



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CIVIL CASE NO 2643 OF 1998**

**GOVINDJI & ANOTHER..... PLAINTIFFS**

**VERSUS**

**SIFA INSURANCE COMPANY LTD.....DEFENDANT**

**JUDGMENT**

The two plaintiffs aver in the plaint that they are registered proprietors as lessees of LR No 209/30007/7 (original number 209/3007/4/2) which shares a common boundary with defendant's property LR No 209/3007/6 original number 209/3007/4/1 and that the beacons had been verified and pointed out by a professional land surveyor. Plaintiffs further aver, among other things, that, in March, 1998 they commenced works to erect a boundary wall along the beacons demarcating the common boundary but the defendant has claimed that his property is being encroached and has threatened to have the said boundary wall demolished. The relief sought is an order of injunction to restrain the defendant from interfering with:

- (i) the plaintiffs possession and quiet enjoyment of their property.
- (ii) the construction of the boundary wall along the beacons demarcating the common boundary as set out in survey plan No FR 158/10

Defendant avers in the statement of defence, among other things, that, the proposed boundary wall will encroach on the defendants property and also deny the defendant the "right to the user by way of easements" and further, diminish the value of the defendant's property. Defendant further avers that the intended erection of a boundary wall is contrary to the Byelaws and Building code of Nairobi City Council. Plaintiff's advocates served defendant's advocates with a request of the particulars of the easements dated 20th February, 1999. Defendant's advocates gave particulars as follows:

- (a) There is an easement over the property known as LR No 209/3007/7, original number 209/3007/4/2.
- (b) The easement is in favour of the proprietors of LR No 209/3007/4/1, original number 209/3007/4/1.
- (c) The easement is in the form of a path.
- (d) The easement came to be after the original piece of property composed of two properties, LR Nos 209/ 3007/4/1 and 209/3007/4/2 was divided. The boundary of the two properties have a building which can be accessed from both properties hence the development of the casement.

(e) There are no particulars of registration of the easement because the easement has not been registered.

Plaintiffs filed an application dated 12th November, 1999 asking the Court to strike out the defence under order VI rule 13(1)(c) and (d) Civil Procedure Rules on the main grounds that the defence may prejudice or delay the fair trial and that the defence is an abuse of the process of the Court. To support the application plaintiffs exhibited the approved plan by Nairobi City Council for the erection of the boundary wall. The plaintiffs also annexed the letter dated 21st September, 1999 from Nairobi City Council approving the plan. There is a condition in the letter of approval that, if the erection of the boundary wall is not commenced within six months of the date of the approval and if erection of the boundary wall is not completed within two years of the date of approval the approval will be null and void.

Mr Wilfred Mwawuda, the Chief Accountant and Administrator of the defendant company, filed a replying affidavit sworn on 16th February, 2002 in answer to the application to strike out the defence. The relevant paragraphs of that affidavit which show the nature of defendant's defence are paragraphs 4,5,7 and 8 which I quote below:

"4. That, the plaintiff's intentions of erecting a boundary wall will deny defendant's company right of user by way of easements and further diminish the value of its property.

5. That, the defendant company's advocates on record M/s Agimba & Associates inform me which information I verily believe to be true, that the defendant company has an equitable easement over the plaintiff's property, by virtue of the fact that the defendant company has a building at its boundary with plaintiff's property, which building can only be accessed by passing through the plaintiffs property, a situation brought about because of division of the original property which encompasses the plaintiff's and defendant company's properties.

6. That, the erection of the boundary wall will deny the entry of light, into the building situated on the defendant company's property, which building is at a boundary of the plaintiffs and the defendant company's properties.

7. That, by virtue of the facts deponed to in the 5th and 6th paragraphs above, the value of the defendant company's property will diminish.

8. That, the defendant has a good defence which raises triable issues".

The plaintiffs application seeking to strike out the defence was dismissed by Visram, Commissioner of Assize (now judge) on 27th January, 2000. Mr Vipinchandra Gulabchand Shah (PW1) gave evidence on behalf of the plaintiffs who reside in England. He is the husband of the second plaintiff and is the Attorney of the first plaintiff under a General Power of Attorney dated 17th October, 1997 (Ex 1). That Power of Attorney authorizes PW1 among other things to commence, prosecute, defend any actions or suits at law or equity in any of the Courts in Kenya. PW 1 stated that he is the one who was using, the plaintiffs property LR No 209/3007/7. He produced a copy of the certificate of title of the land dated 18th November, 1987 as exhibit (Ex 2). The certificate shows that

LR No 209/3007/7 was registered in the name of Arvind Kumar Ambalar

Patel on 18th November, 1987. The registered proprietor then transferred the property to Ramis Properties Limited on 29th June , 1995 who, in turn, transferred the property to the two plaintiffs as tenants in common in equal shares on 27th November, 1997. It is a leasehold property for a term of 90 years and 3 months from 1st September, 1948. The Deed Plan No 130407 dated 4th November, 1987 is attached to the certificate of title. Mr Paul Debacko Gogo (DW 1) gave evidence for the defendant. He is a director of the defendant company which owns the adjacent plot LR No 209/3007/6, original 209/3007/4/1. He testified, *inter alia*, that:

(i) Plaintiffs plot and defendants plot were once one plot which the owner sub-divided into two.

(ii) The owner offered the two sub-divisions for sale to DW 1 but DW 1 could not afford to buy both. He decided to buy the small one which contains flats.

(iii) The beacons marking the boundary between the two plots were identified by DW 1's survey or but not by DW 1 personally.

(iv) DW 1 does not personally know where the boundary beacons are located.

The Court inspected the plaintiff's plot and the defendant's plot at the request of the defendant. The two plots are contiguous. Plaintiff's plot is bigger. There is one big dwelling house erected on the plaintiff's plot.

The plaintiff's plot has a road frontage. The defendant's plot is smaller.

There are several buildings erected on the plot which the defendant has let to tenants. The defendant's plot has also a road frontage and a gate leading to the compound.

There is no documentary evidence to show that the two plots once formed one plot which was subdivided. However, there are tell tale physical features which support the evidence of DW 1 that the whole property originally belonged to one person who later subdivided it to create the two plots which were sold. That notwithstanding, it is important to stress that the dispute is about the construction of a boundary wall between the two plots. There is already a timber fence separating the two properties. It is common ground that there is a strip of land of about 9ft wide between the timber fence and the end of the defendant's flat. There is a dispute about the ownership of that strip of land. According to the plaintiff, that strip of land is part of the plaintiff's plot and the boundary between the two plots is along the corners of the defendant's flat.

But according to the defendant that strip of land is a footpath with steps which leads to the rear of the flats. Mr Debacko Gogo testified that he owns that strip of land but hastened to say that he was not sure.

The first issue which has been identified by Mr Le Pelley, learned counsel for the plaintiff and Mr Arwa, learned counsel for the defendant, is where the boundary runs between the plaintiff's property and defendant's property.

It is submitted by Mr Arwa that the plaintiff has failed to prove on a balance of probabilities that the boundary lay where the plaintiff's intend to erect the boundary wall.

At the hearing of the suit, Mr Le Pelley had stated that the only issue in the suit is whether or not the defendant has an easement over the plaintiff's property. I agree that the pleadings, the record and previous proceedings show that the only dispute raised by the defendant up to the time of trial of the suit was about the existence of easements.

I say so because, firstly, the defendant does not specifically aver in the statement of defence that the strip of land between the wooden fence and defendant's flat belong to the defendant.

Secondly, Mr Wilfred Mwawunda in answer to application for striking out the defence deposed in paragraph 5 of the replying affidavit sworn on 16th February, 2000 that defendant's company has a building at its boundary with the plaintiff's property which can only be accessed by passing through the plaintiff's property. Again, Mr Wilfred Mwawunda deposes in paragraph 6 of the same affidavit that the defendant's building is at the boundary.

Indeed, that affidavit does not show any dispute as to the location of the boundary. The affidavit shows that the defendant was only claiming a right of way to his property.

Thirdly, the ruling of Visram, Commissioner of Assize dated 27<sup>th</sup> November, 2000 on the application to strike out the defence shows that the defendant only raised two triable issues viz:

(a) The question as to whether the defendant is entitled to the easement.

(b) Whether or not the intended erection of a boundary wall is in accordance with the bye-laws and Building Code of Nairobi City Council.

The exact location of the boundary was not an issue. Lastly, in the particulars provided by the defendant dated 24th May, 1999 which form part of the pleading by virtue of order VI rule 8(6) Civil Procedure Rules the defendant stated that there is an easement over the plaintiff's property in favour of the defendant's property in the form of a path. The defendant's claim of easement over the pathway is inconsistent with its claim of right over the pathway.

Moreover, Mr Paul Debacko Gogo (DW 1) conceded in his evidence that his flat is along the boundary and that the boundary runs along the wall of his flat. He ultimately admitted that he does not know where the boundary beacons are located.

It is not true that plaintiffs have not proved where the boundary is located. Mr Vipinchandra Guchbchand Shah (PW 1) produced a copy of the certificate of title of the plaintiff's plot with accompanying Deed Plan No 130407 dated 4th November, 1987. That Deed Plan shows the specific measurements of the plaintiff's plot. PW 1 also produced the Survey Plan No FR 158/10 referred to in paragraph 3 of the plaint and which is admitted in paragraph 4 of the statement of defence. That survey plan shows the location of the boundary and boundary beacons in relation to defendant's flat. Mr Martin Musa – a surveyor (PW 2) inspected the two plots and ascertained the location of the beacons. He drew a part plan (Ex 6) based on the survey plan (Exh 5) re-establishing the beacons.

According to the evidence of PW 2, the boundary line (MM1 – MM2) is along the corners of the defendant's building and touches the corners of the building. The defendant did not produce its certificate of title or documentary evidence or expert evidence to rebut the contents of the Survey Plan (Ex 5); the Part Plan (Ex 6) and the evidence of Mr Martin Musa as to the official location of the boundary.

From the foregoing, I am satisfied that the official boundary between plaintiff's plot and defendant's plot is along the corners of the defendant's flat along the line marked MM1 to MM2 in the Survey Plan (Ex 5). It follows therefore that the 9 feet strip of land between the wooden wall and the defendant's flat is part of the plaintiff's plot.

The next issue is whether the defendant has acquired or owns any easement over that part of plaintiff's property.

As I observed earlier, defendant's plot has a road frontage. There is a gate which leads to a paved parking in front of the one storeyed – flat. The one – storey flat does not reach the extreme left side boundary of the defendant's plot. There is foot – path left between the boundary wall and the flat. That foot path was wider than it is today but the defendant built a block of toilets at the side.

That existing foot-path leads to the court yard at the rear of the one storeyed block of flats and to the two block of buildings which face the court yard at the rear. That indicates that even if the disputed boundary wall is constructed on the right side alongside the corners of the one-storeyed flat thereby obstructing the foot-path on the right side of the flat, the court yard and the rear buildings could be accessed through the foot path on the left side of the flat. That foot path can be widened to its original size by demolishing the block of toilets which the defendant constructed after it purchased the plot. Mr Gogo (DW 1) stated that the residents of the buildings at the rear prefer the foot path on the right side of the flat because the one on the left side leads to the toilets which stinks. But the defendant has power to remove that nuisance.

The contention that the construction of the boundary wall will interfere with the defendant's right to light and to the ventilation is an after thought and untenable. It is not in the defence or in the particulars. The windows of the one-storey flat do not face the disputed strip of land. The windows face the road. Indeed there are no windows on the right side of the flat up to a height of about 12 feet. But above that height, there are two small windows which appear to be toilet or bathroom windows. It is improbable that the

boundary wall will be built to such a height. Mr Gogo also complained that the construction of the boundary wall will interfere with water taps, manholes and drainage located on the disputed strip of land. There was however no evidence that there was in fact manholes or that the construction of the boundary wall will deprive the defendant of essential utilities. It appears that water from the rear of the plaintiffs building is trapped with gutters and drained with pipes into the part of the disputed area. The windows of the rear of the plaintiff's building, in fact, face the disputed area and there is an iron door at the rear of the plaintiff's building which also face the disputed area. It seems from all this that the dispute area next to the plaintiff's building is for the benefit of the plaintiff's building.

The plaintiff's title is registered under the Registration of Titles Act. By section 23(1) of that Act, the certificate of title is conclusive evidence that the plaintiffs are the absolute and indefeasible owners of the land subject to the encumbrances, easements, restrictions and conditions that may be endorsed on the title. In this case, no easements are endorsed on the title.

This is a case where the original owner of the plot sub-divided it into two and offered each sub-division for sale. The defendant elected to buy one sub-division. If there was any easement in the plaintiff's plot that the original owner wanted to transfer to the defendant that easement could have been shown in the transfer as stipulated in section 34 of the Act.

As easement of way over the plaintiff's plot such as claimed by the defendant could only be acquired if the defendant had enjoyed the access to that way peacefully and openly as right and without interruption for 20 years since the plaintiff acquired the property (see section 22 of the Limitation of Actions Act). In this case, the plaintiffs acquired their property on 27th November, 1997. According to Mr Gogo, the defendant bought its property over 5 years ago (from year 2002). By the time this suit was filed, the defendant had hardly used the disputed pathway for 5 years.

However, the defendant does not claim the easement over the path way by virtue of contract or prescription but by virtue of the implication of the law. But as I have attempted to show above, the defendants plot is not land locked. The entire plot is accessible from the public road and the rear buildings are accessible from the foot path on the left side of the one storeyed flat. It cannot be said, therefore, that the disputed pathway is a way of necessity in the sense that, without it, the transfer of the plot to the defendant is ineffectual and the defendant's plot cannot be reasonably enjoyed. In my view, an easement of necessity over the disputed pathway cannot be implied. Indeed, implying such an easement in the circumstances of this case would be a derogation from the transfer in favour of plaintiff and would defeat the principle of indefeasibility of title secured by section 23 of the Registration of Titles Act. Mr Gogo admits that when he was informed that the plaintiffs were erecting a boundary he went to the site and questioned the plaintiffs as to how his flats would be reached and that the plaintiff said that he was following the beacons. There was a disagreement and Mr Gogo reported to the police who stopped the plaintiff from constructing the bounding wall. As the evidence shows, the defendant is still opposed to the construction of the boundary wall.

The plaintiffs submitted the boundary wall plan to Nairobi City Council for approval. The Plan was approved. Although the approval has now expired the plaintiff can still seek a fresh approval. For the foregoing reasons, I am satisfied that this suit was justified and that the plaintiffs have proved their case as required by law. Consequently, I enter judgment for the plaintiff against the defendant and grant the injunctions sought in terms of the plaintiff with costs to the plaintiff.

Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2003

**E.M. GITHINJI**

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**JUDGE**