



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 236 OF 2011

MARTHA ESPERENCE FERNANDEZ.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY..... DEFENDANT

JUDGMENT

1. For the umpteem time, I am called upon to render a judgment in a matter where I did not take evidence. Hearing in this suit commenced and was concluded before Nyamweya J. I am therefore confronted with the unenviable task of evaluating the recorded evidence together with the written submissions and rendering a determination without the benefit of assessing the demeanor of the witnesses.

2. The plaintiff brought this suit against the defendant through a plaint dated 25th May 2011 seeking the following verbatim reliefs:

i. A perpetual and permanent injunction restraining the defendant from further trespassing, destroying, claiming and or interfering with the plaintiff's property LR No. 209/8294/338 in any manner inconsistent with the plaintiff's right of possession.

ii. An order that the plaintiff's property is not on a road reserve or bypass.

iii. Compensation for damages and malicious damage to demolishing property to reconstructing the same at its former state as assessed by the quality surveyor amounting to Kshs 983,880/- . (sic)

iv. Compensation for damaged and looted property amounting to Kshs 643,000/-

v. Any other remedy the court may wish to grant.

vi. Costs of the suit.

vii. Interest on (iii), (iv), (v) and (vi) above at court rates.

3. In her plaint, the plaintiff stated that she was the registered owner of Land Reference Number **209/8294/338** situated in South C within Nairobi (hereinafter referred to as the **suit property**). The plaintiff's case was that on the night of 17th May 2011 and the morning of 18th May 2011, servants/agents of the defendant's predecessor, the City Council of Nairobi, illegally and without cause trespassed on the suit property and demolished a four-bedroomed massionette built thereon without notice. The plaintiff stated that she wanted to renovate her house and had sought and obtained consents and permits from the Council. She averred that the defendant's illegal actions left her in an open and inhabitable state. She further averred that the Council ignored her plea for compensation.

4. The defendant filed a statement of defence dated 16th September 2011 in which it denied the plaintiff's claim. The defendant's case was that the user of the suit property was at all material times residential and that the plaintiff extended the user to commercial contrary to the provisions of Physical Planning Act. The defendant contended that the plaintiff carried out developments including extension and construction of structures without its approval contrary to the said Act. It was also contended that the plaintiff occupied the suit premises without obtaining the requisite occupation certificate contrary to the Act. The defendant further stated that it served an enforcement notice upon the plaintiff, requiring her to remove the illegal structures and upon default, it acted within its mandate and proceeded to execute the enforcement notice. According to the defendant, any loss incurred by the plaintiff was precipitated by the plaintiff's illegal actions and omissions and no claim or remedy would lie against it.

5. At the hearing, the plaintiff (PW1) testified that the defendant denied having demolished her house on LR No. 209/8294/338. She stated that she bought the property in 1990 through a mortgage and that she followed all the necessary processes and was issued with a certificate of occupation by the defendant. The plaintiff testified that before the demolition, she had lived on the property for 21 years. She further testified that following the demolition, she instructed a quantity surveyor to assess the cost of reconstruction which was assessed at Kshs

983,880/-.

6. It was the evidence of PW1 that at the time of demolition, she was not running any business on the suit premises. She informed the court that she had applied for a licence to operate an Mpesa shop and to sell cosmetics and that after inspecting the shop, the Council issued her with a clearance certificate. She produced the licence and payment receipt as PExh 2(a) and (b). PW1 stated that at the time of demolition, she was using the premises for residential purposes and was not carrying out any business. She testified that she was not issued with an enforcement notice and she urged the court to award her compensation for the illegal demolition.

7. In cross examination, PW1 stated that the entire guest wing was demolished together with part of the wall of the main house. She contended that the defendant admitted in its defence that it demolished the house. She stated that she had a certificate of occupation.

8. Josphat Mutuka Muturo (PW2) testified that he was a registered quantity surveyor practising in the name of Buildnett Consultants. In 2011, he was called by the plaintiff to advise on the cost of rebuilding her home which had been demolished. He prepared a bill of quantities in which he assessed the cost at Kshs 983,880/- excluding VAT. He stated that the estimates which had been prepared in May 2011 had escalated. He produced his report as PExh. 3.

In cross examination, PW2 stated that the estimates comprised the cost of material and labour. The plaintiff closed her case at this juncture. The defendant did not call any witness.

9. Through counsel, the plaintiff filed submissions dated 20th March 2015 in which she stated that the defendant descended on her property in the dead of the night and demolished it. Counsel contended that the demolition was uncivil and that no notice of the intended demolition was served on her. Reference was made to Articles 29, 31, 40 and 47 of the Constitution and it was submitted that the defendant breached the plaintiff's constitutional rights and had no right to take the action it took. The Court was referred to the decisions in **Virenda Ramji Gudila & 3 others vs. Attorney General(2014)eKLR**, **Joshua Kasina vs. District Works Officer Mwingi & 3 others(2006)eKLR** and **Dishon Gitau Mburu vs. Nairobi City Council & another(2012)eKLR**.

