



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Bhanji & 2 others v Kassamali & another (Environment and Land Case Civil Suit E285 of 2021) [2023] KEELC 17137 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E285 OF 2021**

LN MBUGUA, J

APRIL 27, 2023

BETWEEN

MOYEZ SADRUDIN BHANJI 1ST PLAINTIFF

ZUBEDA SADRUDIN BHANJI 2ND PLAINTIFF

STEVE RUTO 3RD PLAINTIFF

AND

SULTAN ABDUL KASSAMALI 1ST DEFENDANT

NAJMA SULTAN KASSAMALI 2ND DEFENDANT

JUDGMENT

1. The protagonists herein are members of a housing estate known as Westlands Gardens consisting of 8 maisonettes of which the 1st and 2nd plaintiffs (a son and mother team) occupy a house which borders the house of the defendants who are a spouse team. The 3rd plaintiff is also a resident in the estate. The dispute revolves around the erection of a hedge fence and installation of flower pots by the defendants at the boundary of the two houses.
2. By a Plaint dated July 30, 2021, the plaintiffs contend that the parties herein together with others not before the Court are directors of Westlands Gardens Limited Housing Estate (herein the estate). They are homeowners and neighbors and have set rules and regulations that govern the estate. One of the regulations of the estate require that occupiers keep a decent length of fence to avoid being a nuisance to others.
3. It is the plaintiffs' case that in disregard of the rules and regulations, the defendants have put up a 3 feet wooden fence and have also grown a hedge fence, which has advanced to 6 feet above the acceptable height within the estate and it encroaches way over to the plaintiff's property. Further the defendants



have also placed flower plots on the boundaries, which again have encroached onto the plaintiffs' property occasioning disturbance.

4. The plaintiffs therefore pray for judgment against the defendants jointly and severally for;
 - a. A declaration that the defendants have by their acts of putting up a hedge fence, unlawfully encroached and trespassed onto the plaintiffs' property and thereby committed acts of private nuisance thereon.
 - b. A declaration that the defendant's actions of erecting a 6ft hedge fence are illegal as they go against the Westlands Gardens Limited Rules and regulations.
 - c. A mandatory injunction to compel the defendants by themselves, their agents/servants/employees to pull down, uproot or otherwise remove the hedge fence unlawfully erected.
 - d. General and exemplary damages for prolonged trespass to and/or nuisance.
 - e. Any other order that this court may deem fit to grant in the interest of justice.
 - f. Costs of this suit and interest at court's rate from the date of filing suit.
5. The defendants opposed the suit by way of a statement of defence dated February 23, 2022.
6. The plaintiff's case was led by one witness, the 1st plaintiff (PW1), who adopted his witness statement dated July 30, 2021 as their evidence. He also produced the documents contained in their list of documents of even date as P. Exhibit 1-5.
7. The testimony of Pw1 is that he lives in house No.2 with his elderly mother the 2nd plaintiff; (their plaintiff mentions house no.1). They have lived there for over a period of 40 years since 1980. He contends that each mainsonette has a garden at the back of the house while the front is a carpark. So when you walk outside each of the houses, there are garden beds on both sides. One can have flowerbeds or grass. To create boundaries between the houses, flower beds are grown as depicted by the photographs produced.
8. It was his testimony that the defendants' erected a hedge fence around their house in mid-2020 without consulting directors of the estate. That the defendants started with a 3 feet wooden fence around their compound then they did a hedge which was 6 feet at the time of filing the suit.
9. He testified that his mother, the 2nd plaintiff who is almost 85 years old would go to their balcony in the morning to enjoy views of the whole estate, but that is not the case anymore. He points out that the mother is undergoing treatment for Osteoporosis due to arthritis and she is taking steroid injections. He adds that her mobility is restricted thus she is not able to bask in the sun and the hedge fence restricts her from enjoying sunlight at her balcony.
10. Referred to the survey report dated April 14, 2022 filed by the defendants, Pw1 stated that the fence of defendants is now 3 feet as per the report, but it was 6 feet at the time of filing suit, so it was trimmed and the wooden painted fence was removed.
11. PW1 also testified that the hedge fence is attracting a lot of insects which go to their ground floor balcony and fall on his mother, so she can't sit on the balcony especially when the hedge fence is being watered.
12. On cross-examination, PW1 stated that Westlands Gardens Limited is guided by Memorandum and Articles of association produced as P. Exhibit 2, and that each house in the estate has a separate title deed. He further stated that their rules and regulations are separate from their Memorandum and Articles of Association and they were put in place by the directors but they are not in writing.



