



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT THIKA**

**ELC CASE NO. 722 OF 2017**

**JOYCE WANGARI MWANGI.....PLAINTIFF**

**VERSUS**

**SHABAN GAKERE BHAKARI.....DEFENDANT**

**JUDGMENT**

By a **Plaint** dated **16<sup>th</sup> August 2017**, the Plaintiff herein brought this suit against the Defendant for the following orders;

- 1. An order of Declaration that the Plaintiff is the rightful owner of Plot No.43 House No. 799 Kamenu Estate.***
- 2. An order for the defendant to remove any illegal structures built on Plot No.43 House No.799 Kamenu Estate and/or in alternative the said illegal structures be removed forthwith.***
- 3. General damages for trespass against the Defendant.***
- 4. Costs of the suit and interest thereon.***
- 5. Any other relief that this Honourable Court may deem fit and just to grant.***

In her statement of claim the Plaintiff averred that she is the allotted owner of **Plot No.43 House No.799 Kamenu**, by the then **Municipal Council of Thika**, currently **Thika Sub County** and she was authorized to build planned commercial stalls at the frontage side facing **Kamenu- Kiganjo Road**. She further averred that the Defendant built an illegal structure in front of her plot blocking the frontage/entrance for her customers to access the shops, blocked the drainage system and is a security threat to her and her customers.

The suit is contested and the Defendant filed a Defence and Counterclaim and denied all the allegations made in the **Plaint**. He admitted that the Plaintiff is the owner of the suit property, but stated that he is a stranger to the alleged authorization to build commercial plots to the frontage side of the plot and averred that if the same was authorized, it was illegal. He further averred that though he was issued with a notice of intention to sue, he could not honour it as he is the legal allottee of the space for the construction of a kiosk by the former **Municipal Council of Thika** and he has been operating his business for the last seventeen years.

He alleged that the Plaintiff demanded that the Defendant do vacate the premises which was lawfully allocated to him. In his **Counter Claim**, he prayed for Judgment against the Plaintiff for;

- a) A permanent injunction restraining the Plaintiff, her agents, servants, employees or any other person claiming to act with the authorization of the Plaintiff from demolishing and/ or interfering with the Defendant's Kula Kiosk located at Kamenu Makongeni.***
- b) The Plaintiff's suit be dismissed with costs.***

The Plaintiff filed a Reply to the Defence and a Defence to the Counterclaim in which she reiterated the contents of the **Plaint** and denied all the allegations made in the Defence.

**PLAINTIFF'S CASE**

**PW1- Joyce Wangari Mwangi** adopted her witness statement dated **3<sup>rd</sup> August 2017** and produced her list of documents dated **16<sup>th</sup> August 2017** and filed on **29<sup>th</sup> August 2017** as evidence in Court. She testified that she was

allocated her plot by the **Municipal Council of Thika** and an approval to build thereon. However the Defendant has built in front of her shop and though she had given him notice to vacate he has failed to move. She further testified that though the Defendant has filed a **Counter Claim** she denied the allegations. She further sought for the costs of the suit and interest thereon.

On cross examination, she testified that she was allocated the suit property by the **Municipal Council of Thika** and she has been an owner of the suit property since **1980**. She further testified that her husband died in the year **2000**, and denied being a tenant. Further that they were allowed to build shops on the suit property and she acknowledged signing the tenancy agreement and also being given the survey plan. It was her evidence that the defendant found her on the plot and despite giving notice to the Defendant to vacate, he has refused to move out. She testified that she did not know if the Defendant has a temporary license to put up his kiosk, though there are minutes from **Kiambu County** on the issue of Notice. She further testified that the holders of the temporary licenses were given notice and they moved out.

On re-examination she testified that she had authority from the **Municipal Council of Thika** to put up her shops on the suit property.

## **DEFENCE CASE**

**DW1 - Shaban Gakere Bakari** adopted his witness statement filed in Court on **17<sup>th</sup> October 2017**. He also produced his list of documents as Exhibit 1. He testified that he built his kiosk outside **Kamenu Estate** next to the suit property but outside the Estate. He further testified that he has paid the business premises licenses.

On cross examination, he testified that he was given the plot buy one **Jane Muiruri** as a **Temporary Operating Licence**, but he was not supposed to build any permanent structure. Further that the terms were that he would be asked to move out anytime. That he was given notice to move out on **26<sup>th</sup> January 2018** and **12<sup>th</sup> February 2018**, but the notices did not have minutes from the **Municipal Council of Thika**. It was his testimony that the minutes were not authentic and that is when he complained, and the Plaintiff was urged to come to Court. It was his testimony that he is a licensed businessman and that he also did not attach the minutes.

On re-examination, he stated that his **Temporary Operating License (T.O.L)** has minutes of the **Municipal Council of Thika** but the Plaintiffs notices had no minutes of the **Municipal Council of Thika**. He further acknowledged that his occupation was temporary.

