



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC.NO.251 OF 2011

GEORGE KAMAU WAKANENE.....1st PLAINTIFF
ELIZABETH WANGU MUREITHI.....2nd PLAINTIFF
DAVID MBORA3rd PLAINTIFF

=VERSUS=

CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGEMENT

The a Plaint dated 31st May 2011, the Plaintiffs herein *George Kamau Wakanene, Elizabeth Wangui Mureithi* and *David Mbora* have brought a claim against the Nairobi City County government which is a successor of the Defunct City Council of Nairobi. The Plaintiffs have sought for the following orders against the Defendant:

- i. A perpetual and permanent injunction restraining the Defendant, her Agents, Servants, Employees and or assignees from further trespassing, destroying, claiming and or interfering with the Plaintiffs' properties being LR.Nos.209/8294/339, 209/8294/335 and 209/8294/337 – South C or in any manner inconsistent with the Plaintiffs right of possession.*
- ii. An order that the Plaintiffs properties are not in a road reserve or bypass.*
- iii. Compensation to the Plaintiffs for damages and malicious damage of demolishing their properties to re-constructing the same at their former state as assessed by the Quantity Surveyor as follows:*
 - a) The 1st Plaintiff - Kshs.880,140.00/=*
 - b) The 2nd Plaintiff – Kshs.896,445.00=*
 - c) The 3rd Plaintiff – Kshs.294,050.00/=*
- iv. Compensation to the Plaintiffs for damaged and looted properties as shall be proved to the court.*

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

vi. *Costs of the suit.*

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

The Plaintiffs had alleged in the Plaint that they are the registered legal owners of the suit properties named herein below situated in South C, Nairobi:

- *LR No.209/8294/339 owned by George Kamau Wakanene 1st Plaintiff*

- *LR. No.209/8294/335 owned by Elizabeth Wangu Mureithi – 2nd Plaintiff*

LR. NO.209/8294/337 owned by David Mboru – 3rd Plaintiff

It was their contention that on or about the night of **17th May 2011**, and morning of **18th May 2011**, the Defendant, its employees and or agents illegally and without justifiable cause invaded and trespassed on the Plaintiffs houses, built on their respective properties **LR NO.2098294/339, 209/8294/335 and 209/8294/337** and demolished them, destroyed the walls and looted goods properties without notice or reason served upon the Plaintiffs. It was their contention that whenever they intended to renovate or develop their houses and carry business or any activity, the Plaintiffs always applied for consents and permits from the Defendant who after visiting the premises would grant them the said permits and consents as for the law require.

They also contended that due to the Defendant's illegal actions, the Plaintiffs properties were left open, unsecured and unoccupied and thus they incurred losses. The Plaintiffs particularized the trespass by the Defendant in paragraph 8 of the Plaint. Further, the Plaintiffs particularized their loss in paragraph 9 of the Plaint thus the **1st Plaintiff** sustained a loss of **880,140/=**, **2nd Plaintiff** sustained loss of **896,445/=** whereas the **3rd Plaintiff** suffered a loss of **kshs.294,050/=** as per the attached Bill of Quantities. Further that despite Demand and Notice of Intention to Sue, the Defendant has refused and/or ignored to respond or compensate the Plaintiffs.

The Defendant filed its Statement of Defence on **20th September 2011**, and denied all the allegations contained in the Plaint and did put the Plaintiffs to strict proof thereof. It was the Defendant's allegations that despite the stipulated use of the suit properties, the Plaintiffs have extended the use to include commercial (Shops) contrary to the Physical Planning Act Cap 286 Laws of Kenya. Further that the Plaintiffs had carried out development including extension and construction of structures without the approval of the architectural and structural plans from the Defendant contrary to the law. Defendant also averred that the Plaintiffs have been occupying the suit premises without obtaining occupation certificates from the Defendant and therefore due to the foregoing illegalities, the Defendant served the Plaintiffs with **Enforcement Notice** on **29th March 2011**. The Plaintiffs were required to remove the said illegal structures within a period of **7 days**, failure of which the Defendant had legal mandate to move in and execute the Enforcement Notice.

It was the Defendants contention that if the Plaintiffs incurred any loss, it was precipitated by the Plaintiffs own illegal actions and omissions and therefore no claim or remedy can lie on their favour out of their own illegalities.

