



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC CASE NO.35 OF 2017**

**(FORMERLY ELC HCCC NO.506 OF 2008)**

**THE KING POST LIMITED.....PLAINTIFF**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**JUDGEMENT**

By an **Amended Plaintiff** dated **23<sup>rd</sup> October 2014**, the Plaintiff herein **The Kingpost Limited** has sought for judgement against the Defendant in the following terms:-

- 1) A permanent injunction does issue against the Defendant, its agents, servants, employees whether elected or nominated restraining and prohibiting them from entering LR.1870/IV/42, issuing any enforcement Notice(s), threatening or summoning the Defendants directors, employees or agents or in any way executing and in particular Enforcement Notice dated 10<sup>th</sup> July 2008 issued against the Defendant**
- 2) A declaration that the Enforcement Notice dated 10<sup>th</sup> July 2008 issued by the Defendant against the Plaintiff is oppressive, ineffectual and therefore null and void.**
- 3) General damages for trespass and nuisance.**
- 4) Costs and interest on 3 above.**
- 5) Any other equitable remedy this Honourable court may deem fit to grant.**

The Plaintiff had alleged that at all material times, it was the registered owner of **LR.No.1879/IV/42** on **Rhapto Road, Westlands Nairobi**. Further that the Plaintiff had obtained all the necessary construction approvals from the Defendant pursuant to the provisions of the **Physical Planning Act, Cap 286 Laws of Kenya**, and thereafter undertook a multi-million construction of a Tourist Development Complex, comprising a block of flats with all necessary amenities. That the said construction began in the **year 2005** and was completed on **15<sup>th</sup> September 2008**, when the Defendant issued a Certificate of Occupation. Further that the said development had the sanction and approval of the Investment Promotion Centre, a legal entity under the Investment Promotion Act 2004. The Plaintiff also contended that prior to commencement of the construction, it obtained a **Beacon Certificate** from the Survey of Kenya confirming the position of the beacons to satisfaction of the correctness of the boundaries of **LR.No.1870/IV/42**. It was also contended that in the course of the development, through its contracted Architects Engineers and Contractors at various stages as required, submitted development plans, structural designs being **DV 597EB875** and **EC 727** to the Defendant who approved upon receipts of the requisite payment and continued supervision of the construction to its completion.

The Plaintiff alleged that sometimes on **20<sup>th</sup> June 2008**, or thereabouts, the Defendant through its agents and in particular **Elias Otieno Okumu**, the then Kilimani Area Councillor in cahoots with the office of the then Nairobi Mayor and the Director of City Planning Department made verbal complaints that the development on the Plaintiff's land had encroached on unspecified people's land. Further that the said complaints were followed by several visits by the said Councillor, the Mayor and Official of the Inspectorate on various dates with threats of demolition of the development and constant harassment made to the Plaintiff's Directors.

It was the Plaintiff's contention that the said complaints were **unwarranted, illegal, null and void** as the erection of the building by the Plaintiff to completion was done in full compliance of the necessary laws and with the supervision and consent of the Defendant. The Plaintiff further alleged that the blatant entry of the officials of the Defendant to the Plaintiff's land amounts to trespass, nuisance and a

breach of the rights of the Plaintiff to enjoyment of its land and investment.

Again that on **10<sup>th</sup> July 2008**, the Defendant through the Department of City Planning, purportedly issued an **Enforcement Notice** under the **Physical Planning Act, Cap 286** claiming that the development by the Plaintiff was carried out without permission or fulfilment of development conditions and that the Plaintiff had no occupation certificate. That pursuant to the Notice, the Defendant has threatened forceful entry into the land to execute demolition. The same threat was verbally issued by an agent of the Defendant, Councillor **Elias Otieno Okumu** of **Kileleshwa Ward**. The Plaintiff contended that the said purported Notice is unlawful, null and void and ineffectual as the said City Council was *functus officio* as regards supervisory role in the construction of the said premises.

Further that the acts, threats and Notices issued by the Defendant are unjustifiable in fact and law and has caused the Plaintiff's management anxiety and apprehension of arrest and the risk of demolition of the Plaintiff's property by the Defendant in enforcement of the purported Notice. The Plaintiff sought for protection from this Court through this suit, and urged the Court to allow its claim.

