



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 174 OF 2016

ALBERT OCHOKOLO.....1ST PLAINTIFF

PETER IJAA.....2ND PLAINTIFF

SAMMY WASIKE.....3RD PLAINTIFF

= VERSUS =

HALIMA HUSSEIN.....DEFENDANT

J U D G M E N T

1. The Plaintiffs filed a suit against the defendant via a plaint dated 25th May 2016 and filed in court on 15th December 2016 praying for judgment against the defendant for;

a) An order for demolition of the illegal structure erected by the Defendant on L.R. NO. SOUTH TESO/ANGOROMO/3823 and a permanent injunction as per paragraph 7 above.

b) Costs.

c) Interest.

d) Any other or further relief this Honourable Court deems fit and just to grant.

2. The plaintiffs pleaded that on or about April 2016, they received a notice from Lake Victoria North Water Services Board to the effect that there was a protruding permanent shed being built on the sewer drain in Plaintiff's storey building which is contrary to their by-laws and hence threatened to take legal action against them. That the defendant illegally and without written permission from the plaintiffs put extension structure to the plaintiffs' storey building contrary to the laid out and approved building plans, drainage and sewerage lines and in effect the illegal structure is built on top of a public sewer drain contrary to the health laws and regulation. That the defendant changed, altered and or improved on the leased premises without prior consent and approval in writing from the plaintiffs and relevant authorities and breached the terms and conditions stipulated in the tenancy agreement.

3. The defendant entered appearance and filed their defence on 3rd March 2017. She admitted that she is a tenant in the plaintiffs' premises situated on L.R. NO. SOUTH TESO/ANGOROMO/3323 from January 2009 and that she sought the counsel of the 2nd plaintiff on how the issue of the dust can be addressed and the 2nd plaintiff allowed the defendant to put up a temporary extension using glasses on the veranda of the building to reduce the amount dust blowing into the premises. She averred that she wrote a letter to the town manager requesting approval for the extension and that request was granted on condition that the same should not cover the sewage man-hole. She further stated that she agreed with the 2nd plaintiff that she will cost of renovation on understanding that the 2nd plaintiff who is actually the defendant's landlord will not increase rent for the next two years and that she incurred a sum of Kshs.572,000/= in carrying out the renovation and that renovations were done with full blessings of the plaintiffs. She stated that the suit is an abuse of court process aimed at terminating the tenancy after the defendant has carried out extensive improvements on the leased premises.

4. The plaintiffs filed a Reply to Defence on 18th April 2017 and denied the contents of the defence and put the defendant to strict proof.

5. The matter was set for hearing on 22/3/2021 with PETER IJAA WASIKE testifying as PW1. He adopted his witness statement dated 25th May 2016 as his evidence in chief. He informed the court that the 1st plaintiff is deceased. He testified that the 1st and 3rd plaintiffs were his brothers and they jointly owned a commercial building in Busia Town on L.R. NO. SOUTH TESO/ANGOROMO/3823 and the defendant is one of their tenants occupying one house where she runs a hotel business and pays Kshs.13,000/= as rent. In early April 2016 he received a notice from Lake Victoria North Water Services Board to the effect that there was a protruding shed built on the sewer drain in their storey

building which is contrary to their by-laws and they were given a 7-day notice to demolish the same failure of which legal action would be taken against them. He went to the site and found the defendant had indeed put up a permanent extension to their building without their consent building plans, building approvals and indeed she had erected the said extension on top of a public sewer drain and water systems thus blocking both systems.

6. He informed the court that the said blockage had not only affected the other tenants but innocent neighbours as well. They approached the defendant and found out that she had already put up the structure and showed her the said letter and the adverse effects her illegal actions may cause but she became adamant. They instructed their advocates on record who wrote and served her with a demand notice to remove the structure but she ignored the same. He prayed that an injunction do issue restraining the defendant from using the illegal structure and an order for demolition of the same. He produced the documents in their list of documents dated 25/5/2016 as *PEX 1-4*. He told the court that he filed succession proceedings to succeed the 1st plaintiff which was granted. He produced the certificate of death, chief's letter and limited grant as *PEX 5-7*. He sought the prayers contained in the plaint.

7. Upon cross-examination by counsel of the defendant, he stated that the defendant was paying rent for the room she took and she had been a tenant for about 10 years though they did not have a tenancy agreement. He told the court that his complaint is the extension built on top of the sewer. He denied that the defendant sought his consent to renovate at her expense and said that the impugned structure is built of cement, iron bar and iron sheets and it has exceeded the edge of the existing building. He denied that she put the extension because dust was getting into the hotel and extension was done in 2-3 days. He said that he got a report from sewage and water as he was at home. He stated that *PEX 3* was not addressed to him and the Amukura building is on two plots. He stated that there is no tenant who has complained and the public health officers came and asked him to demolish the offending structures. He said that he was not aware that the defendant had permission to build and he was not complaining because the defendant has refused to the increment of rent. He stated that the structures are affecting sewer from his toilets.

