



**REPUBLIC OF KENYA**

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

**ELC NO. 586 OF 2009**

**PROF. LUCY IRUNGU.....PLAINTIFF**

**VERSUS**

**HON. ALBERT ALEXANDER AGGREY EKIRAPA..... 1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff brought this suit against the defendants on 18<sup>th</sup> November 2009 seeking the following reliefs:-

- a. Loss of use of the property.
- b. Mesne profits.
- c. Kshs.1,954,000/= being the costs of the restoration of the demolished and damaged portion of the property.
- d. General damages for malicious damage to property.
- e. Punitive damages.
- f. Costs of the suit.
- g. Interest at court rates.

In her plaint dated 16<sup>th</sup> November 2009, the plaintiff averred that she is the registered owner of all that parcel of land known as **L.R No. 209/ 6014** situated on Nyeri Road, Kileleshwa, Nairobi (hereinafter referred to as **“the suit property”**) on which she has erected a residential house and other ancillary amenities. The Plaintiff averred that on 24<sup>th</sup> June 2009, the 1<sup>st</sup> defendant and one, Paul Curzon added her as a 2<sup>nd</sup> defendant to a suit which they had filed against one Dr. Wilson MiritiKiraitu namely, Nairobi High Court (Environment and Land Division) Civil suit No. 244 of 2009 (hereinafter referred to as **“the previous suit”**). In the previous suit, the 1<sup>st</sup> defendant herein and the said Paul Curzon sought among others, an order of injunction to restrain the plaintiff herein and the said Dr. Wilson MiritiKiraitu from encroaching and trespassing on a parcel of land known as **L.R No. 209/9674** (hereinafter referred to as **“Plot No. 209/9674”**). The plaintiff averred that while the previous suit was pending hearing and determination, the 2<sup>nd</sup> defendant herein, on 20<sup>th</sup> August 2009 purported to serve the plaintiff with an enforcement notice under the Physical Planning Act Cap 286 Laws of Kenya demanding that the plaintiff demolishes her residential house and other developments she had put up on the suit property or risk the

same being demolished by the 2<sup>nd</sup> defendant.

Upon receipt of this notice, the plaintiff wrote to the 2<sup>nd</sup> defendant through her advocates on record protesting against the same and lodged an appeal against the same under the Physical Planning Act aforesaid. The plaintiff averred that while the previous suit and the appeal which she had lodged against the said enforcement notice were still pending determination, the defendants herein jointly and severally by themselves, their agents and servants using the 2<sup>nd</sup> defendant's bull dozers and guards willfully and unlawfully trespassed on the suit property on 1<sup>st</sup> October, 2009 and maliciously and extensively demolished and damaged part of the plaintiff's said developmentsthereon.

The plaintiff averred that as a result of the aforesaid acts of trespass, she was deprived of the use and enjoyment of the suit property and suffered monetary loss in the process of reinstating the said demolished and damaged part of the said property. It is on account of the foregoing that the Plaintiff sought against the defendants the reliefs set out at the begging of this judgment.

The defendants were served with summons to enter appearance but failed to enter appearance within the prescribed time. Interlocutory judgment in default of appearance was entered against the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 23<sup>rd</sup> June 2010 and 9<sup>th</sup> February 2010 respectively. The suit was thereafter set down for formal proof on 16<sup>th</sup> April 2015 when the same was heard before me. The defendants did not appear in court for the formal proof although they had been served with a hearing notice. At the hearing, the Plaintiff gave evidence and called no witness. In her evidence, the plaintiff reiterated the contents of her plaint which I have highlighted at lengthy above.

The plaintiff testified that; she purchased the suit property in the year 2009 and put up a house thereon. The 1<sup>st</sup> defendant owns plot No. 209/9674 which is adjacent to the suit property. When she started constructing a house on the suit property, the 1<sup>st</sup> defendant sued her and Dr. Wilson Miriti Kiraitu. While that suit was pending, the 2<sup>nd</sup> defendant served her with an enforcement notice threatening to demolish her residence on the suit property against which notice she lodged an appeal. Notwithstanding the pendency of the suit that the 1<sup>st</sup> defendant had filed against her and the appeal that she had lodged against the said enforcement notice, the defendants proceeded on 1<sup>st</sup> October 2009 to demolish part of the building that she had put up on the suit property. The contractor that she had engaged to construct the said house one, Elijah Obenga of Obenga Construction Company assessed the cost of restoring the demolished building at Kshs.1,954,000/=.

She produced a copy of the bill of quantities that was prepared by Obenga Construction Company limited on 5<sup>th</sup> January 2010 as P Exhibit 1. The plaintiff stated that she paid the said contractor the said sum of Kshs.1,954,000/= for the restoration of the building that was demolished by the defendants. The restoration exercise took about 4 months to complete. Upon completion of the building, she rented the same to a tenant at a monthly rent of Kshs.70,000/=. The premises were rented out one month after completion of the repair works. The plaintiff urged the court to grant the reliefs set out in her plaint together with costs of the suit.

After the close of the plaintiff's case, the plaintiff's advocate opted to file written submissions which were filed on 2<sup>nd</sup> October 2015. I have considered the plaintiff's case as pleaded and the evidence that was tendered in proof hereof. I have also considered the submissions by the plaintiff's advocates and the authorities cited in support hereof. As I have stated at the beginning of this judgment, the defendants did not enter appearance and interlocutory judgment was entered against them.

