



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 475 OF 2018**

**DR JOHN NDUBA.....PLAINTIFF**

**=VERSUS =**

**DIRECTOR OF SURVEYS.....1<sup>st</sup> DEFENDANT**

**EDWARD ELIJAH MWENDA.....2<sup>nd</sup> DEFENDANT**

**JUDGEMENT**

**Introduction and litigation history**

1. The Plaintiff and 2<sup>nd</sup> Defendant are neighbours currently residing at L.R No. 13843/1 and 13843/2 respectively. The suit herein was initially commenced by the Plaintiff vide a plaint dated 6<sup>th</sup> November 2018.

2. The 2<sup>nd</sup> Defendant upon being served with the plaintiff's pleadings and summons herein, filed a statement of defence and counterclaim dated 27<sup>th</sup> November 2018. In the counterclaim, he sought for dismissal of the Plaintiff's suit and the following reliefs:

*i. A permanent injunction do issue restraining the Defendant to the counterclaim, his agents, servants, employees and/ or people working under him from entering, encroaching, trespassing or in any other way interfering with the Plaintiff's quiet possession of property known as LR No 13843/2.*

*ii. An order directing the Defendant to the counterclaim to move, at his own cost, the live fence encroaching onto property LR No. 13843/2*

*iii. Damages for trespass.*

*iv. Cost of the survey and beacon re-establishment process undertaken with respect to property LR No. 13843/2*

*v. Costs of this suit and interest thereon.*

3. On 22<sup>nd</sup> June 2021, before the matter could proceed for hearing, the Plaintiff's Counsel informed the Court that the Plaintiff's prayers in the plaint had been overtaken by events and that he had therefore decided to abandoned his claim. This necessitated the suit to proceed only with the 2<sup>nd</sup> defendant's counterclaim that had been filed together with the Statement of Defence. The 1<sup>st</sup> Defendant never entered appearance in the matter and was also not been listed as party to the counterclaim.

4. Pursuant to the court's directions, the matter was set down for hearing and it subsequently proceeded for hearing of the counterclaim on 26<sup>th</sup> October 2021 and 3<sup>rd</sup> November 2021. Later parties were granted time to file and exchange their respective written submissions.

**2<sup>nd</sup> Defendant's case/Plaintiff to the Counterclaim**

5. In his evidence-in-chief, the 2<sup>nd</sup> Defendant relied on his defence, counter-claim, witness statement and supplementary list and bundle of documents that were part of his trial bundle dated 26<sup>th</sup> October 2021.

6. In his testimony, he admitted to being a neighbour to the Plaintiff for over eight (8) years after purchasing the property from Mr Simeon

Obae and Mrs Rose Obae. He stated that during this period, the Plaintiff's dogs would sneak into his property, causing havoc and even killing his chickens and rabbits.

7. The 2<sup>nd</sup> Defendant further stated that despite several complaints, the Plaintiff had failed to act thus necessitating him to erect a perimeter wall. It is during this process that he discovered the existing live fence had encroached on his property by about 3 meters.

8. He further stated that he had also informed the previous owner of the property, Mr. Simeon Mbae about the issue but was advised to seek for re-establishment of the beacons. He averred that the nuisance with the dogs was still ongoing since the fence was not sealed off.

9. He also relied on the surveyor's report dated 21<sup>st</sup> November 2018 which had been produced in his evidence in chief. It was also his testimony that despite the Plaintiff not taking part in the survey process, he was equally aware of the said report. He reiterated that he was even willing to share the cost of re-establishment of the beacons with a view of correcting the anomaly but there was no cooperation from the Plaintiff. He reiterated that the beacon re-establishment exercise was meant to establish the true position of the fixed boundaries.

10. He further stated that he had filed a counterclaim to the Plaintiff's so as to have the matter conclusively resolve by the Court. The dispute had been in existence for a considerable period of time and has continuously affected him.

