



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 2201 OF 2007**

**GIBSON KAMAU KURIA .....PLAINTIFF**

**VERSUS**

**RACHEL WAMBUI KAMAU.....DEFENDANT**

**JUDGMENT**

This suit was commenced by way of a Plaint dated and filed on 12<sup>th</sup> October 2007 in which the Plaintiff, Gibson Kamau Kuria, sought for Judgment to be entered against the Defendant for:

- a. An injunction to restrain the Defendant by herself, her agents and servants from breaching her covenants under her lease made to benefit the Plaintiff's Maisonette;
- b. A prohibitory injunction to restrain the Defendant by herself, servants and agents from interfering with the plaintiff's user of car parks on the said land reference number 1/495, used in common by all owners of maisonettes on the said land reference number 1/495.
- c. A mandatory injunction to compel the Defendant by herself, her agent and servants, to remove the partition and fence from the common gate lying between her maisonette and the gate to the said land reference number 1/495.
- d. A mandatory injunction to compel the Defendant by herself, her agent and servants, to pull down and remove the foundation stone, and other structures on the common garden laying between the Defendant's Maisonette and the gate to the said land reference number 1/495.
- e. A prohibitory injunction to restrain the Defendant by herself, her agent and servant, from committing trespass on the common garden laying between the Defendant's Maisonette and the gate to the said land reference number 1/495.
- f. General damages.
- g. The costs of this suit.

**The Pleadings**

In the said Plaint, the Plaintiff informed the court that he resides in Maisonette Number 10 on Land Reference Number 1/495, Galana Road, Kilimani, Nairobi (herein referred to as the "Plaintiff's Maisonette"). He further stated that the Plaintiff's Maisonette is held by him under a lease of 999 years from 1<sup>st</sup> May 1982. He stated that his landlord is called Tigoni Holdings Limited (hereinafter referred to as the "Landlord") which is the registered proprietor of land reference number 1/495, residential property measuring 1.044 acres, held by it in fee simple. He further informed the court that the Landlord has constructed on the said land reference number 1/495, 15 other maisonettes which it has let to other lessees for the same period on terms identical to those contained in the Plaintiff's lease in respect of the Plaintiff's Maisonette. He added that the management of the common gardens, roads, and car park is vested in a company known as Tigoni Holdings (Management) Ltd (hereinafter referred to as the "Management Company") of which the plaintiff and the owners of the other 15 maisonettes are shareholders. He further informed the court that the defendant, a female adult, is a neighbour of the plaintiff and resides in Maisonette Number 1 on the said land reference number 1/495 (herein referred to as the "Defendant's Maisonette"). He stated that the defendant also holds a lease for 999 years from 1 May 1982 from the Landlord.

It was his further statement that under the Plaintiff's lease and all other leases including the Defendant's lease, the Landlord has let to the Plaintiff and all other owners of maisonettes on the said land reference number 1/495, under clause 5 of the lease, (i) the right and liberty at all times for the lessee, his servants and all licensees (in common with the landlord, the management company and all other owners or occupiers for the time being of other maisonettes in the estate having the same right) to use for the purpose only of access to or egress from the said premises with or without vehicles, any roads, pathways and parking area on the said piece of land (ii) the use of garden in common with other owners (iii) free and uninterrupted passage and running of water, soil, grass and electricity from and to the said premises through sewers, drains, cables, pipes, and wires in, under or passing through the said piece of land and (iv) together with the benefit of any covenants entered into by the lessees of the other maisonettes with the landlord.

He further added that the plaintiff, like all other owners of maisonettes on the said land reference number 1/495, including the defendant, have covenanted with the landlord vide clause 1 (v), not to or omit to suffer done or omitted to be done any act or thing on or in respect of the said premises which contravenes the provisions of any Nairobi City Council by-laws or any enactment amending or replacing the same or contravenes any statute or statutory instrument enactment relating to planning control and development, vide clause 1 (viii) not without any written consent of the Landlord and or the Management Company make any structural alterations in or in addition to the said premises, vide clause 1 (xi) not to permit to be done in the said premises anything which be nuisance or may tend to the annoyance of the tenants or occupiers of any other maisonettes and vide clause 1 (xiii) not to erect any fence or partition surrounding the said premises.