This matter commenced hearing on **9th June 2015**, when the Plaintiffs gave evidence from themselves and called one witness.

Plaintiffs Case

PW1 George Kamau Wakanene told the court that he owns the suit property **LR No.209/8294/339** and he

lives therein together with his family. That on the night of **17th May 2011**, while sleeping, they heard noise and when they went out to check, they found a bulldozer demolishing their house. That he did not know who were demolishing the houses then, but he later realized the demolition had been authorized by the City Council of Nairobi. He produced a copy of his Title Deed as exhibit no.1 and also testified that he bought the house in the year **1991** and has lives therein all through the years. He also told the court that he had no Notice to vacate and he had obtained all the approvals from the City Council of Nairobi. He admitted that he used to sell cooking gas behind his house and was running a café which had been licenced by the Defendant. It was his testimony that he had not done any adjustments to the house and he did not know why the same had been demolished. Further that after the demolition, he instructed a Building Contractor who prepared a Bill of Quantities. The damages were in the tune of Kshs.880,000/=. He urged the court to allow the said costs.

PW2 – Joseph Mutinda Mutuku, a **Quantity Surveyor** practicing under the name of Buildnett Consultants told the court that he is a registered Surveyor and he prepared the Bill of Quantities for the Plaintiffs herein. They were in respect of **Lr.Nos.209/8294/339, 209/8294/335** and **209/8294/337** for the Plaintiffs herein. The properties were in South C and they were partially demolished houses. He quantified the cost of repairs and prepared summaries of the same. He produced the said Surveyor's Reports as exhibits 6(a), 6(b) and 6(c) respectively.

He also told the court that he charged kshs.5000/= for attendance from each of the Plaintiffs herein.

PW3 – Elizabeth Wangu Mureithi told the court that she lives **in LR. No.209/8294/335** which is in South C. That on the night of **17th/18th May 2011**, the City Council of Nairobi used a bulldozer to demolish her house without any notice. She testified that she had not received any Notice of demolition. She produced her Title Deed in court and also told the court that she has lived in the said house since the year **1985**. That she had a small Kiosk behind the house but she had obtained approvals from the City Council of Nairobi to run the same. That even if it was illegal to run the Kiosk that was not a licence for demolition of her houses. She also testified that a Surveyor prepared a Report on the loss and damages that she suffered which report was produced as exhibit in court.

PW4 – David Mboru Gakuro also testified in court and stated that he owns and lives in the suit property **LR. No.209/8294/337** which is registered in his names as per the Title Deed that he produced in court.

Further that he bought this house in 1976 and he lived therein since then. It was his testimony that on the night of **17th/18th May 2011**, the City council of Nairobi authorized demolition of the back of his house without any Notice. He also testified that he had never carried any development nor done any illegal business. He only had a small barber shop at the back of the house in which the City Council of Nairobi had issued him approvals and permission as evident from **exhibit no.11**. That he has been paying all the rates to the City Council as is evident from **Exhibit 12**. It was his testimony that he did not know why the City Council demolished his house. After the demolition, he incurred loss and damages and therefore he engaged the services of a Quantity Surveyor who prepared a Bills of Quantities **exhibit 13**. He also testified that the costs of repairs of his house after the damage was **Kshs.294,050/=** as per Bills of Quantities. He urged the court to allow his claim.

Defendant's Case

DW1 – Wilfred Wanyonyi Masinde told the court that he is a building inspector working with the Nairobi City County Government previously City Council of Nairobi. He adopted his **Witness Statement** dated **8th May 2015** fully and told the court that his duties are to inspect building developments within the City County. He further testified that he monitors such developments to ensure that developers do comply with Physical Planning Act Cap 286 Laws of Kenya and Nairobi City County Building By-Laws. That he inspect and check out if developers have complied with development requirements such as:

- 1) **Approval Plans**
- 2) **Change of use**

3) *Occupation certificates*

4) *Ensure that illegal structures do not exist in the city*

According to him, illegal structures are buildings build without approval from the County Government. He therefore ensures that the laws are followed by issuing Enforcement Notices to law breakers. It was in this regard that he issued Enforcement Notices to the Plaintiffs herein who had carried on extensions of their buildings at the back, occupied the same without permission from the City Council of Nairobi. He also testified that the use of the buildings was residential but the Plaintiffs had converted the same to commercial use without permission from the City Council of Nairobi. It was his further testimony that he deposited the Enforcement Notices at the Plaintiffs respective premises and later the illegal structures were demolished after the Enforcement Notices were not complied with. He also testified that the main houses were not demolished but only the illegal structures. Though the witness referred to the three Enforcement Notices, they were not produced as exhibits in court. It was his allegations that the Physical Planning Act was not adhered to and that the single permit had no conditions and were issued by the Chief Licencing Officer of the City Council of Nairobi.