Simultaneous to the Plaintiff, the Plaintiff also filed an interlocutory application dated **15<sup>th</sup> October 2008** and sought for temporary injunction to restrain the Defendant from trespassing and or entering into **LR.No.1870/IV/42**, the suit property herein.

The Defendant after having been served with the above mentioned Chamber Summons application as per the **Affidavit of Service** of **Hezron Ochieng Odiego**, Court Process Server filed a Notice of Appointment of Advocates via **Asiema & Co. Advocates** and **Notice of Preliminary Objection** dated **28<sup>th</sup> October 2008**, wherein the Defendant averred that the entire suit was bad in law and therefore incompetent for having been undertaken without exhaustion of the relevant procedure to wit appeals to the relevant Physical Planning Liason Committee. The said Preliminary Objection was canvassed by way of written submissions and a Ruling was delivered on **12<sup>th</sup> October 2009**, wherein the Court dismissed the said Preliminary Objection and maintained status quo prevailing then.

The Defendant did not file their defence and on **17<sup>th</sup> November 2009**, the Plaintiff requested for Judgement against the Defendant for failing to file their defence. The said request was granted on **2<sup>nd</sup> December 2009** and matter allowed to proceed for formal proof.

The hearing commenced on **2<sup>nd</sup> November 2015**, wherein the Plaintiff called three witnesses.

#### **The Plaintiff's Case**

**PW1- Bhupindera Singh Chana**, the Managing Director of the Plaintiff Company gave evidence and adopted his witness statement fully which was recorded on **23<sup>rd</sup> July 2013**. He averred that the Plaintiff herein is engaged in business of renting out serviced apartments. He further stated that the suit property herein **LR.No.1870/IV/42**, which is situated along **Rhapta Road** is owned by the Plaintiff herein. He further testified that the Plaintiff is the registered proprietor of the suit property and he identified the title deed for the said parcel of land. That the said suit property was purchased for **Kshs.8,800,000/=** on **20<sup>th</sup> May 2005**. Further that after the purchase, the Plaintiff applied for planning permission from the Defendant's Department of Physical Planning and the said permission was granted. It was his testimony that the Plaintiff undertook a project of developing **Tourism Development Complex** with residential apartments for Tourists and the same was also authorized by the Kenya Investment Authority as is evident from the exhibit produced in court. He also testified that before the construction, the Plaintiff had obtained the **Beacon Certificate** from the Survey of Kenya and after the construction was approved, the Defendant inspected the said development and gave a go ahead to complete the same. Further that at completion, the Defendant gave the Plaintiff **Occupation Certificate** and the Plaintiff occupied the said complex.

However, the Defendant on **10<sup>th</sup> July 2008**, issued an **Enforcement Notice** to the Plaintiff to the effect that the complex was not constructed as per the Defendant's by-laws. He contended that during the construction of the building, the Defendant used to send its personnel to check and inspect the said development and they were never stopped from constructing by the Defendant herein. Further that the Defendant even issued them with an occupation certificate. He further alleged that the **Mayor of Nairobi, Geoffrey Majiwa** trespassed on the suit property in **October 2008** with some administrative officers and TV crew and threatened to pull the building down with allegation that the said building was illegally and unlawfully constructed.

That there were tenants in the building specifically tourists and Diplomats from various Embassies. The said tenants were scared as they were informed that the building would be pulled down. It was his testimony that though the said team left that day, the administrative officer kept on appearing in the building and threatened to bring the said building down. That the said building was valued at **Kshs.280,000,000/=** as it consists of 54 serviced apartments with all the high end amenities such as **Swimming Pool** and **Gym**.

It was his further testimony that the Plaintiff had fully complied with all the building by-laws, gotten approval for the development and after completion was given the occupation certificate. He urged the Court to allow the Plaintiff's claim.