13. Referred to the minutes of a meeting of directors dated April 18, 2021 and to P. Exhibit 2 (page 31), Clause 84, pw1 stated that the same provides for quorum of 7 directors for a meeting of Westlands Gardens Limited to be held. He added that amongst the 8 maisonettes, 2 are owned by one director hence the requirement of a quorum should be 6.
14. Referred to P. Exhibit 1, at page 14 of the plaintiff's bundle, he stated that 4 directors of Westlands Gardens Limited attended the meeting held on April 18, 2021, while others had given their apologies. He further stated that there is a clause of waiver of requirement of a quorum of 7 directors at page 26 of the plaintiff's bundle. He further stated that the minutes of the meeting of April 18, 2021 do not indicate the height of the fence and there is no mention of acceptable height.
15. He also states that at page 48 of his bundle, there are WhatsApp messages from Jane Ruto calling for a general meeting for directors who are shareholders, and at page 52, it is his message calling for a meeting which was absconded by the defendant. He stated that voting on trimming of fence was done on April 14, 2021.
16. When re-examined, he stated that the quorum in a meeting of Westlands Estate Limited is whichever number attends a meeting.
17. The Defence called 2 witnesses, whereby DW1 was the 1st defendant. He told the court that the 2nd defendant is his wife. His witness statement dated 21.4.2022 was adopted as his evidence. He produced a sketch map of Westlands Gardens Maisonettes as D. Exhibit 1 and marked a survey report dated April 14, 2022 as MF1 2. He refuted Pw1's claim that his hedge fence is over 6 feet and that his flower pots are a nuisance.
18. On cross-examination, Dw1 stated that he resides at house No.2 in Westlands Gardens Limited, that the 1st and 2nd plaintiffs reside next to them at House No.1, while the 3rd plaintiff stays at House No.5. There is a tenant in House No.3. He added that he has been neighbors with the plaintiffs for the last 20 years, but he had known them for about 30 years and they have had cordial relationship for all those years.
19. He stated that he was present at the meeting of April 18, 2021 and the signature of chairman and secretary appended in the meetings produced as P. Exhibit 1 are correct. At paragraph 3 of the minutes, it is stated that after discussions, he suggested that he would trim the fence.
20. He further stated that in 2021 when the covid pandemic hit, people were not allowed to have physical meetings, so meetings could be held on WhatsApp. He states that at page 48 of plaintiffs' bundle, Jane Ruto called for a meeting and page 50 of the same bundle, someone by the name Zul Mawani sent a message to chair to discuss the issue. She states; "Hello everyone, can you please confirm if you are available...". He stated that he saw the message from Zul calling for a meeting but there was no confirmation of the meeting and he cannot recall whether the meeting took place.
21. Referred to photographs at page 63 of the plaintiff's bundle, he stated that the photograph is not clear but he can discern that Steve Ruto's hedge (3rd plaintiff's) is about same size as his. He also stated that the 2nd plaintiff is small in height due to old age and she carries a stick but he does not know if she can see the other side from their house but to him, she ought to be able to see over the fence.
22. He stated that there were no insects when he put up the hedge fence, but they came later as they are seasonal. He added that they control the insects via spraying and trimming every week but you cannot control some of them as they naturally cross over.



23. He further stated that the demand letter served on him at the instance of the plaintiffs demanding that he trims his fence is dated June 11, 2021 while the defendants' survey report at page 18 of their bundle is dated April 14, 2022, thus there is a difference of about 10 months in between and during that time, he used to trim the hedge fence weekly, thus he does not agree that it was not different as at June 11, 2011 and April 14, 2022.
24. When re-examined, he stated that there is no report indicating that the insects shown to the court by PW1 came from his hedge fence. He further stated that on the WhatsApp messages at page 56 of the plaintiff's bundle, it indicates that only 2 people out of 5 voted that he trims his fence and he has not been shown any written resolution for him to trim his fence.
25. DW2 introduced himself as a licensed surveyor and he produced the survey report for maisonette No.3 situated on Land Reference No.1870/VI/52-Westlands dated April 14, 2022 as D. Exhibit 2.
26. When cross examined, he stated that he visited the defendants' premises around 10th -12th April 2022 and while standing there, he was able to see house No.5 but he did not take photographs.