After the hearing of *viva voce* evidence, the parties filed their respective written submissions. The ***Law Firm of Laichena Mugambi & Co. Advocates*** for the Plaintiffs filed their written submissions on **27th July 2015**, and submitted that the Plaintiffs have proved their case on a balance of probabilities. The court was urged to uphold the Plaintiffs claim. The Plaintiffs relied on various provisions of the Constitution and of specific importance were Articles 40 (3) and (5) of the Constitution of Kenya 2010 which provides that:

“The state shall not deprive a person of property of any description, or in any interest in, or right over property of any description and the state shall support, promote and protect the intellectual property rights of the people of Kenya”

Further, they relied on Article 47 (1) and (2) of the Constitution of Kenya 2010 which provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that “if a right on fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”

The Plaintiffs also relied on various decided cases among them ***ELC No.480 of 2011, Virenda Ramji Gudila & Ano...vs... The Attorney General*** where the court awarded the Plaintiff the value of damages to the land, buildings and improvements lost in the demolition as pleaded in the Plaint.

The Plaintiffs submitted that their fundamental rights to property were breached by the illegal acts of the Defendant and they urged the court to dismiss the Defence and allow the Plaintiffs case.

On the part of the Defendant, the ***Law firm of Ogetto Otachi & Co. Advocates*** filed their written submissions on **25th September 2015**, and urged the court to allow the Defence and dismiss the Plaintiffs case. The Defendant submitted that their actions were justified as the Plaintiffs had breached the Physical Planning Act and that the Plaintiffs had been served with the Enforcement Notices as provided by the law. The Defendant relied on Section 38(1) of the Physical Planning Act which provides that:

“When it comes to the Notices of a Local Authority, that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained or that any of the conditions of a development permission granted under this Act has not been complied with, the Local Authority may serve an Enforcement Notice on the owner, occupier or developer of the land”

The Defendants submitted that even after serving the Plaintiffs with the Enforcement Notices, the Plaintiffs did not comply with them and therefore the Defendant acted as the law allow it to act. The

Defendant for that submission relied on Section 39 (1) of the Physical Planning Act which provide that:

“if within the period specified in the Enforcement Notice or within such further period as the Local Authority may determine any measures required to be taken (other than discontinuance of any use of land) have not been taken, the Local Authority may enter on the land and take those measures and may without prejudice to any penalties that may be imposed or any other action that may be taken under this Act, recover from the person or where the Enforcement Notice is served, any expenses reasonably incurred by it in connection with the taking of those measures”

It was submitted that the Defendant’s actions were justified by law as even after being served with Enforcement Notice, the Plaintiffs failed to stop the illegal use of the property or to remove the developments therefore the Defendant invoked the provisions of Section 39 of the Physical Planning Act, entered the premises and demolished the illegal structures. The Defendant also submitted that the Enforcement Notices were duly served and they relied on Section 45 of Cap 286 which states as follows:

“Any Notice or order under this Act shall be made in writing any as Notice or order shall be served or given to any person or his agent or shall be sufficiently served if it is left at the last known postal residential or business address of the person to be served..”

To the Defendant, the Notices were sufficiently served as they were left at the residential address of the Plaintiffs herein. On whether the Plaintiffs are entitled to the relief sought, the Defendant submitted that the Plaintiffs are not entitled to such relief as they have not approached the court with clean hands.

The Defendants on this point relied on the case of *Neno Evangelism Centre* through its *Registered Trustee...vs.. Director of City Planning & 3 Others 2012 eKLR*, where the court held that:

“The Notices further made it clear that the developments had been carried out without the requisite permission and occupation certificate from the city Council. As a consequence, the Applicant was required to stop the illegal development and occupation. They were also required to remove the said structure. As the Applicant has failed to demonstrate that the structure in issue had Development Permissions or Occupation Certificate I find that the said structures were on a prima facie basis, unlawfully constructed and occupied. In the circumstances, the Applicant appears to have come to court with dirty hands”.