**PW2 - M/S Kenta Naushad Jiwa**, told the Court that in the **year 2008**, she worked as Administrative Manager for the Plaintiff herein **Kingpost Ltd**. It was her testimony that sometime in **October 2008**, while in her office, officers from City Council of Nairobi stormed into her office and one of them was introduced as the Mayor of Nairobi, **Geoffrey Majiwa**. He asked for the building plans for the building as he alleged the building was illegally constructed. When she protested, the said officials threatened to arrest her. However, she alleged that the building was not an illegal development as it had been approved by the Defendant by issuance of approved Development Plans and Occupation Certificate. Further that the said City Council officials were accompanied by TV crew who took videos of the building and the said clip was shown on **KTN News**.

**PW3 - Peter Wainaina Mureithi** an employee of **Kingpost Ltd**, the Plaintiff herein told the Court that sometime in **October 2008**, the City Council of Nairobi officials visited the suit premises and inspected the building for about 25 minutes. That the Nairobi Mayor was present and alleged that the building was illegally constructed. He adopted his statement fully as part of his evidence.

The Plaintiff further filed written submissions and relied on various decided cases. The Plaintiff relied on the case of *Moya Drift Farm Ltd...Vs...Theuri 1973 EA Page 114*, where the Court held that:-

***“The Appellant was the absolute and indefeasible owner of the land and was entitled to take proceedings in trespass”.***

It was the Plaintiff’s submissions that since it is the registered owner of the suit property, then it is entitled to bring this suit for trespass against the Defendant.

This Court has now carefully considered the available evidence and the exhibits produced in Court. The Court has also considered the pleadings in general, the annexures thereto, the written submissions and the relevant provisions of law and the Court makes the following findings;

The Plaintiff alleged that it is the registered owner of **LR.No.1870/VI/42**, and as a registered proprietor, then it is the **absolute and indefeasible** owner with rights protected by the law. The Court has seen the Certificate of title and it is indeed evident that the suit property herein was transferred to the Plaintiff on **12<sup>th</sup> May 2005**. There is no evidence whatsoever that the said title has been challenged or cancelled. Being the registered owner under Cap 281 (now repealed) then as provided by **Section 23(1)**, the Plaintiff is the absolute and indefeasible owner. It provides as follows:-

***“The Certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as a proprietor of land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge except on the grounds of fraud or misrepresentation to which he is proved to be a party”.***

Therefore, the Plaintiff herein having been issued with the certificate of registration upon transfer is deemed to be the **absolute and indefeasible** owner of the suit property. The above provisions of law is now replicated in **Section 26(1)** of the **Land Registration Act 2012**.

As a registered proprietor of the suit property, then the Plaintiff’s rights are protected under **Section 24** of the **Land Registration Act 2012**. Such rights include exclusive use of the suit property, quiet and peaceful enjoyment of the same and uninterrupted use of the said parcel of land.

The Plaintiff further averred that after the acquisition of the suit property, it applied to the Defendant for development permissions and in that regard, it submitted its development plans for approval by the Defendant. Indeed the Defendant through the Directorate of Physical Planning approved the said development plans. The said approvals were produced as exhibits in court. Therefore it is evident that the Plaintiff’s construction was commenced on the suit property with the approval of the Defendant through the City Planning Department.

The Plaintiff also alleged that as it continued with the development and construction on the suit property, the Defendant’s personnels inspected the said development time and again and there was no objection at all. Eventually after the completion of the construction, the Defendant issued the Plaintiff with an Occupation Certificate on **15<sup>th</sup> September 2008**. Indeed, the Court has seen the said Certificate of Occupation which was signed by the Director of City Planning on behalf of the **Town Clerk**, City Council of Nairobi. The Defendant did not challenge the said certificate of occupation as it did not file its defence nor oppose the Plaintiff’s suit. Therefore the Court will find and hold that indeed the Plaintiff constructed the suit property with the approval of the Defendant who continued to inspect the said construction and eventually after the completion of the same, the Defendant issued the Plaintiff with a certificate of occupation.

The Plaintiff also testified that after the completion of the building and after it had rented out the serviced apartments to Diplomats and other international tenants, the Defendant agents through the Councillor of Kileleshwa ward one **Elias Otieno Okumu** visited the offices of the Plaintiff and alleged that the said building had encroached on other people’s parcels of land. However, this Court has seen the **Beacon Certificate** dated **9<sup>th</sup> June 2005** and it is clear that the boundaries of **LR.No.1870/IV/42** were defined by the Survey of Kenya.