8. On re-examination, he reiterated that he sued the defendant for the extension, not the renovations and that the impugned extension was still there to date. He stated that their building is called Amukura House and he had received *PEX 3* after the defendant finished building. He further reiterated that the defendant never sought their consent to do the extension.

9. The 3rd plaintiff, SAMMY WASIKE, testified as the plaintiffs second witness and adopted his witness statement dated 25th May 2016 as his evidence in chief. He also adopted the evidence of PW1 where he stated the defendant pays rent to the 2nd plaintiff and she has constructed an extension permanent structure shade in front of their commercial building which structure is blocking the sewage system. He stated that the defendant built the structure without their consent, and or county authorities' consent. He went on to state that this a threat to the neighbours and other tenants because once the sewage system is blocked for anybody to unblock it or clear it, the permanent structure built by the defendant must be demolished first. That he approached the defendant and informed her of the wrong committed but she kept quiet and they went again together to inform her of the adverse effects the structure would cause to the entire community and she kept adamant.

10. During cross examination by Mr Bogonko, learned counsel for the defendant, the witness stated that the extension was built around 2016 when they filed the case and it is blocking the sewerage line. He told the court that the toilets on the 1st floor are disturbing them as the extension was put on top of a manhole. He did not have a picture of the extension and the suit plot is in 3 names. He denied that there was discussion of dust entering her hotel or being aware that the county government gave her permission to erect the extension. Pw2 admitted that the tenancy with the defendant was made with their deceased father. He asserted that someone cannot put up extension on your building without your permission. On re-examination, the witness stated that the county government cannot give permission to build without their consent and the letter dated 16/4/2016 to the defendant gave conditions such as not to interfere with wayleaves (water pipes, manholes and cables). He reiterated that the extension is on top of a manhole.

11. The defendant, HALIMA HUSSEIN, relying on her sole evidence admitted that she knows the plaintiffs as they are her landlords. She testified that she does business of hotel under the trade name of Kawakal Hotel which started in the year 2007 during the lifetime of the plaintiff's father. It is her evidence that she placed a temporary construction in front of the hotel along the highway to prevent the dust from getting into the hotel. She said that she got approval from the county for the structure and denied building on top of a manhole. That the structure has been there for seven years.

12. DW avers that she got permission from PW1 and she has spent approximately Kshs.572,000/= on the construction. She further stated that she requested the 2nd plaintiff not to increase rent during the period. That the building of the structure took over one week, and 2 months later the brothers started claiming that the rent should be increased. She produced the letter dated 16/4/2016 as *DEX 1* and repair budget as *DEX 2*. She urged the court to dismiss the case.

13. Upon cross-examination by Mr Onsongo, learned counsel for the plaintiffs' the defendant stated that they did not reduce their agreement with PW1 into writing, but the discussion was in the presence of witnesses. That she visited the town manager who visited the site but the approval given was not from the physical planner. She admitted she did not know the details of the title for the suit plots. The letter from Lake Victoria South Water Services Board indicating that she had built on top of the manhole was untrue. The admitted conceded she did not remove the structure as directed in the said letter. She admitted that it is only her hotel whose veranda extends to the front and the lower part of the structure is built with bricks, wall is glass, door is steel and iron roofed for shade.

14. On re-examination, she states that the structure was only put to block the dust and the door is put to secure the security and cleanliness. She told the court that she did not need building plans for temporary structures and she visited the manager because it was being built on a road reserve. She said that the manhole is open both sides. That when she visited the offices of Lake Victoria South Water Services Board, she was informed that the letter was written with partiality. This marked the end of the defence evidence.

15. Parties agreed to exchange written submissions. The defendant filed her submissions on 8TH November 2021 stating that the plaintiffs have failed to prove their allegations against the defendant because they did not bring forth any evidence to show that there exists a sewer below the extension that was put up by the defendant. She submitted that all she did was to raise an extension upwards to prevent dust from

interfering with her business. That it was not enough that a notice was received from Lake Victoria Services Board, as that alone cannot be used to implicate the defendant because it has not been established that indeed the extension was on top of a sewer drain. She submitted that on her own volition she produced a consent letter from Minister of Lands, Housing and Urban Development from the County Government of Busia to prove that she indeed sought consent from the relevant authority. She humbly urged the court to find that the suit lacks merit.