It was therefore submitted that the Plaintiffs have failed to prove their case on the required standard and the court was urged to dismiss the same with costs to the Defendant.

This court has now considered the above adduced evidence and the exhibits produced therein. The court has also considered the written submissions, the cited case law and the relevant provisions of law and the court handles renders as follows:

The issues for determination are as set out by the Defendant.

- i. Whether the Defendants actions were justified***
- ii. Whether Notices were served on the Plaintiffs by the Defendant.***
- iii. Whether the Plaintiffs are entitled to the relief claimed.***

Before delving into the issues for determination, the court will point out on a few uncontested facts. There is no doubt that the Plaintiffs are the registered owners of the suit properties identified in the Plaint. The Plaintiffs in their evidence produced the Certificates of title to their respective parcels of land.

There is also no doubt that the Plaintiffs have lived on these parcels of land for long. The ***1st Plaintiff*** purchased his parcel of land where his residential house stand on ***4th September, 1991*** as per his

Certificate of title. The **2nd Plaintiff** got registered as the proprietor of her parcel of land on **23rd August, 1985** whereas the **3rd Plaintiff** got registered as a proprietor of his parcel of land LR No. 209/8294/337 on **9th March 1976**. All the three Plaintiffs produced their respective Certificate of Titles to their respective parcels of land. There is also no doubt that the Plaintiffs had been carrying on some businesses on their respective parcels of land and the City Council of Nairobi had issued them with single business permits. The businesses that the Plaintiffs were carrying out were therefore licenced.

Further, it is evident that the Plaintiffs houses were demolished on the night of **17th/18th May 2011** by some persons who were authorized by the City Council of Nairobi, the Defendant herein. DW1 did admit that the said demolition was done by the agents of the Defendant after the same had been authorized by the Director of City Planning as guided by the law. DW1 told the court that the said demolition was justified. However, the Plaintiffs have alleged that the said demolition was illegal and the Defendants should be ordered to compensate them for the loss incurred.

It is not in doubt that after the demolition of the Plaintiffs structures as authorized by the Defendant, the Plaintiffs did suffer loss and damages as per the Bills of Quantities produced as exhibits no.6(a), (b) and (c) by PW2. The Plaintiffs have urged the court to order that the Defendant do compensate them for the said loss and damages. However, the Defendant has urged the court to dismiss the said claim as the loss were precipitated by the Plaintiffs inactions.

The court will now analyse the identified issues for determination.

i) Whether the Defendant's actions were justified.

As the court analysed earlier, it is evident that the Plaintiffs structures or part of their residential houses were demolished and they were demolished by the Defendant and/or its agents on the night of **17th/18th May 2011**. The Defendants witness one **Wilfred Wanyonyi Masinde** told the court that the Plaintiffs had erected illegal structures on their respective parcels of land which were only meant for residential purposes. That they had set up business on these residential premises without change of user and the said extension were illegal and business are unauthorized. However, it is evident that the Plaintiffs did admit that they were running small business at the back of their houses. However, the said businesses had been authorized by the City Council of Nairobi, Licencing Department. Since the Plaintiffs had licences for their ongoing businesses, the same were not unauthorized. The Defendant's witness had alleged that the Plaintiffs had changed the residential premises to commercial use without change of user approvals. If that was the case, then the Defendant ought to have charged the Plaintiffs with such an offence. If the Plaintiffs had erected illegal structures then, the Defendant ought to have charged the Plaintiffs under Section 30 of the Physical Planning Act.

The Defendant had alleged that under Section 39 of the Physical Planning Act, after issuance of an Enforcement Notice, the Local authority had discretion to enter into such land and take such measures. However, the said discretion is not absolute and it needed to be exercised humanely and cautiously/reasonably. The Defendant herein did carry the demolition at night. There was no evidence tendered of the illegal structures. The Plaintiffs have produced Single Business Permits from the City Council of Nairobi, the predecessor to the Defendant herein. If the Plaintiffs were carrying out business on illegal structures, could the Defendant have given them licences?. The court finds that Article 47 (1) of the Constitution grants every person right to fair administrative action. It reads as follows:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that “if a right on fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”