On the **28<sup>th</sup> of November 2018**, the Court directed parties to file written submissions. The Court has now carefully read and considered the pleadings, the evidence by the parties, cited authorities and provisions of law and the written submission, and renders itself as follows:-

It is this Court's opinion that the issue for determination is **whether the parties are entitled to the orders sought**.

It is not in doubt that the Plaintiff is the owner of **Plot No.43 House No.799**, the suit property herein. The Plaintiff produced evidence to show that she is the owner of the suit property. She has further produced building plans to the said suit property. It is however not clear whether or not the said building plans were approved as the Plaintiff has not produced any evidence to show that the same were approved.

The Plaintiff has also alleged that the Defendant had put up illegal structures in front of her house and thereby blocking the shops and is a security threat. Though the Plaintiff has alleged that the structures that the Defendant had put up were illegal, the Defendant produced a letter of allocation from the **Municipal Council of Thika** dated **7<sup>th</sup> April 2000** allocating the **Kula Kiosk** to **Jane W. Muiruri**, which was later transferred to the Defendant, a fact that has not been controverted. The said letter allocated him the kiosk on a temporary basis.

Therefore this Court finds and holds that the structure that was put up by the Defendant was **not** illegal as he has a **Temporary Operating**

**License** giving him the authority to put it up. Further the Plaintiff has produced in evidence letters from the County Government addressed to the Defendant terming his Kiosk illegal and thereby requiring him to remove the structure. This Court has already found and held that the Kiosk was not illegal and therefore terming the structures illegal by the County Government was without basis.

Having also perused the letter, this Court notes that when the Defendant was granted the temporary license, there was a condition requiring him to remove the Kiosk if the site shall be required by the **Municipal Council** or the **County Government of Kiambu** for any purpose. It is therefore clear from the license that the Defendant would only be required to remove the structure if the **Municipal Council** or the **County Government of Kiambu** required to use the site. On the contrary, it is not in doubt that neither of the two entities require to use the site as they have not given such notice. That the only reason that the Defendant is being required to pull down the structures is because apparently it has blocked the Plaintiff's Shops. This Court holds and finds that this reason is not one of the condition that the Temporary operating License required in order for the Defendant to pull down the structures and therefore it is not merited.

The Plaintiff has urged the Court to declare that she is the rightful owner of **Plot No. 43 House No. 799 Kamenu**. This is a fact that is not in

dispute and the Defendant has acknowledged as much in his pleadings. Further the Plaintiff has also urged the Court to order the Defendant to remove the illegal structures that he has put up in front of her house. The Plaintiff has failed to demonstrate that the Defendant's kiosk was illegally on her suit property or was blocking her shop. See the case of **Micheal Kimani & Another... Vs... National Social Security Fund & Nelson Obama ELC 1378 of 2013**, where the Court held that:-

*“.....The Applicants have not demonstrated that the second Respondent's plot was created illegally.....There is no evidence that they obtained any building approvals from the County Government or its predecessor. Admittedly, the balconies of their houses are facing what they call a road reserve which is actually a plot held by the second Respondent. If there is any*

***person whose rights have been infringed, it is the second respondent who has balconies hanging over his plot. To this extent, I do not see what prima facie case the applicants have. I find no merit in the Applicant's Application which is hereby dismissed with costs to the Respondents."***

The Defendant having demonstrated that his kiosk was legally in place, this Court finds and holds that the Plaintiff's claim is not merited. This Court finds that the Plaintiff has failed to prove her case on a balance of probability and therefore her prayers cannot be granted.

Consequently having found that the Defendant is not on the Plaintiffs property, there is no merit in holding that there was trespass and therefore the prayer for grant of General Damages also fails.

The Defendant has in his Counter claim urged the Court to restrain the Plaintiff from demolishing his kiosk. It is clear that the Defendant's kiosk is lawfully in place and unless the temporary license is revoked for the lawful purpose as per the letter of allocation, and in accordance with laid down procedures, then there is need to have his kiosk protected and as such this Court finds that his claim is merited and the Counter claim is allowed entirely.

Having now carefully considered the available evidence, the Court finds that the Plaintiff's suit or claim is not merited and the same is dismissed entirely with costs to the Defendant. However, the Court finds the Defendant's Counter- Claim merited and the same is allowed entirely with costs.

It is so ordered.

***Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of July 2019.***

**L. GACHERU**

**JUDGE**

**12/7/2019**

In the presence of

Mr. Kevero Holding Brief for Mr. Magani for Plaintiff

Ms. Kenja Holding Brief for Karanja Kangiri for Defendant

Lucy Court Assistant.

**Court-** Judgment read in Open Court.

**L. GACHERU**

**12/7/2019**

**JUDGE**