16. The plaintiffs filed their submissions on 9th November 2021 and submitted that the defendant erected an illegal structure without prior written consent or knowledge of the plaintiffs and the said illegal structure is a health hazard to the other occupiers and users of the plaintiffs' building and members of the public. They submitted that the alleged approval dated 16/4/2016 was an afterthought to cover the defendant's illegality as the Lake Victoria Services Board letter is dated 25/3/2016 and the demand notice is dated 8/4/2016. They submitted that the approval letter was subject to non-interference with way leaves and the defendant had already breached those conditions by building on manholes. They cited Section 3(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act CAP 301. The plaintiffs urged that they have proved their case to the required standards and their claim should be allowed as prayed in the plaint.

17. The only issue for determination is whether or not the plaintiffs have proved their case that;

i) The structure was built without their permission.

ii) If the structure is built on a sewer line in contravention of by-laws.

iii) Whether or not the impugned structure should be demolished.

18. From the pleadings and the evidence adduced, there is no dispute that there is a structure put up by the defendant in front of Amukura house. The dispute is whether it was illegally put up and on top of a sewer line. The burden of proof was vested on the plaintiff to prove this fact in accordance with the provisions of section 107 and 109 of the Evidence Act Cap 80.

19. In discharging this burden, the two plaintiffs presented oral and documentary evidence. The plaintiffs admit the defendant has been their tenant in the premises referred to as Amukura House. The 2nd plaintiff who gave evidence as PW1 denied that the defendant had sought his consent before putting up the impugned structure. The existing tenancy agreement between parties was reached orally and the monthly rent payable is Kshs.13,000 as shown in the receipt produced as *Pex 1*. The defendant contended that she sought the consent of the 2nd plaintiff adding that she requested for freezing of increment of rent for a period to enable her to recoup her expenses incurred in putting up the structures. That the plaintiffs only changed their mind because now they wanted to increase rent.

20. On the basis that this was an oral tenancy, the first hurdle for the plaintiffs was to prove that indeed the defendant required their consent to undertake a construction that is outside of the demised premises. This was not explicitly elaborated and or demonstrated. The plaintiff did not lay a basis even in their submission which section of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which is the guiding Act or which contract had been contravened as pleaded in paragraph 6 of this plaint. Since it is the plaintiffs' word against the defendant word on the matter of consent, the plaintiffs required corroboration of their evidence which in this case is mission.

21. The second limb that required proof is whether or not the structure is built on top of a sewer or manhole. The plaintiffs pleaded in paragraph 5 of the plaint thus "*... the structure was put up contrary to the approved building plans, drainage and sewerage lines and it is built on top of a public sewer.*"

22. As already mentioned herein above, the tenancy agreement between the parties was oral. The defendant denied that she had built the structure on top of a manhole. According to her, the structure is built on the highway to prevent dust from entering the hotel. In cross-examination, the defendant said it is only her hotel whose veranda extends to the front. Further in re-examination, the defendant stated that she visited the County Manager because the structure was to be put up on a road reserve, that the manhole is open on both sides.

23. The fact that the defendant admits that the structure is put up on a road reserve supports the plaintiffs' averments that the structure is contrary to the approved building plans of Amukura House. It is immaterial that it is a temporary structure, taking into account that the defendant is not the only occupant of the demised premises. The defendant denied building on top of the manhole yet she confirms in re-examination that the manhole is open to both ends. The inference drawn from defendants evidence is that this structure although on top of a manhole, it is not blocking it.

24. As far as the veracity of the letter from the Lake Victoria South Water Services Board is concerned, the same was admitted as an exhibit. The defendant did not produce another letter from the same office stating that *Pex 3* was partially written. The plaintiffs also questioned the authenticity of the letter dated 16/4/2016 produced as *Dex 1*. The defendant stated that she sought approval from the town manager before putting up the structure which permission was given as contained in the letter 16/4/2016. The plaintiffs' questions are valid because as at 8/4/2016, they had done a demand letter asking the defendant to remove the illegal structure. Thus the plaintiffs' proof that the structure besides contravening their approval plans, was also done without consent of the relevant County Government's planning permission.

25. In light of the answer to the second question, the 3rd question is answered that the offending structure should be demolished. The defendant produced a budget list of her expenditure in bringing up the structure. She is not entitled to any compensation because no counter-claim was made. In any event, she has enjoyed use of the period of seven years this case was pending.

26. In conclusion, I find the plaintiffs' case proved. Judgment be and is hereby entered in their favour as follows;

a) The defendant be and is hereby directed to remove the offending structure within 90 days hereof.

b) In default of compliance of (a) above, the plaintiff are permitted to proceed and remove the offending structure using

lawful means.

c) Costs of the suit awarded to the plaintiffs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 24TH DAY OF MARCH 2022.

A. OMOLLO

JUDGE