



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 109 OF 2016

IRENE KATUMBU KIMANTHI.....PLAINTIFF

VERSUS

PHILIP MWANIA.....DEFENDANT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY.....2ND INTERESTED PARTY

KITUI COUNTY GOVERNMENT.....3RD INTERESTED PARTY

RULING

1. In the Application dated 9th September, 2016, the Plaintiff is seeking for the following reliefs:

a. That pending the inter-partes hearing and determination of this suit, the Defendant his agents, tenants, servants, occupants of Kitui Municipality Zone 83 Plot No. 6 and/or in any manner howsoever be restrained from throwing rubbish and/or causing rubbish to fall on the Plaintiff's Kitui Municipality Zone 83 Plot No. 5, her house and/or compound.

b. That pending the inter-partes hearing and determination of this suit, the Defendant his agents, tenants, servants, occupants of Kitui Municipality Zone 83 Plot No. 6 and/or in any manner howsoever be restrained from allowing any part of the Flat, building, roof, windows and/or any part of the building on the Defendant's Kitui Municipality Zone 83 Plot No. 6 from encroaching onto and or trespassing, overhanging and/or remaining on Plaintiff's Kitui Municipality Zone 83 Plot No. 5 and/or interfering with the Plaintiff's legal and equitable interests and rights of quiet possession, occupation and enjoyment of her plot.

c. That the costs of this Application be paid by the Defendant/Respondent.

2. The Application is supported by the Affidavit of the Plaintiff. According to the Plaintiff, he is the registered and legal owner of land known as Kitui Municipality Zone 83 Plot No. 5 and that the Defendant owns a parcel of land known as Kitui Municipality Zone 83 Plot No. 6.

3. According to the Plaintiff, his plot and the Defendant's plot are next to each other and both of them front the common access road; that he has developed his plot by building a house while the Defendant has built on his plot a dwelling three storeyed flat.

4. The Plaintiff's complaint is that the Defendant has constructed his flat directly on and crossed the boundary wall onto his plot; that the Defendant's balcony has also encroached on his plot and that the construction of the Defendant's flat has infringed on his privacy and in breach of his legal rights, the building code, the NEMA guidelines and regulations and the Kitui County Government and NCA guidelines and regulations.

5. In response, the Defendant deponed that before he commenced construction, he had drawings of the building approved by the relevant county officers; that his building is clearly demarcated and reflected into the Area-map and that it is not true that his tenants and agents throw rubbish onto the Plaintiff's plot.

6. The Defendant stated that neither his balconies, roof or gutters overhang on the Plaintiff's plot.

7. The Parties filed brief submissions which I have considered. I have also considered the authorities.
8. It is not in dispute that the Plaintiff is the legal owner of parcel number Kitui Municipality Zone 83 Plot No. 5 while the Defendant is the legal owner of Plot No. 6.
9. Although the Plaintiff has alleged that the Defendant has breached the building code, the NEMA guidelines and regulations and the NCA guidelines by building a Flat which has encroached on his plot, the Defendant has deponed that his Flat is within the confines of his plot.
10. The Defendant has attached on his Affidavit the duly approved building plans of the impugned Flat.
11. From the photographs annexed on the Plaintiff's Affidavit, it is difficult, to establish if indeed the Defendant's building has encroached on the Plaintiff's plot.
12. Indeed, in view of the approvals that were granted to the Defendant to put up the said building, it would be pre-mature for this court to order for the demolition of the said building before the court receives *viva voce* evidence to establish the Plaintiff's allegations.
13. Considering that the Defendant's Flat is fully developed, and the same is occupied, I find that the balance of convenience tilts in favour of the Defendant.
14. Although the Plaintiff alleged that the Defendant's agents have been throwing rubbish on his plot, there is no evidence before this court to prove that allegation.
15. In the circumstances, and for the reasons I have given above, I dismiss the Application dated 9th September, 2016 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF FEBRUARY, 2018.

O.A. ANGOTE

JUDGE