11. In his written submissions that were filed in Court, he urged the Court to find that the proper procedure for bringing this dispute to Court had been followed and urged the Court to adopt the Surveyor's report dated 21<sup>st</sup> November 2018 in its determination of the matter.

### **Plaintiff's case/Defendant to the Counterclaim**

12. The Plaintiff's claim having been abandoned, he proceeded to rely on his reply to the defence and counterclaim as evidence of his case.

13. It was his case that the 2<sup>nd</sup> Defendant never raised the issue of any dispute with the boundary for the eight years (8) that they had been neighbours.

14. He averred that it was the 2<sup>nd</sup> Defendant who has been frustrating and harassing him with intentions of trespassing on his land. He denied ever committing any acts of trespass onto the 2<sup>nd</sup> Defendant's land.

15. In his evidence in chief, he testified that he was a retired medical doctor who knew the 2<sup>nd</sup> Defendant as his neighbour. He stated that he purchased his property L.R No. 13843/1 in 2010 from Simeon Obae and since the acquisition of the said property, he had never interfered with the fence.

16. He further stated that there have been several issues with the 2<sup>nd</sup> Defendant and that the most frustrating moment was sometimes in July 2018 when the 2<sup>nd</sup> Defendant broke into his fence with a group of workers to put up a perimeter wall. It was his further testimony that the issue went out of control and was referred to the area OCS who directed them to the area chief. The chief then informed him that a surveyor would be sent to undertake a survey so as to try and resolve the dispute.

17. In respect to the survey that was undertaken, he disputed the contents of the said report. It was his testimony that he was not aware of the same and he never attended any of such exercise and he was surprised as to how the same was done without accessing his property.

18. In respect to the removal of the fence and reestablishment of the beacons, it was his testimony that the 2<sup>nd</sup> Defendant equally had an obligation to contribute to the said costs and he could not be condemned to do so on his own.

19. In cross examination, he conceded to being aware of the survey exercise that was undertaken but denied ever taking part in the same.

20. In his written submissions, dated 3<sup>rd</sup> December 2021, he relied on the case of ***Philip Ayaya Aluchio vs Chrispinus Ngayo (2014) eKLR***, while submitting on the context of measuring damages for trespass. He asserted that in this case the Defendant had neither tendered the estimated damage cost nor the actual cost of restoration.

21. He also argued that the act of trespass is a tort that would be subject to the Limitations of Actions Act. Considering that the 2<sup>nd</sup> defendant had admitted to planting and tending to the live fence and had also never raised the issue of encroachment with the previous owner Mr Obae, the claim of trespass would be extinguished by Section 4(2) of the Limitation of Actions Act. For this, He relied on the case of ***Aquilla Properties Limited vs Bhupendra Patel (ELC 173 Of 2012 Nairobi)***.

22. Additionally, it was argued that the threshold set in ***Giela vs Casman Brown [1973] E.A 353*** case for granting a permanent injunction had not been proven. Consequently, the Plaintiff prayed that the counter-claim be dismissed with costs.

### **Analysis and Determination**

23. Having considered the pleadings of the parties, oral evidence, documentary evidence and written submissions, the issues which in my opinion arise for determination before this court are as follows: -

#### ***i. Whether the correct procedure for the resolution of the fixed boundary dispute was followed?***

**ii. Whether the 2<sup>nd</sup> Defendant/Plaintiff in the counterclaim is entitled to the reliefs sought?**

**iii. Who should bear costs of the counterclaim?**

**Issue No. 1**

**Whether the correct procedure for the resolution of the fixed boundary dispute was followed?**

24. From the evidence tendered by the parties herein, it is evident and clear that the boundary in question is a fixed boundary. The Chief Land Registrar upon receiving the initial complaint had directed the parties to the office of the 1<sup>st</sup> Defendant, the Director of Survey.

25. The Director of Survey is empowered under Section 15-17 of the Land Registration Act to alter and rectify boundary lines or position of a boundary based on a cadastral map based on subdivision plan, combination plan or any other approved plan necessitating the alteration of the boundary.

