



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Case 122 of 2003**

**TAHIYA ABDALLA ISSA .....**  
**PLAINTIFF**

**- V E R S U S -**

**1. ALI ALWI ABDALLA**

**2. BWANA ABDI ISSA ALI**

**3. HEIDI ERNST LUSENO .....**  
**DEFENDANTS**

**J U D G M E N T**

The plaintiff and defendant are the respective proprietors of adjoining property Title No. Lamu Block 1/930 and Title no. Lamu Block 1/929. Both plots are developed. However the plaintiff filed this suit because at that time the defendants had started to further developments which the plaintiff fears shall have the effect of completely blocking the plaintiffs windows in her own building thus depriving her and her tenants from enjoying the amenities provided by the said windows namely light, free flow of air and uninterrupted view which she had enjoyed since 1975. Plaintiff prays that injunction do issue against the defendants restraining them from constructing the walls complained of and a mandatory injunction ordering the defendants to demolish the wall they have attempted to construct.

Instead of the court deciding on an interlocutory injunction order was made to have the whole suit heard and finalized. The issues agreed to by the parties are listed thus:-

1. *Is there a party wall adjoining Plot no. 929 and Plot No. 930 as averred by 2<sup>nd</sup> and 3<sup>rd</sup> defendants?*

2(a) *Did the development on plots 929 and 930 at one time comprise one development?*

(b) *If the answer to 2(a) is in the affirmative were the said developments subsequently separated by the blocking of a door in an internal wall formed a "party wall" as averred in the defence.*

Or

(c) *Did the said two properties prior to 1975 comprise of ground*

*Floor developments as avered in para.5 of the plaint?*

*(d) Did the plaintiff effect improvements on her property No. 929 in the year 1975 to comprise of a second and third floors, with windows on the said floors facing direction of the defendants property no. 930.*

*3. Is the blocking work on the alleged party wall and remnants of Old Swahili doors and windows still visible as per para.3 of defence.*

*4. Is the wall the subject of this suit owned by both the owners of Plot no. 929 and in equal shares as amended in para.6 of the defence.*

*5. Did the plaintiff develop the second and third floors on plot no. 929 in the year 1975.*

*6. Were the second and third floors on Plot no. 929 constructed In March 2003 without the consent of the defendants.*

*7. Are the defendants entitled to develop their part of the party (if it is found there is a party wall) to block the windows of the plaintiff as averred under para.10 of Plaint.*

*8. Is the plaintiff seeking to enforce a right of easement against her own property as pleaded in Para. 7 of the defence.*

*9. If it is found that the plaintiff has established a right of easement over plot no. 934 should the same be extinguished on grounds stated at paragraph 10 of the defence.*

*10. Has the plaintiff opened windows on a party wall and therefore adversely affected the defendants rights so as to entitle the defendants to orders discharging or extinguishing any of the rights of plaintiffs as pleaded.*

*11. Are there ..... party walls on properties at Lamu and is the Plaintiff action unconcealed and obsolete.*

*12. Does the existence of plaintiffs windows in her property amount an impediment the defendants and does the same violate their right to privacy.*

*13. What prayers in Plaint or Defence can be granted.*

*14. What orders as to costs.*

Firstly the court has to look at the evidence tendered by both parties before attempting to answer these questions. For the plaintiff Mr. Abdalla Issa Timamy testified that the plaintiff is his daughter. He purchased the house on plot 929 in 1963 and gave it to his daughter the plaintiff. He testified further that when he purchased building in 1975 there were two walls his wall (Plot no. 929) and defendants wall (Plot no. 930). Building on Plot no. 930 was undertaken by Adlwi as inheritance from previous owner. He said his wall is higher by one foot (929). He started building on his wall ("**juu ya ukuta wangu**") he said, not on the wall on plot No. 930. The neighbour did not object. Alwi inherited the property in the eighties he did not complain or take any objections. House erected on Plot no. 929 and thereon 930 was not one house. They were 2 separate houses with one compound plan and title. Plaintiffs building had the roof covered but recently the tenants reported non repair, that is why I was repairing in April (2003). This witness said he holds a power of attorney from owner. He complained that the defendants have built and closed the plaintiffs windows cutting off light and air on the first floor. This will cause the supporting timber for upper floors to rot and collapse. Three windows are closed on one side and another on the other side. On cross-examination the witness testified that the area is now marked for conservation. To carry out alterations permission has to be obtained from the Council and other authorities. But in 1975 when he built there, there was no conservation requirements. That is when the

first and second floors were built. He emphasized that the houses are on two levels. The buildings on plaintiff plot were constructed by 2<sup>nd</sup> witness, Ahmed Fadhil in 1975 2<sup>nd</sup> and 3rd floor. Permission from neighbours was sought and obtained to the constructions.

