



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 225 OF 2008

CHRISTOPHER JOHN KIRUBIPLAINTIFF

VERSUS

ESTATE SONRISA LIMITEDDEFENDANT

RULING

This is an application by the Plaintiff dated 22nd August 2008 in which he seeks orders against the Defendant in the following terms:

- “1
- 2

3) That an injunction restraining the Defendant whether by himself or through his agents or servants and/or in any other manner whatsoever from trespassing on and/or continuing to build or erect structures on the Plaintiff’s property known as Plot No. Kwale/Galu Kinondo/99 (hereinafter referred to as ‘the Plaintiff’s property’) pending the hearing and determination of this suit.

4) That a mandatory injunction compelling the Defendant to forthwith pull down and remove the wall as it encroaches onto and are built by the Defendant on the Plaintiff’s property”.

5) That the costs of this application be provided for”

The application is supported by an affidavit sworn by the Plaintiff’s manager, Benard Pownall on 22nd August, 2008. The grounds set out in the application are:-

- (a) The Defendant has trespassed on the Plaintiff’s property and erected a wall by reason of which the Plaintiff has and continues to be deprived of the use and enjoyment of his property and suffer loss and damage.**
- (b) The Defendant threatens and intends, unless restrained by this Honourable Court, to continue to trespass upon the Plaintiff’s property as aforesated and building thereon.”**

The application is founded on a Plaint dated 22nd August 2008 in which the Plaintiff seeks the following reliefs:

- (a) An injunction restraining the Defendant whether by himself or through his agents or servants and/or in any other manner whatsoever from trespassing on and continuing to building and/or erect structures on the Plaintiff's property;**
- (b) An order that the Defendant do forthwith pull down and remove the wall that encroaches on the Plaintiff's property;**
- (c) Damages**
- (d) Further or other reliefs;**
- (e) Costs of and incidental to this suit"**

In its Defence dated 31st October, 2008 the Defendant Company denies that the wall complained of has been put on the Plaintiff's plot as alleged and that there is no encroachment. Second, that the dispute between the Plaintiff and Defendant is over a boundary of the Plaintiff's and Defendant's plot and this court therefore lacks jurisdiction in the first instance to determine this suit as such jurisdiction has been bestowed upon the Land Registrar by the Registered Land Act, Cap. 300 Laws of Kenya. The Defendant also filed an Affidavit in Reply sworn by a director of the company, Zahir Kara on 24th January, 2011. The Defendant also filed Grounds of Opposition which set out the following grounds:-

- “(1). The application has no basis in law and in fact.**
- (2). No special circumstances exists to warrant the granting of the orders of interlocutory mandatory injunction sought.**
- (3). The application has not met the conditions for granting interlocutory injunction**
- (4) The suit on which the application has been brought is incompetent for want of jurisdiction. The application therefore lacks foundation or substratum.”**

By consent the parties filed and exchanged written submissions which are on record.

I have considered the application, the affidavits and submissions by Counsel. The questions for the determination of the court in this application are; inter alia:-

- 1. Whether on a prima facie basis, the Defendant has erected a wall on the Plaintiff's property/Plot No Kwale/Galu Kinondo/99 thereby encroaching and trespassing on the Plaintiff's property?**
- 2. If the answer to the above is in the affirmative, whether the Plaintiff's application has met the threshold and criteria for the grant of Mandatory Injunction.**
- 3. Whether the court has jurisdiction to determine this case ie. Is it a boundary dispute or a land dispute?**
- 4. Whether on a prima facie basis the Defendant has erected a wall on the Plaintiff's plot No. Kwale/1 Galu Kinondo/99?**

The Plaintiff to support that the wall is on his land has exhibited what he calls a survey plan marked “BP - 2”. He claims that it was obtained from the Provincial Surveyor and it shows that the location of the Plaintiff's property in relation to the property of the Defendant Plot No.98. I have carefully looked at the said plan. It is a sketch or drawing but there is nothing to show that it is an official document from the Survey Department or office. It has no markings or official stamps. It is a mere piece of paper whose

source the court cannot tell. It is not certified by the Provincial Surveyor.

The Plaintiff's claim of trespass also relies on a Survey Report by one Bartholomew C. Mwanyungu a Private Land Surveyor. In his Report dated 17th March 2008; the Report is headed:-

“RE-LOCATION/RE-ESTABLISHMENT OF PLOTS 47 AND 99 GALU

Authority:- The work was given to us through a verbal discussion and negotiation with Mr. Benard Pownall of Media Craft Services Mombasa.