10. Through counsel, the defendant filed submissions dated 29th April 2015 in which reference was made to Article 185 of the Constitution and Section 29, 31, 38 and 39 of the Physical Planning Act (hereinafter referred to as "**the Act**") for the submission that its actions were justified by law. The defendant contended that its officers inspected the plaintiff's premises and noted that the plaintiff was using the back of her house for commercial purposes without the requisite approvals and without a certificate of occupation contrary to Section 30 of the Act. Counsel submitted that the plaintiff failed to stop the illegal use of the property or to remove the offending development despite having been served with an enforcement notice. This has provoked the demolition of the premises under Section 39 of the Act.

11. As to whether notices were served upon the plaintiff, the defendant relied on Section 45 of the Act as well as the case of **Harrison Mwangi Nyota vs. Naivasha Municipal Council CA No. 509 of 2003** to argue that the notices which were left at the plaintiff's residential address were sufficiently served. With regard to the reliefs sought, the defendant submitted that the plaintiff did not comply with the notice or lodge an appeal challenging the same and was therefore not entitled to any claim. Counsel relied on Section 39(1) and (2) of the Act as well as the case of **Neno Evangelism Centre through the registered Trustees v Director of City Planning & 3 others (2012)eKLR**. Lastly, counsel submitted that having failed to prove any wrong doing on part of the council and having admitted to using the back of her house for commercial purposes, the council's actions were supported by the law and the plaintiff's claim should be dismissed with costs.

Determination

12. I have considered the parties' respective pleadings, the evidence on record and the written submissions tendered by the parties. The plaintiff testified and called one witness, Josephat Mutuka Muturo, a quantity surveyor. The defendant did not lead any evidence. Two issues fall for determination in this suit. The first issue relates to the legality of the Council's demolition of the plaintiff's premises. The second issue relates to the quantum of damages awardable in the event that the demolition is adjudged to have been illegal.

13. In its defence on record, the predecessor to the defendant admitted that it carried out the demolition. It further contended that the demolition followed an enforcement notice which had been duly served. However, no evidence was led to support the contention that an enforcement notice had been duly served prior to the demolition. The plaintiff testified that she purchased the suit premises through a mortgage and that the premises were duly certified for occupation. She produced a title in her name.

14. In my view, if there was an extension to the premises which the Council considered to have been illegal, the Council was duty bound to serve an enforcement notice and in the event of non-compliance proceed to demolish the premises. No evidence of service of the enforcement notice was tendered by the defendant. Consequently, the procedural legality of the action taken by the Council cannot be vouched. The net effect is that the uncontroverted evidence of the plaintiff satisfies this court that the Council did not follow the procedure laid down in the Physical Planning Act hence the demolition was illegal.

15. On quantum, the plaintiff called a quantity surveyor, Mr Josephat Mutuka Muturo, who testified that he estimated the cost of rebuilding the house at Kshs 983,880. His estimates were not controverted in any way. I will therefore allow this part of the plaintiff's claim.

16. The claim for compensation for damaged and looted property amounting to Kshs 643,000 is a special damages claim. By law, the plaintiff was required to specifically prove this claim. In both her written witness statement and oral evidence, the plaintiff did not lay any basis for this limb of the claim. The court is not therefore persuaded that the limb of special damages has been proved.

17. On general damages, the plaintiff submitted that an award of Kshs 20,000,000 would be fair, contending that the entire demolition process was illegal and amounted to trespass. She relied on **Verinda Ramji Gudila & Another v The Attorney General, Nairobi HCCC No 480 of 2011**. I have taken into account the fact that the main house was not demolished. I have also taken into account the value of the demolished structure and the inconvenience caused to the plaintiff. In my view, the sum of Kshs 20,000,000 proposed by the plaintiff is

inordinately high. I would award the plaintiff general damages at Kshs 500,000 (Five hundred thousand only).

18. Lastly, the plaintiff sought a permanent injunction against the defendant. I will not grant the permanent injunction because the defendant is a County Government discharging constitutional and statutory mandate. Its officers are at all times entitled to enter the suit premises for the purpose of enforcing or implementing the law. To injunct the defendant will not be in the public interest.

Disposal Orders

19. In light of the foregoing, judgment is hereby entered in favour of the plaintiff against the defendant in the following terms:-

(a) Costs of reconstructing the demolished property Kshs 983,880.

(b) General damages – Kshs.500,000.

(c) Costs of the suit

(d) Interest on (a) and (b) from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Omondi holding brief for Mr Laichana Advocate for the plaintiff

Mr Ogari holding brief for Mrs Omesa Advocate for the Defendant

June Nafula - Court Clerk