



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC 227 OF 2016**

**REGINA MWIKALI MUEMA.....PLAINTIFF**

**=VERSUS=**

**BETH WANJIRU AKA BETH**

**MUNJIRU & ANOTHER.....DEFENDANTS**

**JUDGEMENT**

1. The Plaintiff brought a suit against the Defendants claiming the following reliefs:-

- a) A permanent injunction restraining the 1<sup>st</sup> Defendant from any interference with Plaintiff's peaceful occupation and enjoyment of the suit property Plot Number 177/1 Ngei 2A Huruma Nairobi.***
- b) An order of eviction of the 1<sup>st</sup> Defendant from Plot Number 177/1 Ngei 2A Huruma Nairobi.***
- c) An order to the 2<sup>nd</sup> Defendant to enforce (a) above***
- d) General damages for pain suffering and mesne profits***
- e) Costs and interests thereon of this suit***
- f) Any other relief this Honourable Court may deem fit to grant.***

2. The 1<sup>st</sup> Defendant filed a defence and raised a counter-claim in which she seeks the following reliefs:

- a) A permanent injunction to issue to restrain the Plaintiff either through herself, her agents, servants or any one claiming under her from trespassing, abusing, hurling insults to the 1<sup>st</sup> Defendant or in any other manner whatsoever interfering with the 1<sup>st</sup> Defendant peaceful enjoyment and possession of plot No.177 EEC Ngei II Nairobi.***
- b) Costs of the suit and Counter-Claim.***

3. The Plaintiff claims to own plot No.177/1 Ngei 2A Huruma area of Nairobi City County. The 1<sup>st</sup> Defendant owns plot No.177 EEC Ngei II which is next to the Plaintiffs plot. The Plaintiff's evidence is that she was allocated her plot by Nairobi City Council on 14<sup>th</sup> March 2008 after her house was razed down at Mathare Slums. In the year 2010, the 1<sup>st</sup> Defendant purchased an adjacent Plot No. 177 from Margaret Wambui Mwangi. The 1<sup>st</sup> Defendant also wanted to purchase her plot but she declined to sell it to her.

4. The 1<sup>st</sup> Defendant then started harassing her and at times caused her temporary structures to be burned down. The 1<sup>st</sup> Defendant later commenced construction of a multi-storeyed building which encroached on to her plot on the lower side by two metres and when the storey building reached first floor, the balcony extended to her plot by 3 metres. The Plaintiff states that the balcony to the Plaintiff's building is precariously hanging over her mabati structure and that during the construction debris fell into her roof. The Plaintiff has made numerous complaints to various government agencies for assistance in vain. It is on this basis that Plaintiff prays for the prayers in the Plaintiff.

5. The 1<sup>st</sup> Defendant on her part testified that she purchased her plot from Margaret Wambui Mwangi on 20<sup>th</sup> September 2010. The vendor

gave her a beacon certificate and that she has been paying rates to Nairobi City County. She stated that the Plaintiff had put up a temporary structure on an open space next to her plot. The illegal structures were pulled down by Nairobi City Council and the Plaintiff rebuilt them. She states that the Plaintiff has been hurling insults against her, has made numerous complaints against her including instigating criminal charges against her for which she was acquitted.

6. The 1<sup>st</sup> Defendant states that she has completed putting up a five storey building and denies ever approaching the Plaintiff to sell her plot to her. The 1<sup>st</sup> Defendant denied ever encroaching on to the Plaintiff's plot. It is on this basis that she prays that the Plaintiff's suit be dismissed and judgement entered for her as per the prayers in the counter claim.

7. I have gone through the evidence adduced by the Plaintiff and that of the Defendant. I have also considered the submissions by the parties. The Plaintiff's main claim against the 1<sup>st</sup> Defendant is for a permanent injunction seeking to restrain the 1<sup>st</sup> Defendant from interfering with her plot No.177/1 and for an order of eviction from plot No.177/1 as well as damages. On the other hand the 1<sup>st</sup> Defendant's claim against the Plaintiff is for an injunction restraining the Plaintiff from trespassing ,abusing, hurling insults to her or in any way interfering with the quiet enjoyment of her property.

8. The issues which emerge for determination in this suit are firstly whether plot No. 177/1 exists on the ground. Secondly, whether the Defendant has encroached on to the said plot. Thirdly, is the Plaintiff entitled to the prayers sought.Lastly, is the 1<sup>st</sup> Defendant entitled to the prayers sought. The Plaintiff's evidence is that she was allocated her plot on 14<sup>th</sup> March 2008 after her house at Mathare slums was razed down. The Plaintiff produced a photocopy of an allotment letter dated 14<sup>th</sup> March 2008. During the hearing, she claimed that the original was razed down when her house was burned. She later changed and claimed that the original was confiscated by a lady at City Hall when she went there. When asked whether she had paid for the allotment, she had no evidence of any payment.