He confirmed that if windows are sealed there can be light only from one window. PW2 was not able to produce building plan used 1975 saying it was a longtime ago. On the side of the defendants DW1 Ahmed Omar testified that he was working with National Museums of Kenya for 16 years. He was experienced as Assistant Planner and Draftsman. At the time of trial he said his main work is to give technical advise to residents in preparation and restoration plans and repairs and new ones and upgrading of public areas. He is also a consultant to the County Council and they approve building plans. The area in which plots 929 and 930 are situated is his area of conservation. It is a gazetted Monument under Antiquities Act. This witness dwelt at length describing typical Swahili house. He said the scale of No. 929 is almost twice size of the other (930). He said

two structures share same wall . He explained that each house had to get light and air. On cross-examination he admitted he was not “**registered physical planner**” as required under the Physical Planning Act. He also admitted knowing both parties. He admitted that plot no. 929 and 930 are not connected internally. He did not visit plot no. 929 but looked from outside. He confirmed that the buildings were surveyed in 1915. Defendants witness no. 2 said he was working as Inspector of Buildings for Museums of Kenya. He testified that the developer of Plot no. 930 applied for upward extensions to and also alterations on the first floor which were approved by the Council. He was not present when the approval was past. He produced building bye-laws. Defendant witness number 3 is the wife of 3rd defendant she resides in the house on Plot no. 930. She testified that their house was a single storey and that their intention is to revert the house to Swahili architecture style by creating a court yard. Which was not there before, they have created a staircase wall niches. They are improving common wall on the ground floor and creating space. The courtyard will be open to sky. There is a wall of plot no. 929 built leaving space for another wall – a space that could fit a block. She asserted that nevertheless there was common wall between the two properties. This witness did not see any reason why she should develop her house upwards. As far as I can see the dispute relates to the maintaining of rights acquired by the plaintiff and the extension of the defendants house upwards. I have studied the “**Planning Lamu Conservation of an East African Seaport**” by Francesco Siravo and Ann Pulver published in 1986 and provided to court by the Defendant’s witness. It appears to me that the purpose is to preserve the ancient architecture of buildings in Malindi by protecting the old building and structures and planning new buildings or new alterations so as to preserve the appearance of the town. The developers of new buildings or alterations are therefore expected to respect and confirm to the old buildings, when making plans which must be approved by Local Planning Commission. In this case the evidence of how the plans of the defendants were approved is not clear. The witness no. 2 for defendant says he drew the plans and when they were approved he was not present. It is not disputed that the Plaintiffs building was in existence in 1975. It is also not disputed that it was only in the year 2003 did the defendants move to extend their house upwards by addition of upper floors. It is also not disputed that if the defendants execute their additions, the plaintiffs windows will be closed up and light and air will no longer flow freely through to their building. The thrust of the defendants case is that here is a common boundary wall and therefore one party cannot restrain the other from opening up the windows on the wall into the others plot and that it is lawful for defendants to construct their wall even if the windows of the plaintiff are closed. Indeed the defendants have purported to build the first floor thereby already closing the windows of the plaintiff on first floor.

On the facts as stated by parties when the plaintiff purchased the house (on No.929) it was standing on its wall and in between his wall and the building on No.930 there was space. The defendants also admit that between the two buildings there is a space where a block can be placed. My observation here is that both buildings had separate walls and that is why the plaintiffs 2<sup>nd</sup> and 3rd floors were able to stand on their own walls for so long since constructed by PW2 after the plaintiff purchased the house in 1975.

I have perused the English authority “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 :-

i) *as describing a wall erected on land belonging to the owners of adjoining lands in equal moieties as tenants in common.*

ii) *where the wall is divided into long individual halves*

*one half standing on the land of each of two adjoining*

*owners.*

iii) *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.*

IV) *as applied to a wall longitudinally divided each moiety*

*being subject to an easement of user by the owner of the other moiety.*

The defendant have also cited the authority of the High Court reported in ***E.A. (1960 Page 208 Hansraj Thakkar –vs- The Vanik Majani***. That case relates to a wall dividing two properties and there was issue of easement. The defendants opened up windows on a disputed wall without the consent of the plaintiff and the plaintiff complained and requested a mandatory injunction to compel the defendants to close the windows. On the facts of that case the court found the wall belonged to the defendant alone ***“subject to a possible easement of support in respect of plaintiff W.C and bathroom which do not limit his right to put windows on his wall.”***

