



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 1125 OF 2015

ANNA WAIRIMU.....PLAINTIFF

=VERSUS=

JANE WAIRIMU MWANGI.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit against the defendant seeking the following reliefs:-

a. Damages for loss of income

b. General damages for pain and suffering caused by the collapse of the defendants building on the plaintiff's parcel of land.

c. Injunction to restrain the defendant by herself, his servants' agents, workmen and/or employees from encroaching on the plaintiff's land.

d. Order of mandatory injunction compelling the defendant to forthwith bring down the building in the manner safe for all the neighbouring residents and in the quickest time possible to enable the plaintiff resume her normal life.

e. Interest

f. Cost of the suit

2. The Plaintiff is the registered owner of LR No.Kabete/Lower Kabete/2509 on which she had constructed her own temporary residential house as well as rental units which were also temporary structures. The defendant is owner of an adjacent plot known as Kabete/Lower Kabete/2507 on which she had constructed a five storey house which collapsed due to irreparable cracks which had developed on it.

3. It is the plaintiff's contention that during the construction of the collapsed building belonging to the defendant debris from the ongoing construction fell on the houses on her plot and that dust from the construction works aggravated the health condition of her daughter who was asthmatic. When the defendant's building finally collapsed, it caused serious damage to her rental houses which made the local authorities to ask the tenants to vacate the rental houses due to safety concerns. The plaintiff was also asked to vacate her house. The plaintiff was forced to rent a house where she paid rent. She also lost rental income from the rental premises for the period the tenants were out of the houses.

4. The plaintiff therefore prayed for grant of prayers in her plaint. At the closure of the hearing of the plaintiff's case the defendant's counsel indicated that he was not going to call any evidence from the defendant's side. He only indicated that the defence was to rely on witness statement as well as the survey report which had already been filed in Court.

5. I have considered the evidence adduced by the plaintiff as well as the witness statement filed by the defendant and the defence filed herein. The issues which emerge for determination are firstly whether the plaintiff suffered any loss and if the loss was attributable to the negligence of the defendant. The other issue is whether the plaintiff is entitled to the prayers in the plaint.

6. There is no doubt that the plaintiff suffered loss to her properties. The plaintiff produced a bundle of photographs taken from the scene. The photographs clearly shows debris on the roof of her rental houses. The photographs also show cracks to one of the buildings on her plot. The photographs also show the five storey building before it collapsed. Photographs of tenants vacating their rental houses are also clear. It is therefore clear that the plaintiff suffered loss.

7. The next issue for determination is whether the plaintiff's loss is attributable to the defendant. There is no doubt that the defendant's

building developed cracks which were irreparable as confirmed from a letter from the National Construction Authority. The defendant herself has admitted in her witness statement that the collapse of the building was due to an oversight from her engineers. The impact of the collapsing building is the one which caused cracks to the plaintiff's semi-permanent structure and the damage to the rental structures on the plaintiff's land.

8. Were it not for the collapsing building, the plaintiff and her tenants would not have vacated or the damage to her houses would not have occurred. It does not matter at what stage the photographs were taken; whether before or after the collapsing building was being brought down. The fact remains that the plaintiff incurred loss and that loss is attributable to the negligence of the agents of the defendant who put up a building not in accordance with the required standards.

9. The plaintiff claimed that she relocated to a rental house where she paid shs.17,000 per month for the period they were evacuated. She also stated that she lost rental income of Kshs.6,000/= per month from the rental units for the same period. There was no evidence that the plaintiff paid rent of Kshs.17,000/= per month or that each rental unit for her tenants was Ksh.6,000/= per month. This was a special damage claim which ought to have been pleaded and specifically proved in evidence. When the valuer was cross examined, he stated that he was shown rent cards by the plaintiff. If there were any such rent cards as claimed then they should have been put in evidence to support a claim for rental income of Kshs.6,000/= from each unit. If the plaintiff had incurred rent of Kshs.17,000/= per month, she should have produced receipts issued to her if that was the case that she used to pay rent. The computed rent income as per the valuers report has therefore no basis and is in direct contradiction to the evidence of the plaintiff and is thus for rejection.

10. There was also no evidence that the plaintiff incurred Kshs 8,000/- for standing charges in respect of electricity for the period the rental houses were not occupied. Nothing would have been easier than the plaintiff producing payment receipts from Kenya Power and lighting or if payment was through any other means, a statement to that effect. In any case this amount was not pleaded in the plaint. Though the valuer has shown that he charged Kshs.116,000/= for his professional fees there is no evidence that an invoice was raised or that a receipt for the same was issued. This is a claim which ought to have been pleaded and proved in evidence. This was not done.

11. The plaintiff seems to be claiming damages for pain and suffering. This is based on the alleged fact that the plaintiff's daughter who was said to be asthmatic had her condition aggravated from the dust from the debris of the building. There was no medical evidence adduced that the plaintiff's daughter was asthmatic or that the collapse of the building aggravated her condition.

12. There is a prayer for injunction restraining the defendant or her agents from encroaching on the plaintiff's land. There was no evidence by the plaintiff that there was any encroachment on to her land. On the contrary it is the plaintiff who had encroached on to the defendant's parcel as per the survey report dated 14.5.2018. If the plaintiff wanted to contradict this report, she should have engaged her own surveyor to state otherwise.

13. The plaintiff also wanted the defendant to be compelled to bring down the collapsing building. This prayer has been overtaken by events in that the building has already been brought down and its debris carted away as confirmed by the report of the valuer who was engaged by the plaintiff.

14. The only issue remaining for consideration is on damages awardable to the plaintiff for the damage to her houses. The plaintiff is entitled to be put back to the position she was before the damage to her houses occurred. In assessing damages in cases like this, one of the measures applied is cost of reinstatement. In the instant case, it is only repair which can put the plaintiff in the same state she was before the damage occurred. The plaintiff's houses were made of iron sheets with concrete floors. The rental houses had only one course of stone wall. In one of the houses, there were a few courses with finish of iron sheet walls. This is the house which had only its roof damaged. In arriving at the cost of reinstatement I will go by the figures given in the valuers's report which is Kshs.1,287,600/= . I therefore enter judgement in favour of the plaintiff against the defendant in the sum of Kshs.1,287,600/= with costs and interest . The interest on general damages shall be calculated at Court rates from the date of this Judgement until payment in full.

Dated, Signed and delivered at Nairobi on this 18th day of October 2018.

E.O.OBAGA

JUDGE

In the presence of:-

M/s Mumo for Mr Kiarie for plaintiff

M/s Njoki for Mr Kahonge for defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE