



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 1157 OF 2000
ANNE CHERONO CHEROIGIN.....PLAINTIFF
VERUS
FRED NGUNJIRI.....DEFENDANT

JUDGMENT

The plaintiff filed this suit in a plaint dated 17th July 1998 seeking for orders of:-

- a. An injunction restraining the defendant from constructing on the common walls between L.R No. 330/834 and L.R No. 330/833 without the consent of the plaintiff.
- b. Injunction compelling the defendant to demolish the constructed parts of the common walls between L.R No. 330/834 and L.R No. 330/833 and to restore the same to its original state.
- c. That the defendant pays the costs of this suit.

The facts as per the plaint are; the plaintiff is the proprietor of all that parcel of land situated in the city of Nairobi in the Nairobi area known as L.R No. 330/834 while the defendant is the proprietor is the proprietor of all that parcel of land situated in the city of Nairobi area known as L.R No. 330/833. The said parcels of land are neighboring parcels of land on which has been constructed two masonettes joined by a common wall and sharing a common fence between their respective compounds measuring approximately two meters high. The said walls remained largely unhampered with since the plaintiff bought her house in the year 1990 and all minor alterations have been with the consent of the developer of the estate in which the house is developed and the previous owners of L.R No. 330/833. The structure of the entire estate in which the house is developed ,the height of the walls erected and each detail of its plans and specifications were part of the bargain for purchase of the said L.R No.330/834 and were specifically contracted for the agreement for sale dated 30th May 1990 and further the plaintiff is an owner as a joint tenant of the common walls between LR No. 330/834 and LR No. 330/833. The said walls cannot be altered or in any way interfered with without her prior consent. It's further averred that sometimes during the end of June 1998 the defendant without prior consent of the plaintiff interfered with the common walls between L.R No 330/834 and 833 by commencing construction and adding thereon several courses of masonry and raising the level of the common walls by one meter of three meters. It is contended that the action of the defendant was unlawful because:-

- a. The said construction has been commenced and continues to be carried on without the consent of the plaintiff as a co- owner of the said walls.

b. The said construction of the wall comprises the plaintiffs bargain on the structure of the walls which bargain was part and parcel of the sale agreement and forms part of the proprietary rights on LR No. 330/834.

c. The said construction has interfered with the plaintiff's water booster pipe and electric cables and the same cannot be repaired without demolishing part of the said wall.

d. The said wall has cast a shadow over parts of the plaintiff's premises and has interfered with the plaintiff's natural right of ancient lights on her premise which had been secured by the original design of the premises.

She claimed to have written to the defendant asking that he stops any further construction and that he demolishes the parts added but the defendant has refused to do so and has begun to hurriedly complete construction. Therefore, the plaintiff avers that unless the defendant is restrained by this honourable court he shall continue to construct the said wall in contravention of the plaintiff's rights.

In reply, the defendant filed his statement of defence dated 25th November 1998 where he denied the allegations raised by the plaintiff in her plaint. He added that the agreements alluded to by the plaintiff and the third parties were not binding upon him as he was not a party thereto. He stated that the plaintiff's consent cannot be unreasonably withheld nor premised upon legally untenable, irrational and egocentric conditions. He stated that the construction was done in an architectural and technical sound and manner. He added that the plaintiff had no right to ancient lights in respect of the suit premise L.R No 330/834.