Submissions

27. The submissions of the plaintiffs are dated March 7, 2023 where they address the following issues;
 - a. Whether the defendants' actions in erecting a hedge fence and placing flower pots caused them to trespass onto the 1st and 2nd plaintiffs' property?
 - b. Whether the defendants performed any acts or omissions that caused nuisance to the plaintiffs?
 - c. Whether the plaintiffs have made out a case for the issuance of an order of mandatory injunction?
 - d. Whether the defendants are liable to pay the plaintiffs exemplary damages?
 - e. Who should bear the costs of the suit
28. The plaintiffs submit that trespass occurs where a person without any lawful authority or consent, invades any part of another person's property. They argue that the hedge fence on part of the defendants' property that borders the 1st and 2nd plaintiff's house No.2 has gotten into the property of the 1st and 2nd plaintiffs and their flower pots that have been placed on the property have bloomed into their property, thus the defendants have occasioned trespass. They rely on the cases of *Alex Waigera Mwaura v Chania Power Company Limited & another* [2020] eKLR, and *Joseph Kipchirchir Koech v Philip Cheruiyot Sang* [2018] eKLR to buttress the issue of trespass.
29. They also rely on the case of *Thomas Ngarachu Ngugi & 5 others v John Wilfred Wanyoike & 6 others* [2020] eKLR, to submit that in the tort of nuisance, there must be an action or an omission on the part of the tortfeasor which has caused undue interference to a neighbour's use and enjoyment of his property.
30. They point out that their claim in relation to nuisance is anchored on three actions of the defendants. First is erecting a hedge fence that is above 3 feet tall blocking their view. Secondly, is to have the overgrown hedge fence which then attracts insects which move into the plaintiffs' properties and create disturbance. Third, is allowing their children to play in the compound creating noise for the neighbours.



31. The plaintiffs cited the case of *MA CGM Kenya Limited v Stout Minera Metals Limited* [2014] eKLR to submit that they have made out a case for the grant of a mandatory injunction and pray that the Court finds so.
32. They rely on the case of *Park Towers Ltd v. John Mithamo Njika & 7 others* (2014) eKLR and the case of *John Chumia Nganga v Attorney General & another* [2019] eKLR to submit that where there is trespass and nuisance, the aggrieved party ought to be awarded damages as a matter of right. Thus they urge the Court to award them damages for trespass and nuisance.
33. The submissions of the defendant are dated March 15, 2023 where they frame the issues for determination as
 - a. Whether there was any trespass caused by the hedge fence and flowerpots;
 - b. Whether there were any rules, regulations or resolutions restricting the erection of a hedge fence;
 - c. Whether the Hedge fence was ever 6 feet;
 - d. Whether any resolution was passed for the removal of the Hedge fence;
 - e. Whether interference of a view caused by the hedge fence is actionable in law to constitute a private nuisance.
34. It was submitted that no evidence was tendered to indicate that there was trespass upon the plaintiff's property caused by the hedge fence or that the flower pots had been placed on plaintiffs' land. Further, no documentary evidence was availed to establish the boundaries of the 1st and 2nd plaintiffs' property. To this end, reference was made to the case of *Joseph Mithika M'ithula v. Jacob Mung'athia Munoru* (2022) eKLR.
35. It was further submitted that the estate has no rules and regulations restricting the erection of a hedge fence, pointing out that in cross-examination, Pw1 had stated that such rules and regulations are not in writing.
36. It was submitted that there was no evidence of a hedge fence which is 6 feet or more, and that defence availed evidence showing that their fence is of the same height with that of their neighbors. Further, there was no resolution passed for the removal of the hedge fence. That the only minutes availed by the plaintiffs (P-Ex 1) simply indicated that the 1st defendant made a suggestion of trimming the fence. It is averred that the alleged meeting of May 23, 2021 had no quorum as only 4 persons were present.
37. It was also submitted that plaintiffs have no actionable cause which would warrant the classification of a nuisance and on this point, defendants relied heavily on a United Kingdom decision in *Hunter & others v Canary Wharf Ltd* (1997) 2 All ER.

Determination

38. Having considered the pleadings, the evidence and the rival submissions, I deem it fit to frame the issues falling for determination as follows;
 - a. Whether the defendants have erected a hedge fence contrary to the rules/regulations of Westlands Gardens Limited Estate.
 - b. Whether there was trespass onto the plaintiffs' property and whether there was nuisance thereof.



- c. Whether the plaintiffs are entitled to damages.
39. It is not disputed that the parties herein reside in maisonettes erected on Land Reference No.1870/VI/52 situated at Westlands identified as Westlands Gardens Limited Estate. The Estate is governed by the Articles of association of Westlands Gardens Limited, a company formed to govern the estate's affairs. The 1st and 2nd plaintiff's house borders that of the defendants. The 1st plaintiff in his witness statement identifies his house as NO, 2. Similarly, the 1st defendant in his witness statement states that their house though registered as maisonette NO 3, it is commonly identified as No.2.
40. It is also common ground that the defendants have erected a hedge fence on the part of their property that borders the 1st and 2nd plaintiffs. The defendants did not refute that they have flower pots.
41. The plaintiffs contend that the hedge fence erected by the defendants is about 6 feet which is unacceptable height and that the fence trespasses onto their property. While the defendants admit to putting up a hedge fence, they argue that it is about 3 feet and it is well maintained and it is not a nuisance to the neighbors.
42. The The provisions of section 107 of the Evidence Act stipulate that;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.
43. While section 109 thereof further provides that:
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.
44. What resonates from the above provisions of law is that he who alleges bears the burden of proving, see - Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR. Thus for the case at hand, it behooves the plaintiffs to proof first and foremost that there were actions and or omissions on the part of the defendants which amounted to trespass and nuisance, affecting the plaintiffs adversely to warrant the issuance of the orders sought in the plaint.
45. Section 3 (1) of the Trespass Act, cap 294 provides that;
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
46. I find that there is no express prohibition of putting up a hedge fence of a certain height around the maisonettes in the estate. In paragraph 9 and 10 of the plaint, the plaintiffs contend that the defendants had put up the 6 feet hedge fence contrary to the rules and regulations of the estate. It is trite law that what is pleaded must be proved in evidence; See- Charter House Bank Limited (Under Statutory management) v. Frank N. Kamau (2016) eKLR, Galaxy Paints Company Ltd v Falcon Guards Ltd [2000] eKLR.
47. During cross examination, Pw1 stated that; “There are no rules and regulations which are written except the Articles of Association”.



