approvals before any construction is done. That the plaintiff was in breach and he accused the plaintiff of constructing a residential house encroaching on other plots as well as blocking an access lane. The 1<sup>st</sup> defendant counter claimed for an order that the plaintiff be directed to demolish the offending structures.

3. I did not see any statement of defence filed by the 2<sup>nd</sup> defendant. After the close of pleadings, the matter proceeded to hearing.

4. The plaintiff gave her evidence on 11<sup>th</sup> October 2018. She told court that she lives in Tudor and is a business woman. That she was a Juakali Association member in 1990 and was allotted a plot at the Juakali shades near Makupa roundabout. PW1 said she got a title for that plot after about 5-6 years and built rental houses on it. PW1 continued that in the year 2001, a Mr Mwangola accused her of encroaching on his plot. The matter went to court but was later finalized. She referred to these court proceedings in her pleadings but they were not produced as exhibits

5. PW1 further stated that in February 2010, the Council Askaris came to the suit premises very early and demolished her structures. She later heard that James Kisia was claiming the plot. That her structures were demolished and upto now she has not recovered anything. She produced the documents contained in her list dated 5<sup>th</sup> May 2016 in evidence in support of her case (P ex 1-6). PW1 said she also carried out a valuation of the property which report she produced as P ex 7. In total, the plaintiff says she lost equivalent of Kshs21,999,999/= for which she sought an order that the defendants do pay her together with costs and interests.

6. Miss Momanyi advocate appearing for the 1<sup>st</sup> defendant put the plaintiff to cross-examination. PW1 said that the county askaris did not show her any order when they carried out the demolition. That the place is empty and no one has come to claim the plot. That she never met Mr Kisia and PW1 did not know whether he was working for the 1<sup>st</sup> defendant. In re-examination, PW1 said she is not using the land because she wants every issue to be cleared. That marked the close of the plaintiff's case.

7. Mrs Momanyi counsel for the 1<sup>st</sup> defendant informed the court on 22<sup>nd</sup> November 2018 that the 1<sup>st</sup> defendant would not call any witness. She closed the 1<sup>st</sup> defendant's case without calling any evidence. The 2<sup>nd</sup> defendant also tendered nil evidence as he did not participate in the proceedings.

8. The plaintiff and the 1<sup>st</sup> defendant filed written submissions. The plaintiff reiterated the facts presented in her evidence. The plaintiff submitted that she followed due process before she was given her title deed and that the plaintiff had proved a prima facie case against the

defendants as outlined in the case of **Mrao Ltd –versus- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**. The plaintiff relied further in the decision of **Kirui –versus- Nairobi City Council (2003) KLR 218** where it was held that

**“the court was satisfied that the plaintiff had a kiosk where he had operated a business since 1976, that he held a trading licence issued to him for the purpose over the years by the defendant and that the kiosk was demolished by the defendant... If indeed the plaintiff’s kiosk was located on a wrong plot of land, the defendant must have known of its constructing and should have turned away the plaintiff or declined to issue him with licences over the years. There was no justification for the demolitions.”**

9. On damages, the plaintiff submitted that she is entitled to both special and general damages. She gave the particulars of special damages as follows;

(a) Lost revenue .....Kshs17,133,000/=;

(b) Movable property damage .....Kshs163,000/=;

(c) Value of demolished premises..... Kshs4,700,000/=;

(d) Valuation fees .....Kshs28,000/=

**Total .....Kshs22,034,000/=**

10. On general damages the plaintiff claims loss of business, profits, loss of sources of income and loss of business premises. She cited the case of **Herman P. Stayn –versus- Charles Thys Civil Appeal No. 86 of 1996** which held that;

**“A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”**

11. The 1<sup>st</sup> defendant on its part submits that the plaintiff has not proved her case. For special damages, the 1<sup>st</sup> defendant argues that the same must not only be pleaded but must be proved and in this case the plaintiff failed to do both. That the valuation report which gives the figures being claimed by the plaintiff did not form part of her documents contained in the list dated 6<sup>th</sup> May 2016. The 1<sup>st</sup> defendant supported her submissions by relying in the case of **David Bagaine –versus- Martin Bundi (1997) eKLR**.

12. On general damages, the 1<sup>st</sup> defendant submitted that the plaintiff claimed that structures demolished were on plot no. 348/IX/MI. That the evidence tendered shows there was a court order for demolition on plot no 362/IX/VII and that there is a road separating the two plots. That the factual status on the ground in respect of the two parcels are distinct. That the plaintiff was duty bound to show how the demolitions on plot 362/IX/MN affected her plot no 348. For these reasons, the 1<sup>st</sup> defendant urged the court to dismiss the suit.