In the case also, there was issue of right to privacy which would be lost if the windows which were on the plaintiff property was co..... that court held that English Law does not recognize right of easement to prospect or privacy. But many exists by usage or custom and substantial influence with such right of privacy where it exists if the interference be without consent of the owner of the document tenant, affords a good cause of action”. Custom of privacy has to be pleaded and proved. In this case the custom of privacy has to be pleaded and proved. In this case the custom of privacy for Moslem women is not disputed but there is no issue raised on that matter. So in this case it is shown that a party wall is not the one which is standing on its own and gives no support to the buildings of the other owner of property.

From the above I have come to the conclusion that these two plots (929) and (930) have each a wall erected on their respective lands and that they are independent of each other. The evidence of the defendants witness PW1 and 2 is not credible they did not investigate the side of plaintiff’s case on Plot 929 and they did not consider the consequences that the plaintiffs already erected property would suffer by having the windows blocked. In the law of Real Property by McGerry 4r Ed. Page 233 the categories of party walls are described just as in the case of Watson –v-s Gray above mentioned ownership of soil upon which the wall is constructed raised a presumption of tenancy in common where the exact situation of the boundary cannot be shown or where the site of the wall could be shown to have been owned in common. Where the wall was built entirely on one owners land the presumption was that the wall was that persons property.

From evidence the two plots are surveyed differently and have different deed plans the attempt by the defendant to establish the party wall by comparison of marks and niches the wall are only speculative and evidence of boundary location should have been forthcoming.

I, therefore, find there is no party wall between the two buildings .

Regarding the issue of easement the plaintiff pleads that her property has enjoyed as easements the flow of light, air and the view through her windows on the first floor and second floor which were constructed after purchasing the building when it had only the ground floor in 1975 for a period of more than 290 years. These rights to easement are not shown to have been granted but are said to have been

acquired by prescription.

The creation of easements by prescription is governed by the Statute Cap. 22 Limitations of Actions.

There is no dispute that until March, 2003 when the defendants started extension on their land the first and second floors and windows letting in light and air to the plaintiffs rooms. There was no objection from the defendants and the windows were open for all to see.

For examination of the “Planning of Lamu” aforesaid on page 150 paragraph 28 headed :-

Respecting the neighbours side windows and protecting your privacy.

**“Special problems may be expected when a vacant plot between two buildings has allowed the adjoining property owners to insert side windows into what was original party wall.**

Plan 4 proposes a solution where the new ground floor

**only partially .... The neighbouring building and the first floor is set back from it. This solution makes possible the creation of an outer and inner court yard .....**”

It is clear that the purported approval of extensions of the defendants was not done in compliance with the recommendations contained in “**Planning Lamu**”. The rights of the plaintiffs were not considered at all. The witness said it would be in order to close the windows of the adjoining property (plaintiffs) even without informing her. This appears oppressable and unreasonable on the part of the witnesses and also by the defendants. They did not respect the needs of light and air of the plaintiff. By writing of extending the building on Plot no. 930 upwards against the wall of the building on Plot 929 would interfere with the skyline of Malindi as shown under page 46 of the “**Land Development**” and turn it into skyline of any modern city with skyscrapers. It appears to me this is not the way the conservation is intended. In the circumstances then I find there is no party wall between the two plots. While the defendants are entitled to extend their building upward they must not block the windows of the plaintiff. They must adopt the plan set out at page as Plan 4 at page 150 and 151 of Lamu Plans of such other plan that will respect the plaintiff right to light and air through the open windows on Plot no. 929. The consequence is that the defendant must bring down the wall of their first floor extensions in order to leave sufficient space to allow the opening of the plaintiffs windows which are now closed by that wall. I am looking at the photograph exhibit D Exh. No. 13 in this regard. Conservation needs are nowadays given highest priority. Judgment is therefore granted to the plaintiffs as prayed in plaint under prayer (a) and (b) with costs.

The defendant shall obey the mandatory order within 90 days of this judgment.

**Dated this 13<sup>th</sup> day of October, 2004.**

J. KHAMINWA

**JUDGE**

**13.10.04**

Khaminwa – Judge

Cege – Court Clerk

Mr. Buti

Mr. Kimani

Judgment read in open court in their presence.

J. KHAMINWA

JUDGE

Mrs. S.M. Kimani for defendant - I ask for certified copies of proceedings for my clients record.

Court – Application allowed.

**J.KHAMINWA**

**JUDGE**