The plaintiff's claim against the defendants is based on trespass. The effect of the interlocutory judgment that was entered against the defendants is that, the defendants' liability to the plaintiff for said acts of trespass is not contested in these proceedings. That issue was laid to rest when interlocutory judgment was entered against the defendants as aforesaid. The purpose of the hearing that was conducted herein was for the plaintiff to prove the various reliefs that she has claimed against the defendants arising from the said acts of trespass. The plaintiff has claimed damages under several heads. In her submissions, the

plaintiff has admitted and rightly so that there is duplication in the claims that she has put forward against the defendants.

The plaintiff has claimed both loss of use of the suit property and mesne profits. In her submissions, the plaintiff has admitted that these claims mean one and the same thing. Under the two heads of claim, the plaintiff submitted that a sum of Kshs.490,000/= would be adequate compensation for the loss she suffered when the premises remained unused for a period of seven (7) months. The Plaintiff had testified that it took her about 4 months to repair the damage that had been caused to the suit property and a further one (1) month to rent it out to a tenant at Kshs.70,000/= per month. The sum of Kshs.490,000/= claimed by the Plaintiff has been arrived at by multiplying the monthly rental income of Kshs.70,000/= by seven (7) months being the period which the plaintiff claims the suit property could not yield any income.

I am in agreement with the decision of the Court of Appeal in the case of **Kenya Hotel properties Ltd Vs. Willesden Investments Limited (2009) eKLR** on how the court is supposed to proceed when assessing mesne profits. I am of the opinion however that the plaintiff's claim is inconsistent to some extent with her evidence. According to the evidence that was tendered by the plaintiff, the premises remained unutilized for a total period of five (5) months; four (4) months during the repairs of the damage that was caused by the defendants and one (1) month when the plaintiff was looking for a tenant. The plaintiff is therefore entitled to be compensated for a period of five (5) months and not seven (7) months as submitted by the plaintiff. I would therefore award the plaintiff a sum of Kshs.350,000/= as mesne profits.

The other claim by the plaintiff is for special damages in the sum of Kshs.1,954,000/= which the plaintiff has claimed to have spent in repairing the damage that the defendants had caused to the building on the suit property. The law on special damages is that the same must not only be pleaded but must also be strictly proved. The plaintiff testified that the cost of repairing the damaged building came to Kshs.1,954,000/=. In proof of this assertion, the plaintiff produced a bill of quantities that was prepared by Obenga Construction Company Ltd. which contained the particulars of the repairs that were carried out and the cost hereof. The plaintiff testified that she paid the said sum of Kshs.1,954,000/= to Obenga Construction Company Limited for the said repair works. The said bill of quantities was not contested. There was also no contest that the plaintiff paid the said sum of Kshs.1,954,000/= set out in the said bill of quantities to the contractor who carried out repairs to her residence. I am satisfied that the plaintiff has proved her claim for special damages in the sum of kshs.1,954,000/=.

The plaintiff has also claimed general and punitive damages. Like special damages, general damages is compensatory in nature. The only difference between special and general damages is that the latter cannot be quantified. The onus was upon the plaintiff to establish that she suffered more loss over and above the loss of use of the suit property and the direct costs that she incurred in restoring the suit property to its former state prior to the demolition and damage that was caused to it by the defendants. I have no evidence of such loss before me. I therefore have no basis on which I can assess general damages payable to the plaintiff as I have been urged to do by the plaintiff in her submissions. In addition to general damages, the plaintiff has also sought punitive damages against the defendants. In support of this claim, the plaintiff has cited the case of **Obongo & Another Vs. Municipal Council of Kisumu (1971) E.A 91 (CAN)** in which the court relied on the case of **Rookes Vs. Barnard and others (1964) A. C. 1129** and stated that exemplary damages for tort may be awarded first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly, where the conduct of the defendant was calculated to procure him some benefit at the expense of the plaintiff. On the material before me, I am satisfied that the plaintiff has satisfied the conditions for granting punitive or exemplary damages against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant from the evidence on record acted arbitrarily and in an oppressive and unconstitutional manner. There is no evidence however that the 2<sup>nd</sup> defendant was actuated by malice, ill will or improper motive. From the contents of the enforcement notice dated 20<sup>th</sup> August 2009, the 2<sup>nd</sup> defendant may have believed albeit wrongfully that it was acting within the provisions of the Physical Planning, Cap 286 Laws of Kenya. In the circumstances, I do not think that a heavy penalty against the 2<sup>nd</sup> defendant would be appropriate. I would award to the plaintiff a sum of Kshs.100,000/= as punitive and/or exemplary damages as against the 2<sup>nd</sup> defendant.

In conclusion, I hereby enter judgment for the plaintiff against the defendants as follows:-

1. As against the defendants jointly and severally:-

- a. Kshs.350,000/= as mesne profit.
- b. Kshs.1,954,000/= as special damages.
- c. Costs of the suit

2. As against the 2<sup>nd</sup> defendant:-

- a. Kshs.100,000/= for exemplary/punitive damages

3. Interest shall accrue on amounts awarded in 1(a) and (b) above at court rate from the date of filing suit, and on 2(a) above at court rate from the date hereof, until payment full.

**Delivered, Dated and Signed at Nairobi this 29<sup>th</sup> day of January, 2016**

**S. OKONG'O**

**JUDGE**

In presence of

N/A for the Plaintiff

N/A for the Defendants