Parties gave their evidence in court. The plaintiff stated that she was a retired banker from Central Bank. The defendant was an adjacent neighbor adding that what separated them was a common wall. The defendant came to the estate in April 1998 when the wall was 2 meters high at the front and the back wasn't very high. She contended that the front wall was high as two layers of stone had been added. She confirmed that the wall was jointly owned by the two parties herein and therefore they both have equal rights. She told the court that before the defendant came, she had a good neighbor one Tom Obondo. She found the wall as it was as Mr. Obondo had not made any changes on the wall. The wall was about 2 meters long, flat and had spikes. The houses were similar except the defendant's house. The defendant renovated the entire house together with the wall and in the process he raised the front wall by two layers of stone which was now slightly 4 meters. At the back of the houses, the common wall had only 2 layers of stone and that her water pipes and electricity had been laid on top of the wall at the back. She contended that the defendant sent his driver one Jack to consult with her about the wall construction. She informed him that she wanted the wall as it was but the defendant insisted that the defendant would go ahead with the construction and subsequently a heated argument took place between the two parties herein and it took the intervention of Mr. Songa the chairman of the security committee of the estate to separate the two. That despite her opposition, the defendant began construction in June 1998. She wrote to the defendant protesting on the construction and the security committee also directed the defendant to cease further construction as it was adverse to her interest. That by the time she came to court, the defendant had added 2 layers of stone on the wall and another 2 meter high gable on the top of the wall and it was the gable that irked her the most. As a result of the defendant's construction, a portion of her house and in particular the bathroom on the ground floor and the corridor was deprived of natural light is darkened and she has had to have to keep the electricity lights in her house on. She further stated that the wall raised changed the character of her house so that it looked ugly and this had lowered the value of her house. The defendant built a very big water tank that sits on the wall which is a danger as the wall was not strong enough to hold it. She contended that one part of the tank was damp and dark due to the seepage of the water. The danger appeared real to her because the tank that had been installed by Mr. Obondo the former owner of the house had collapsed and shattered her windows. The railed wall at the back in essence ended up resting on the electric wires and water pipes and if anything were to happen it would be difficult for her to act on the water pipe and electricity wires or to repair them. She believes that the construction undertaken by the defendant were without the approval of the City Council therefore illegal. She concluded that she would be happy if the defendant was ordered to return the wall to the condition it was before he constructed on it; the tank dismantled and a reasonable one put up.

In the course of her evidence, the court visited the site on 19th November 2014 the plaintiff's house is situated at Gitanga Hill Court Estate house No 12. At the site the plaintiff took the court through the wall and the house. The court also had a look at the tank that had been constructed by the defendant. The wall is between house No 11 and 12 with an addition of two layers. When compared to the wall of the immediate another neighbor, this wall is high. The plaintiff stated that on the front part of the wall, the course is not casting any shadow on her property. She confirmed that the previous owner built the wall high to her comfort and she did not want it higher than the way it was currently. She acknowledged that other neighbors had modified their walls and gates but added that her complaint was on her wall and not so much on what her neighbors had done. She further stated that she complained about the water tank the defendant had installed on her wall which was too big and as a consequence it was weakening her wall. She added that water was seeping at the wall where the tank had been installed and the wall had started changing its color to black an indication that the wall was weakening. She clarified that the tank had not protruded over her wall. Inside the house the wall was black an indication that water was seeping and the water and her claim that this water was from the tank that had been installed. The plaintiff further stated that the addition of the wall had interfered with her cabling insisting that before the two layers of the wall was constructed she was able to see her cables but now she is unable to see the two pipes; one for the water and the other for electricity and felt like she had no control over the two pipes. She complained that the two pipes had been plastered on the wall and should anything happen she would have a problem repairing the wall. On cross examination, she stated that she was consulted on the two course wall but she declined. She added that the slanting part was added with the 2 courses and it affected the light to her house. She contended that before the wall was constructed she enjoyed natural lighting in her house. She stated that the defendant would have put the tank down and not as he had installed it.