13. The plaintiff has demonstrated that she does own plot no 348/IX/MN by producing a copy of the certificate of title (P ex 1) issued to her on 3<sup>rd</sup> October 1996. According to this document, the size of the plot is given as 0.05ha. However from the correspondences produced it appears on the ground there was a dispute on its boundaries going by the letter the plaintiff wrote dated 12<sup>th</sup> April 2001 addressed to Juakali Association. At paragraph 3 of this letter, she says she was shocked to learn that beacons were never aligned after the foot path was made cutting through her plot. The plaintiff also said the beacons are not clear and there is an overlap thus a source of confusion.

14. The question for my determination herein is to ascertain whether the plaintiff has proved her claim that;

**(a) There were demolitions undertaken on plot no 348/IX/MN.**

**(b) She is entitled to compensation under the heading of special and general damages.**

**(c) Who bears the cost of this suit?**

15. The factual evidence presented by the plaintiff has not been disputed since no evidence was tendered to the contrary. The plaintiff stated that the structures demolished belonged to her. Whether they were on a separate title is a non-issue. The plaintiff is only claiming damages occasioned as a result of the demolition. The plaintiff pleaded that she developed/built the structures after obtaining all the relevant permission.

16. The 1<sup>st</sup> defendant submitted that the demolitions carried out were of structures on plot 362/IX/MN and wondered why the plaintiff was obsessed with plot no 362. However there was no evidence presented to support the submission by the 1<sup>st</sup> defendant that the structures demolished whether built on plot 348 or 362 did not belong to the plaintiff. Secondly no evidence was adduced by the 1<sup>st</sup> defendant to explain the illegalities of the structures. Therefore I find that the plaintiff is entitled to be compensated for the demolition of her structures.

17. Did the plaintiff plead and prove the claim for special damages of Kshs22 million? The amended plaint as filed did not give particulars of claim for special damages. The 1<sup>st</sup> defendant rightly submitted that special damages must be specifically pleaded and proved (See Provisions of Order 4 rule 2(1) of the Civil Procedure Rules.) Under paragraph 10(b) of the amended plaint, the plaintiff pleaded for the cost of the demolished buildings as contained in the valuation report. At the time of filing this suit, also no valuation report was filed. The plaint does

not give details of this money.

18. The valuation report was produced as P ex 7. The valuation report is dated 10<sup>th</sup> February 2017. It referred to a house without land on plot no 127/2(61/R) at Kaa Chonjo. The report says instructions were given on phone. All the pages of the report make reference to plot 127/2(61/R). The plaintiff did not give evidence to link the plot number given in the report to her parcel of land which is 348/IX/MN. Further the plaintiff owns a title to her plot no 348/IX/MN and I am unable to comprehend why the valuation report referred and or mentioned house without land to be what was demolished. Given this conflict of plot numbers. I do not find the report to be of any assistance to the plaintiff's case as far as concerns her claim under special damages.

19. The plaintiff attached to the report a list of what she called the cost of destroyed premises as per October 2018. Some of the items listed are deposit refunded. No evidence of such refund if at all made to the tenants was presented neither did she present any tenancy contracts signed between her and the said tenants or receipts issued to them for payment of rent. No iota of receipts for the tenants personal effects were also produced in evidence. In summary, I find that the plaintiff has not proved her entitlement to the award of sums of money being claimed under the heading of special damages.

20. Is the plaintiff entitled to be compensated for general damages for the destroyed structures and loss of revenue? On loss for demolition to her structures, I already found that there was proof of the demolitions having taken place. For this reason I find she is entitled to some form of compensation. Under this heading, I shall award her Kshs2.5 million taking into account the inflationary rates. For lost revenue, she did not tell the court what stopped her from putting up new structures from the time the demolitions were done until now. She also did not present evidence of statement of accounts to enable the court determine what was her monthly/annual income. For failure to discharge this burden, I shall award her a nominal sum of Kshs500,000/= to cover loss of user for a period of two years which in my view was sufficient time to restore the damage. Thus I award a sum of Kshs3,000,000/= to the plaintiff as compensation for general damages payable jointly and severally by the defendants. I also award her costs of the suit.

**Dated, Signed and Delivered at Mombasa this 20<sup>th</sup> day of June 2019.**

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**A. OMOLLO**

**JUDGE.**