9. The 1<sup>st</sup> Defendant had stated that the Plaintiff was residing in an open space which is a road reserve. The 1<sup>st</sup> Defendant produced a subdivision plan for the area which clearly shows that the only plot available is plot No.177. Plot No.177/1 does not appear on the subdivision plan. The Advocates for the 2<sup>nd</sup> Defendant wrote to Nairobi City County who confirmed that Plot No.177/1 did not exist . A copy of the part Development Plan submitted by Nairobi City county also showed that plot 177/1 did not exist on the ground. The Nairobi City County confirmed that the area claimed by the Plaintiff is an open space which is not available for allocation.

10. The 1<sup>st</sup> Defendant produced documents showing that the Nairobi City Council the predecessor of Nairobi City County had issued an enforcement notice which was followed by demolition of the illegal structures put up by the Plaintiff. The Plaintiff however re built them up claiming that she had been allocated the site after her house and others were razed down at Mathare slums. It is therefore clear that the Plaintiff does not own a plot in the area. She is just staying in an open space which is next to the Plaintiff's plot.

11. On whether the 1<sup>st</sup> Defendant has encroached on to the Plaintiff's plot, the Plaintiff's evidence is that the 1<sup>st</sup> Defendant's building has a balcony which has protruded into her space over her mabati structure. This is the portion she wants removed. She argues that the balcony is hanging dangerously over her house. I have looked at the photographs which the Plaintiff produced. Indeed the balcony of the 1<sup>st</sup> floor of the building is above her mabati structure. The question which the court should answer is whether this amounts to trespass to the plaintiff's land. It has been confirmed that the space where the Plaintiff has put her structures is an open space. The Plaintiff cannot claim the open space unless there is evidence that the area was re-panned and a plot was created for her. This evidence is not there. I therefore find that the 1<sup>st</sup> Defendant has not encroached into the Plaintiff's land.

12. The Plaintiff is seeking a permanent injunction against the 1<sup>st</sup> Defendant and an order of eviction against the 1<sup>st</sup> Defendant. She also seeks damages for pain and suffering. The Plaintiff cannot be granted any of her prayers. One cannot injunct another when there is no evidence that the alleged encroachment is into the Plaintiff's land. The protruding part of the Plaintiff's balcony is towards the open space adjacent to her building. She cannot be evicted or ordered to remove the balcony as the space where the Plaintiff is occupying is a road reserve. The Plaintiff would have been granted general damages if it was found that the 1<sup>st</sup> Defendant had encroached into her plot. I therefore find that none of the Plaintiff's prayers can be granted.

13. The last issue for determination is whether the 1<sup>st</sup> Defendant is entitled to an injunction in the manner sought. The 1<sup>st</sup> Defendant's evidence is that the Plaintiff has been hurling insults to her and that she has made all manner of complaints against her including instigating criminal charges against her. I have looked at the letters which the Plaintiff has been writing all targeting the 1<sup>st</sup> Defendant. If these letters are anything to go by, then the 1<sup>st</sup> Defendant has every reason to seek protection of the court. The Plaintiff even claimed that the 1<sup>st</sup> Defendant had constructed the building without approval from the relevant authorities and that the building had been marked for demolition but that the 1<sup>st</sup> Defendant erased the mark "X" put on it. The Plaintiff's evidence cannot be believed. If indeed the 1<sup>st</sup> Defendant's house had been marked for demolition, it should have been demolished notwithstanding the fact that there was deletion of the mark "X" from it.

14. The Plaintiff did not refute the 1<sup>st</sup> Defendant's claims that she has been hurling insults against her. In the circumstances, I find that the 1<sup>st</sup> Defendant is entitled to a permanent junction to protect her from the Plaintiff's insults and interference. I therefore grant the 1<sup>st</sup> Defendant prayer (a) of the Counter-Claim. This injunction should however not be construed as an eviction order against the Plaintiff. As the Plaintiff has not proved her case, the same is dismissed. Each party to bear their own costs.

***Dated, Signed and delivered at Nairobi on this 7<sup>th</sup> day of November 2019.***

**E.O.OBAGA**

**JUDGE**

In the presence of :-

Mr Mulandi for M/s Mogusu for 2<sup>nd</sup> Defendant

M/s Kaberia for Mr Muthama for Plaintiff

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**