The defendant on his part stated that he was the registered owner of LR No 330/833 that the two properties are adjacent to one another and share the subject common boundary. He bought this property by a private treaty as a result of a dispute between Mr. Obondo and Co-operative Bank Limited. The house had been unoccupied for 2-3 years and that when he purchased it, it was in a dilapidated state and the wall in question was in a bad state. He sought the plaintiff's consent to make improvements on the common wall and the increase of the wall by two courses. The plaintiff indicated that the common wall had been erected by Mr. Obondo together with the metal spikes thereon. He further stated that property owners within the court had erected common party and front walls as well as fabricated gates which were different and generally reflected the diverse taste of their owners. The plaintiff allowed him full access to her compound for purposes of executing the construction and that the plaintiff also consented to the removal of her one course brick work on her side. The gable was also constructed with the plaintiff's consent adding that the work in respect of the gable beam and the props were indeed secured from the plaintiff's side. He contended that the plaintiff's attitude suddenly changed in July 1998 after the court meeting of 30th June 1998 which was hurriedly convened after he removed the black polyphone protective vertical hoarding that had been erected around the façade. He was not invited in that meeting but was later invited to a meeting on 14th July 1998 but walked out of the meeting when he inquired from the committee if they would yield to any other decision other than the demand that he brings down the construction of the wall and reinstating his house to its original state. He also complained on being discriminated as other house owners had made improvements on their houses yet he was being asked to bring down his. He stated that when his workers sought for access to plaster the plaintiff's wall, they were denied access by the plaintiff's servant and what followed was a letter she addressed to him. He attempted to seek audience with the plaintiff on the said letter but he was warned by the plaintiff that she would go to court unless he demolished the walls. He hoped that they would amicably resolve the matter between the two of them as neighbors but he was served with the court process. He stated that he put up a water tank since the place had perennial water shortages. He contended that the water tank was not big as compared to those erected by other neighbors. He honestly believes that this dispute was not only sparked off and persistently sustained all along but was also rendered unresolved by the plaintiff's unrelenting malice which has cost him a lot in terms of time and money and lack of emotional well-being such that he had to vacate the said house and let it out. He stated that the plaintiff's house had not depreciated in value since other neighboring houses had also modified their houses. He confirmed that he received a letter dated 7/7/1998 that stated that the modification he was doing was not acceptable. The wall did not interfere with the water pipes as the entire parts were not integrated with the wall. He added that the entire part of the wall was as was done by the developer. He stated that his water tank had been constructed with

safely measures and that there was no crack on the wall. He stated that the black wall was usually a phenomenon with machine cut stones and that the blackness was as a result of oxidation due to the weather conditions since the machine interferes with the stones as it cuts it. He added that the fact that it was black that did not compromise with the structure. He added that a crack in the wall could be brought about by weakness in the structure. He stated that the wall was stable and that if the same was reverse it would have fallen much earlier. He added that she had a role to see to it that the construction were done professionally and that one had the right to complain to the city council if he was doing a shoddy job but the plaintiff did not lodge any complaint to the City Council.

Parties filed their written submissions. This is a summary of the parties submissions. The plaintiff in her submissions reiterated the contents of her pleadings and added that since both parties agreed that they owned the wall any major alteration of the same required the mutual consent of both parties herein. She submitted that the defendant's unilateral decision to alter the wall without obtaining the plaintiff's consent was unlawful and contemptuous of the plaintiff's rights. The defendant's modification affected the face of the estate and in particular the plaintiff's property .She contended that the bargains she had made in acquiring her property and the plans she cherished were now being removed by the defendant. The kind of modification done by the defendant required the approval of the planning department of the city council of Nairobi and therefore without such approval the modifications complained of are unplanned and illegal. She therefore wants the wall returned to the state it was before.

The defendant in his submissions stated that the plaintiff's claim on interference on her natural right of ancient lights .He relied on **Osborn's Concise Law Dictionary 8th Edition at page 25** where ancient light was defined as, "*The right to access of light to any building actually enjoyed for the full period of 20 years without interruption when the light becomes absolute and indefeasible unless enjoyed under some express grant*". He stated that there was no right at common law to the unobstructed access of light to one's windows but such a right might be acquired by prescription. The defendant further submitted that the plaintiff's water pipes and electric cables rested freely on her backyard on the first floor slab and that the two amenities were the way they had been laid by the developer. The plaintiff had not proved that there was water flowing on the wall and that the black stain was as a result of pumice which was caused by oxidation due to weather conditions.