As rightly submitted by the Plaintiffs, if the businesses they were carrying out were on illegal structures, the Defendant ought to have cancelled their licences and charged them with contravening the provisions of the Physical Planning Act. Resolving to demolition their structures at night was a draconian act which

was inhuman and a breach of enjoyment of the Plaintiffs right to own properties. Article 40 (3) of the Constitution provides that

“The state shall not deprive a person of property of any description, or in any interest in, or right over property of any description “

By demolition of the Plaintiffs houses, the Defendant herein which is a Local Government breached the Plaintiffs right as enshrined in Article 40 of the Constitution. What is clear from the above provisions is that private property is protected and may not be taken arbitrarily or destroyed without due process. In the case of **Dry Associates Ltd ..vs.. Capital Markets Authority & Ano. Petition NO.328 of 2011**, the court held that:

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law..... but is to be measured against the standards established by the Constitution”

This court finds that by resorting to demolish the Plaintiffs structures instead of taking other measures as provided by the laws, the Defendant breached the Plaintiffs right as enshrined in the Constitution and therefore the Defendant’s action were not justified.

ii) Whether the Notices were served on the Plaintiffs by the Defendant.

The bone of the contention herein is that the Defendant demolished the Plaintiffs structures without having served them with any Enforcement Notices. DW1 told the court that he visited the Plaintiffs residents as they were putting up the illegal structures and warned them but the Plaintiffs did not heed his warning but continued with the said erection of the structures and later set up the businesses. There was no evidence of such warnings and there was no evidence that the Plaintiffs had been charged with putting up illegal structures. DW1 testified that he served the Enforcement Notices by leaving them in the business premises. He relied on the provisions of Section 39 of the Physical Planning Act. However the Defendant did not produce any of the alleged Enforcement Notices that he allegedly served on the Plaintiffs by leaving them in their business premises. The court finds that there is no evidence that the Plaintiffs were served with the Enforcement Notices that DW1 averred or served on them. The Defendant therefore illegally demolished the Plaintiffs houses and/or structures without any warning. That was unfair administrative action contrary to Article 47 of the Constitution and even contrary to the Principle of Natural Justice – No one should be condemned unheard.

iii) Whether the Plaintiffs are entitled to the relief claimed.

It is evident that the Plaintiffs structures were demolished unfairly and illegally by the Defendant. Due to the action of the Defendant, the Plaintiffs incurred loss and damages. PW2 did testify and produce the Bills of Quantities in regard to each of the Plaintiffs herein. The said Bills of Quantities were not disputed by the Defendant. Though the Defendant alleged that if the Plaintiff suffered any loss, then the said loss was precipitated by the Plaintiffs, the court finds and hold that the actions of the Defendant was unjustified and therefore the Plaintiffs are entitled to compensation. The court finds that the Plaintiffs are entitled to the prayers and relief sought in the Plaintiff.

Having now carefully considered the available evidence, the exhibits produced in court, the written submissions and the relevant provision of law, the court finds that the Plaintiffs have proved their case against the Defendant beyond a reasonable doubt. Accordingly the court enters judgement for the Plaintiffs against the Defendant as prayed in the Plaintiff in terms of prayers no. (i), (ii) (iii) of the Plaintiff.

iv) Further the Plaintiffs have asked the court to award them general damages of ***kshs.20,000,000/=*** for the loss incurred. However, this court will be persuaded by the findings in the case of **Isaac Gathungu Wanjohi ..vs.. The Attorney General & Others , HCC Petition no154 of 2011**, where the court awarded the Plaintiff a sum of 2,000,000/= as general damages for breach of Article 47 of the Constitution. The court finds that each of the Plaintiff herein is entitled to general damages for loss and damages and the

court consequently award each and every Plaintiff Kshs.2,500,000/= as general damages.

v) Plaintiffs are awarded kshs.15,000/- as special costs for PW2s court attendance fees.

vi) Plaintiffs are also awarded costs of the suit and interest thereon at the courts rate.

It is so ordered.

Dated, signed and delivered in Nairobi this **23rd** day of **JUNE**, 2017.

L. GACHERU

JUDGE

23/6/2017

In the presence of

Hon. Gacheru, Judge

M/s Tarus holding brief for Laichena for Plaintiffs

M/s Omesa for Defendant Defendant

Court Assistant: Hilda

L. GACHERU

JUDGE

23/6/2017

COURT:

Judgment read in Open Court in the Presence of the above stated advocates.

L. GACHERU

JUDGE

23/6/2017