The Plaintiff stated that in breach of her covenants under the lease, the Defendant has-

- a. partitioned a part of the common garden, enclosed it with a chain-link fence, put on the same stones and such building materials as sand and commenced construction of a stone building with the assistance of 4 to 6 men;
- b. excluded the Plaintiff from use of a part of the common gardens;
- c. embarked on a building project designed to permanently alter the quality and nature of the Plaintiff's Maisonette and lower its value;
- d. prevented the Plaintiff and other owners of maisonettes on the said land reference number 1/495 from using the common garden as provided in the Plaintiff's lease; and,
- e. set out to develop the common property in contravention of section 30 of the Physical Planning Act.

In the Plaintiff, the Plaintiff stated that despite the demand by him and other owners of maisonettes on the said land reference number 1/495 that the Defendant adheres to the covenants she has made and, inter alia, stops putting up a building on the common gardens on the said land reference number 1/495, the Defendant has refused to do so thereby making this suit necessary. On those grounds, the Plaintiff sought for judgment to be entered against as the Defendant as prayed in the Plaintiff.

No defence was filed.

### **The Evidence**

The hearing of this suit took place on 2<sup>nd</sup> November 2016 when the plaintiff gave his evidence. He reiterated the contents of the plaintiff in his witness statement which he adopted as his evidence together with his documents. In cross examination, the plaintiff confirmed that he was suing on his own behalf but that the other maisonette owners benefit from the outcome of this. He told the court that he is entitled to sue the defendant on the basis of his lease. He said that if only owner breaches a term or condition contained in the lease any other owner has a right to sue. It was his evidence that the defendant's actions of annexing a portion of the common garden and car park denied him and his family full enjoyment of the annexed space.

### **The Issues for Determination**

The issues that arise from this suit for determination are as follows:

- a. Whether the Plaintiff has locus standi to bring this suit in place of the Management Company;
- b. Whether the Defendant has breached her lease for the Defendant's Maisonette by fencing off with a chain link fence and constructing a servant's quarter on part of the common garden and car park;
- c. Whether the Plaintiff's right of access and use of the said common garden and car park have been breached by the Defendant;
- d. Whether to award the Plaintiff general damages
- e. Who will bear the costs of this suit.

### **The Determination**

- a. Whether the Plaintiff has locus standi to bring this suit in place of the Management Company;**

Clause 3 of the Lease provides as follows:

**“The Company has ... granted leases of ... the maisonettes in the estate ... and the Company and the Manager have in every lease imposed and intend in every future lease to impose the covenants conditions and restrictions hereinafter set forth to the intent that any lessee for the time being of any maisonette may be able to enforce the observance of the said covenants, conditions and restrictions by the occupiers or the lessees for the time being of the said maisonettes.”**

This clause clearly grants any leaseholder including the Plaintiff the locus standi to enforce the covenants, conditions and restrictions contained in the Lease against another leaseholder such as the Defendant. The Plaintiff clearly has locus to bring this suit in place of the Management Company against the Defendant.

**b. Whether the Defendant has breached her lease for the Defendant’s Maisonette by fencing off with a chain link fence and commencing construction of a servant’s quarter on part of the common garden and car park;**

It is the evidence of the Plaintiff that the Defendant has fenced off a portion of the common garden and common car park between the Defendant’s Maisonette and the gate that services all occupants of the estate. The Plaintiff produced photos showing the white chain link fence and the building materials deposited ready for construction put there by the Defendant. The Defendant filed no defence and neither did she appear at the hearing. In the absence of any contravening evidence, this court finds that the Defendant is in breach of the Lease by seeking to annex a portion of the common garden and car park for the purpose of constructing a servant quarter thereon.

**c. Whether the Plaintiff’s right of access and use of the said common garden and car park have been breached by the Defendant;**

By annexing a part of the common garden and car park located between the Defendant’s Maisonette and the gate, the Defendant has denied the Plaintiff the right of access and use of those common parts. This is a direct breach of the Plaintiff’s entitlement to those parts of the property.

**d. Whether to award the Plaintiff general damages**

On the question of general damages, I find that the Plaintiff has not laid grounds to demonstrate entitlement under this head. I will thus decline to grant an award of damages

**e. Who will bear the costs of this suit.**

Judgment is entered against the Defendant in terms of prayer nos. (a) to (e) and costs of the suit are awarded to the Plaintiff.

**DATED AND SIGNED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL 2018**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED AT NAIROBI BY JUSTICE SAMSON OKONG’O THIS 19<sup>TH</sup> DAY OF APRIL 2018**

**SAMSON O. OKONGO**

**PRESIDING JUDGE**