48. What resonates from this analysis so far is that the claims of the plaintiffs as set out in their pleadings are not anchored on any tangible evidence as the estate does not have rules and regulations to guide them on what should mark their boundaries.
49. Further, I find that the plaintiffs were unable to show that there was a resolution made by the managing company of the estate which gave rise to a legal obligation on the part of the defendants. The plaintiffs did not demonstrate that there was ever a resolution to indicate what unauthorized height of a hedge was. In the minutes of April 18, 2021, the 1st defendant suggested that he would trim his fence after the 1st plaintiff demanded that the fence be trimmed to the level recommended by management of the estate. A suggestion basically amounts to something put forward for consideration and it cannot certainly amount to a resolution!. Further, Pw1 conceded during cross examination that the minutes of April 18, 2021 do not indicate the height of the hedge, that the wording “6 feet” does not appear, and that there is no mention of what acceptable height is.
50. There is also no evidence indicating that it was unanimously resolved that the defendants ought to trim their hedge fence. The document at page 56 of plaintiff’s bundle indicates that 3rd plaintiff called upon the members to vote and he stated that “ My vote is YES to remove the hedge fence by Friday”. There is no evidence of the results of the votes, nor evidence of other votes.
51. The plaintiffs have to satisfy this court that the defendants had unauthorized intrusion or invasion of its land for the court to infer trespass. DW1 stated that the defendants’ hedge does not extend to the neighbors compound and that even 3rd plaintiff’s hedge is similar to that of the defendants. A perusal of photograph no.63 in plaintiff’s bundle buttresses this claim of the defendants.
52. From the evidence presented by the Parties, I discern that the defendants hedge is on the boundary of the houses. The plaintiff has not availed any report to indicate the nature and extent of the encroachment of the hedge into their compound. It is also not fathomable as to how the wooden fence, the hedge fence and the flower pots were all encroaching on plaintiffs’ property at once.
53. I find that there is no tangible evidence of encroachment onto the plaintiff’s property, hence trespass has not been proved.
54. On nuisance, I make reference to the case of *Nakuru Industries Limited v S.S Menta & Sons* (2016) eKLR, where the Court defined ‘Nuisance’ as was stated in *Clerk and Lindsell on Torts* at page 1354 para 24-01 as follows:-
- “An act or omission which is an interference or with disturbance of or annoyance to a person’s rights used or enjoyed in connection with land. It is caused usually when the consequences of persons actions on his land are not confined to the land, but escape to his land causing an encroachment and causing Physical damage or unduly interfering with the neighbours use and enjoyment of his land.”
55. This court has already pronounced itself that there was no trespass by the defendants upon the properties of the plaintiffs. Similarly, there is no plausible evidence to indicate that the hedge of the defendants and their flower pots were a nuisance to the plaintiffs. Pw1 claimed that the hedge of the defendants had brought insects unto the homestead of the plaintiffs. However, and as noted by the defendants, insects are part and parcel of biodiversity and are cross boundary creatures. What more, other residents too have hedges as noted in photograph on page 63 of plaintiffs bundle.
56. In view of the fact that the claims of Trespass and Nuisance have not been proved, then the claim of damages must fail.



57. In the final analysis, I find that this is a case where the parties could have benefited from some kind of Alternative Dispute Resolution Mechanisms, seeing that they are neighbours in a close knit community of only 8 house owners. Sadly, attempts at an out of court settlement did not bear fruits.
58. Nevertheless, for the harmonious co-existent in the estate, the parties and by extension the home owners need to come up with clear rules and regulations to guide them on what can give rise to legal obligations.
59. As at now, I find that the plaintiffs case has not been proved on a balance of probabilities. The same is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Shah for defendant

Mwachofi for plaintiff

Court assistant: Vanilla