Datum:- Relevant data was obtained from Survey of Kenya offices, Mombasa and others from our head office in Ruaraka, Nairobi.

Data collected covered the entire area of interest

F/R NO. 216/67,145/84,244/151,166/20,184/169 ANO.R.I.M. sheet Map No.9 were used to help finalize the work.

Method:- A ray trace traverse was set between beacon No.43a and 46a.

As wing of – 55, 50 41 was obtained and a scale factor or 1.00025 which is acceptable according to survey regulation.

The beacons 98b,TNI (A.I.C), 99/a,98/a, 48c and 47a, were searched and found firm on the ground. All were searched from one station traverse STN PN2 which was oriented to PNI.

Beacons defining boundaries of plot No.99 were also searched. Beacon No.99/a and 99/d were located and their position very firm (not vandalized). Beacons 99/a and 99/c were established and fixed on the ground using the scaled distance from the R.I.M.

Plot No. 47 has been encroached by the Neighbours of Plot No.50 as shown on the Map attached with this letter.

We established that, the building that is being built has encroached in the plot No. 47. Beacons of plot No. 47 were established 47/6 and 47/c were found on the ground. 47/a and 47/d were re-established; they had been removed by the person building.

Comments: - The plots acreage tallies with the ones provided on the title deed.

- **There is power line and a graded rough road serving the plots.**
- **Plot No. 47 touches the beach shore line.**

Survey done By: Bartholomew Mwanyungu

**Pimatech Licensed Surveyor
MOMBASA**

Date: 17/03/2008

CC: Omondi Waweru Advocates

C.C. Media Craft Services”

It is a technical Report that the Court does not understand unless it is produced in Court in a full trial. But of significance, is that there is no allegation of any encroachment by Plot 98 on Plot 99. The

encroachment therein refers to Plots 47 and 50. It partly states:-

“Plot No. 47 has been encroached by the Neighbours of Plot No.50 as shown on the Map attached with this letter.

We established that, the building that is being built has encroached in the plot No. 47. Beacons of plot No. 47 were established 47/6 and 47/c were found on the ground. 47/a and 47/d were re-established; they had been removed by the person building”.

The Report does not whatsoever refer to Plot 98. There is nothing to show that Plot 98 has any connection with alleged offending encroachment in the Report.

In any case the court takes note that the surveyor is a private one retained by the Plaintiff and there needs to be some corroborative evidence considering the lack of relevance in the Report.

I have also read the letter dated 10th January, 2011 by the District Surveyor –Kwale/Msambweni and marked “ZK2”. It reads:-

“TO ESTATE OF SONRISA LIMITED 10TH JAN. 2011

**P.O. BOX 14115
NAIROBI.**

**RE: GROUND INSPECTION REPORT ON PARCEL NO. KWALE/GALU KINONDO/98
REGISTERED UNDER ESTATE SONRISA LIMITED**

Further to our initial letter which was written to you confirming the accuracy and precision of the boundary which was found to be in harmony with the area map. The boundary wall constructed around the property was found to be within the identified boundary beacons with observations as shown on the sketch attached showing the ground distances, plot number, computed acreages and the neighbouring plots”

Yours faithfully

**Amos W. Simiyu
District Surveyor-Kwale/Msambweni”**

The said statement has not been rebutted by the Defendant and therefore the court is in the circumstances in doubt whether indeed the wall encroached on Plot 99. I have also considered the letter dated 13th February 2009 from the District surveyor which appears to confirm that Plot No. 98 is at its right position as per the Registrar Index map (R.I.M.). These are official communication from the Government District Surveyor.

In view of the foregoing, I do find that the Plaintiff has not shown a prima facie case that the wall is on Plot 99 and that there is encroachment as alleged. There has to be more evidence to prove the Plaintiff’s allegations in this application that this can only be in a full trial. The net result is that the Plaintiff has not met the first limb of the **GIELLA CASE**. The Plaintiff has not on a prima basis shown that he has a case with probability of success.

Having found as stated above, I am of the view that there is no need to delve into the other questions No.2. and No3. The court could only go to consider these questions if the first condition had been met.

I do hereby dismiss the application with costs to the Defendant. The Interim Orders are vacated. Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 9TH DAY OF JULY 2012.

**M.K. IBRAHIM
JUDGE**

DATED AND DELIVERED AT MOMBASA ON THIS 18TH DAY OF JULY 2012

Both sides represented

**J.W. MWERA
JUDGE**