DETERMINATION

I have considered the pleadings, the evidence tendered in court and the written submissions filed by the parties. What the parties are feuding about is on a boundary party wall. Who has rights over this wall? I have perused the English authority of **Watson -vs. - Gray CH.D (1874 – 80) All E.R. page 1001** where the meaning of "***boundary party wall***" is discussed in that case. The ownership of the party wall was given expressly in a deed. However, the court proceeded to explain that by party wall is meant:-

- a. as describing a wall erected on land belonging to the owners of adjoining lands in equal moieties as tenants in common.**
- b. where the wall is divided into long individual halves *one half standing on the land of each of two adjoining owners.***
- c. as applied to a wall which belongs entirely to one of two owners adjoining lands but which is subject to easement of user belonging to owner of other moiety as used in many building Acts.**
- d. as applied to a wall longitudinally divided each moiety *being subject to an easement of user by the owner of the other moiety.***

From the above case law it is clear that both parties herein have equal rights to the boundary party wall. The plaintiff has complained about the defendant's construction of the wall by adding two layers on the wall. The effect of the layering is that the plaintiff's house could not get the natural lighting as it used to before. The plaintiff further complained that the layering of the wall interfered with her electrical wiring and water pipes other than being an eye sore. The defendant on the other had had wanted to improve his

wall by layering the party wall and constructed a water tank. The defendant explained that the plaintiff had consented to his layering of the wall and when he was in the middle of the construction she withdrew the consent. This was followed by a meeting at the estate and a letter by the plaintiff registering her protest against the defendant's actions. The defendant further stated that following the plaintiff's consent to construct of the wall, he asked the plaintiff if he could bring down the bricks that she had constructed on her wall. I am inclined to believe the defendant on this initial consent given by the plaintiff because had he not obtained the consent the defendant would not have crossed into the plaintiff's compound for the constructions he undertook. But the plaintiff having withdrawn her consent it was incumbent upon the defendant to ensure that his construction should not prejudice the rights of the plaintiff. I note that the defendant claimed that when he purchased the house he found the house dilapidated. The plaintiff did not object to the defendant's claim. The defendant further stated that other house owners in the same estate had improved their houses and that he felt discriminated. I also note that by the time the plaintiff came to court, the defendant was almost completing this project. I also find that the plaintiff appears to be prosecuting a case (regarding authorizations for construction, and related matters) that belonged to the County Government of Nairobi which are well-endowed with forensic resources and ought to move to the relevant Court. The defendant stated and I find it righty so that the plaintiff had conceded in the said development.

It is therefore my finding that the plaintiff has not established a *prima facie* case with a probability of success; the plaintiff would not suffer an injury which could not be compensated in damages and the balance of convenience tilted in favor of declining the prayer for an injunction. However the defendant has a duty towards the plaintiff when improving his wall. It is my finding that the defendant must complete the wall to the satisfaction of the plaintiff plaster it and make it look well-dressed. The court visited the site and it is apparent that the problem of natural lighting was there before the wall as a result of the design of the houses. I find that the wall does not block the natural light to the plaintiff's house. The injunction sought by the plaintiff was overtaken by events. As neighbors the parties can work together on making the wall on the side of the plaintiff well-dressed. There is no need to demolish the wall, it is a dividing wall and can be maintained with some improvement. The issue of the danger the wall is causing was not sufficiently established by the plaintiff. In the event of any damage as a result of the said wall then the plaintiff can be compensated by the defendant if she proves that the damage was as a result of the wall that is in existence. The parties are neighbors and have been in court for quite some time. To promote good neighborliness I will not make any order as to costs.

Dated signed and delivered this 13th day of October 2017

R. E OUGO

JUDGE

In the presence of;

The Plaintiff Absent

The Defendant Absent

Court clerk Charity