26. In the instant case, the 2<sup>nd</sup> Defendant/Plaintiff in the counterclaim submitted that the proper procedure for resolution of the boundary dispute herein had been followed. It was the 2<sup>nd</sup> Defendant's submission that he had a report from the Regional Surveyor, Nairobi dated 21<sup>st</sup> November 2018, which report had established that the Plaintiff's property had encroached on his land L.R No. 13843/2 by 2.8 metres. It was his further submission that the Plaintiff had equally hired his own surveyors who had also prepared a report dated 20<sup>th</sup> September 2019 that adopted his report.

27. The Plaintiff did not produce any surveyor's report save for stating in his testimony that the contents of the report dated 21<sup>st</sup> November 2021 was prepared without the surveyor accessing his Plot L.R No. 13843/1 and hence the same was erroneous.

28. Having perused the Surveyor's report dated 21<sup>st</sup> November 2018 which found an encroachment to L.R No. 13843/2, this court is satisfied that the process by the Regional Surveyor in visiting the site and subsequently preparing the said report was proper and within the law. As such, it is the finding of this Court that the proper procedure was followed in resolving the dispute herein and the said report is adopted for consideration.

**Issue No. 2**

**Whether the 2<sup>nd</sup> Defendant/Plaintiff to the counterclaim is entitled to the reliefs sought?**

29. It was the 2<sup>nd</sup> Defendant's testimony that despite relevant Government Authorities and also the 1<sup>st</sup> Defendant reporting that the Plaintiff had encroached on his land, the Plaintiff had refused to relocate the fence claiming that the 2<sup>nd</sup> Defendant should bare the costs of the same.

30. The Plaintiff on the other hand had also maintained his position that when he bought his property L.R No. 13843/1 he already found the 2<sup>nd</sup> Defendant in occupation and as such he was not obligated to relocate the boundary and neither could he be faulted for any actions on encroachment or trespass.

31. The rule of evidence is clear that the burden of proof was upon the 2<sup>nd</sup> Defendant to prove his case so as to be entitled to the reliefs sought in the counterclaim.

32. The 2<sup>nd</sup> Defendant testified that when he initially bought the property from the previous owner Mr. and Mrs Simeon Obae he was not aware of the said encroachment and that it was only until he had brought the contractor to do a perimeter wall on his property that the encroachment was visible. He resorted to bring the issue to the attention of the Plaintiff but the same was not resolved.

33. He subsequently wrote to the Land's Registrar who referred him to the Surveyor. He was able to engage a government surveyor who prepared the report that actually confirmed that there was an encroachment of about 2.8 metres by the Plaintiff's property to his property.

34. In relying on the facts as presented it is the finding of this Court that the Regional Surveyor who was an expert properly arrived at his conclusions in respect of the encroachment of the LR No. 13843/1 to L.R No. 13843/2.

35. The Plaintiff's action on the 2<sup>nd</sup> Defendant's property amounted to continuous trespass on the suit property. It was also apparent from the 2<sup>nd</sup> Defendant's testimony that the Plaintiff even after being prevailed upon on several occasions refused and or declined to move the fence and as such the 2<sup>nd</sup> Defendant is entitled to judgment against him for a permanent injunction to restrain any further acts of trespass.

36. **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."**

Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership.

37. In **Clerk and Lindsell on Torts, 17<sup>th</sup> Edition page 1354 paragraph 24**. It is stated;

*“Nuisance” is defined as an act or omission which is an interference 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 a person’s actions on his land are not confined to the land, but escape to his neighbours land causing an encroachment and causing physical damage or unduly interfering with the neighbour’s use and enjoyment of his land”.*

38. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of *Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J.*, stated:

*“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...”*

39. Further, In *Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR P. Nyamweya J.* (as she then was) held:-

*“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ trespass”*

40. It was the Plaintiff’s submission that the 2<sup>nd</sup> Defendant purchased his property in 2002 and hence the action of trespass as was pleaded by the 2<sup>nd</sup> Defendant was time barred pursuant to section 4 (2) and section 7 of the Law of Limitation of Actions Act Cap 22 since it was brought to court after the stipulated time period.