It is also evident that the Defendant did issue an **Enforcement Notice** to the owner and/or developer of **Plot NO.1870/IV/42**, which is the suit property and it was alleged that the said Developer had contravened the provisions of the **Physical Planning Act**. Among the omissions stated were;

**1) Construction of 12 blocks of flats upto completion contrary to approved plan No.EB875.**

**2) Occupation of the same without approval from the City Council of Nairobi.**

The Developer was given **14 days** to comply and the **Notice** was issued on **10<sup>th</sup> July 2008**. However as the Court held earlier, the Defendant had approved the development on the suit property and the Plaintiff had testified that the Defendant personnels continued to inspect and approve the development time and again as the construction went on. Since there is no evidence to the contrary, this Court will have no reasons to doubt the Plaintiff’s evidence on the continuous inspection of the construction by the Defendant and that the Defendant never raised any objection to the said construction and/or development.

Further, the Defendant eventually issued the Plaintiff with Certificate of Occupation. Therefore with the continued inspection of the construction by the Defendant, there was no way the Defendant could have missed construction of the same contrary to the approved plans **EB875**. Why did the Defendant raise the said concern after the completion of the development and occupation of the same by tenants?

The Plaintiff alleged that the Defendant was out to harass them without any justification. The said allegations are not challenged or

controverted. This Court will indeed find and hold that the **Enforcement Notice** issued by the Defendant on **9<sup>th</sup> July 2008** after it had approved the construction was not justifiable and was just an act of harassment and intimidation to the Plaintiff. The Court finds the said Enforcement Notice was null and void.

The Plaintiff alleged that the Defendant through its agents Councillor, **Elias Otieno Okumu** and the then Nairobi **Mayor, Geoffrey Majiwa** invaded the suit property in the company of the Media crew and threatened to demolish the said development. Further it was alleged that the said invasion caused panic to the tenants and occupants of the suit premises. Indeed it is not in doubt that the suit property was used for tourism promotion and had been licenced by the Kenya Investment Authority as a Tourist's Development Complex and the residential project was approved for occupation. It is therefore clear that with the said threat issued by the then Mayor of Nairobi who acted on behalf of the Defendant was enough to cause panic to the occupants of the suit premises. The allegations made by the Plaintiffs have not been controverted and this Court would have no reason to doubt the Plaintiff's evidence.

The act of the Defendant amounted to trespass and trespass being actionable per se, this court finds that the Plaintiff was justified in seeking for damages. In that regard, the Plaintiff has sought for damages in the tune of **Kshs.4,500,000/=** from the Defendant herein. The Defendant has not objected to the prayers sought by the Plaintiff herein.

Having now carefully considered the available evidence and the written submissions, the Court finds that the Plaintiff has proved its case on the required standard of balance of probabilities. Consequently, the Court enters Judgement for the Plaintiff against the Defendant as prayed in the Amended Plaint dated **23<sup>rd</sup> October 2014**. The Court enters Judgement in the following terms:-

**1) A permanent injunction do issue against the Defendant, its agents, servants, employees whether elected or nominated restraining and prohibiting them from entering LR.1870/IV/42, issuing any enforcement Notice(s), threatening or summoning the Defendants directors, employees or agents or in any way executing and in particular Enforcement Notice dated 10th July 2008 issued against the Defendant.**

**2) A declaration that the Enforcement Notice dated 10<sup>th</sup> July 2008 issued by the Defendant against the Plaintiff is oppressive, ineffectual and therefore null and void.**

**3) General damages for trespass and nuisance in tune of Kshs.4,500,000/=.**

**4) Costs of suit and interest on prayer No.3 from the date of this Judgement to the date of payment in full.**

It is so ordered.

**Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of June 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Kinyua holding brief for Mr. Njagi for Plaintiff

No appearance for Defendant

Lucy - Court clerk.

**Court** – Judgement read in open court.

**L. GACHERU**

**JUDGE**

**19/6/2018**