41. On this aspect, it is the Court’s finding that the Plaintiff’s action amounted to continuous trespass which actions cannot be barred by the Limitation of Action Act. As such the Plaintiff’s assertion on the Limitation of Actions Act is not applicable in the circumstances herein.

42. Granted that Trespass is actionable *per se*, the Court has noted that the 2<sup>nd</sup> Defendant did not indicate any amount to guide the Court in assessing general damages for trespass. The Court would have expected the 2<sup>nd</sup> Defendant to do so in his submissions. None was provided. That notwithstanding, this Court is still obligated to consider the same. Taking that into consideration and noting the duration of the trespass, this Court is inclined to award a figure being a nominal award of general damages for trespass. As stated, the 2<sup>nd</sup> Defendant did not provide the value with which the Court is to work with. The Court therefore proceeds to award a figure of **Kshs.200,000/-** being nominal damages for trespass considering the length of time that the trespass has occurred.

43. On the prayer for permanent injunction, from the 2<sup>nd</sup> Defendant’s evidence stated above, it is my finding that he has met the threshold for the grant of the same. Similarly, the Plaintiff had no right to encroach over his land in any manner. As such this prayer is meritorious and the same is for granting.

44. On the costs incurred of the survey and beacon re-establishment process that was undertaken with the respect to property of L.R No. 13843/2, the same was akin to claim of special damages which must be specifically proved. The undoubted principle is that special damages must be pleaded and specifically proved. Undoubtedly, the Plaintiff made some payments towards the costs of survey and beacon re-establishment, however the evidence that was tendered showed only a receipt of Ksh 40,000/- that was paid by the 2<sup>nd</sup> Defendant towards the said costs and as such, I will proceed to grant the same.

### **Issue No. 3**

#### ***Who should bear costs of the counterclaim?***

45. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

46. In the instant case, it was not disputed by either party that the suit involves a dispute between parties who had been neighbours for several years. It is worth noting that when faced when such suits courts should ensure that the dispute before is amicably resolved without further straining their relationship. It is therefore my view that imposing costs to either party in such a matter would not be appropriate. In the circumstances, I direct that each party will bear own costs of these proceedings.

### **Final orders**

47. In conclusion, I find that the counter claim by the 2<sup>nd</sup> Defendant against the Plaintiff has been proved on a balance of probability and I hereby make the following final orders: -

Judgement be and is hereby entered for the 2<sup>nd</sup> Defendant/ Plaintiff in Counterclaim as follows;

***i) A permanent injunction do issue restraining the Defendant to the counterclaim, his agents, servants, employee and or people working under him from entering, encroaching, trespassing or in any other way interfering with the Plaintiff’s quiet possession of property known as L.R No. 13843/2.***

*ii) The Defendant to the counterclaim is directed to move, the live fence encroaching onto the property L.R No. 13843/2, together with any other fixed or moveable fixture that has encroached onto L.R No. 13843/2 at his own costs within sixty (60) days from today.*

*iii) That should the Defendant not have complied with order (ii) above after the sixty (60) days period, the Plaintiff in the counterclaim be at liberty to do so.*

*iv) The Plaintiff in the counterclaim is awarded nominal damages for trespass in the sum of Kshs 200,000 against the Defendant.*

*v) The Defendant to pay ksh 40,000 being costs of beacon reestablishment incurred by the Plaintiff in the counterclaim.*

*vi) Each party to bear their own costs of the suit.*

48. Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY 2022.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Ms. Ndunda h/b for Ms. Muendo for the Plaintiff/Defendant in the Counterclaim.**

**Mr. Gitonga for the 2<sup>nd</sup> Defendant/Plaintiff in the Counterclaim.**

**Court Assistant; Caroline Nafuna.**

**E. K. WABWOTO**

**JUDGE**