**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT 288 OF 1997**

**SALIM & ANOTHER……..……..PLAINTIFF**

**V**

**MOHAMED…….……DEFENDANT**

This case arises partly because of a peculiar land tenure phenomenon

known only in Mombasa as “House without land’’ defies the existing definitions of land in our laws but because of its notoriety the courts have been forced to give it some measure of judicial notice. “It has thus been recognized in various decisions that one may legitimately own a house temporary or permanent, constructed on land owned by another person. I think the current initiatives, towards reform of our land laws must come to terms with such phenomenon. The case also partly arises because of total lack of or warped physical planning on the part of Mombasa Municipal Council and apparent professional dishonesty on the part of Surveyors. Why do I make these observations?
The original plot No 49/XVII/MI (Plot No 49) was an expansive plot in Kaloleni area of Mombasa municipality. It was owned by one Swaleh Nguru who several years ago gave out subplots to several people who constructed houses thereon and paid him rent. The houses constructed with his authority belonged to those persons while the land remained his. That happened about 30 years ago.

Two such persons were the father of the two plaintiffs in this suit and the defendant who had two adjacent but independent plots on which they constructed permanent houses. There were no survey beacons delineating those plots.

Then in 1992 some surveyors were brought into the plot by Swaleh Nguru, it is said, and carried out subdivisions. It is not clear whether they physically went onto the plot or were simply doing it in their drawing

rooms. What is clear is that the result of that survey has the potential for major conflicts between the house owners.

Two professionals testified in this suit and confirmed those fears. Phillippe Armand Zimmerlin (PW 2) for the plaintiffs, and Edward Marenye Kiguru (DW 2) for the defendant. The court also visited the locus in quo and saw what was on the ground. The surveyors concurred that the survey was done without considering the physical existence of the houses on the ground. It was assumed that the original plot was vacant! The tragedy is that titles were subsequently issued under the Registered Land Act and those who owned houses purchased the land on which the houses stood. Unbeknown to them, the land on which the houses stood was not congruent to the houses. So that portions of the existing houses would fall into the surveyed plot of another or into road reserves. Some old beacons for the main plot were invisible and were suspected to fall within built-up plots. 56 plots numbered 1236 to 1292 were carved out. There have been disputes between some other plot-owners as a result of this complication. One indeed was between the plaintiffs here and the owner of the adjacent plot 1289 which dispute is said to be pending in court. But the dispute in this matter is between the two plaintiffs who inherited then-father's plot later identified as plot no 1288, and the defendant whose plot is No 1287. Both have titles to those plots.

In 1997 the defendant wanted to construct an additional floor and toilets for his house. He dug a septic tank on the existing space between his house and that of the plaintiffs. As far as he was concerned it was within his plot of land which he had bought in 1988 or thereabouts in addition to the house. No one was complaining until both parties called in surveyors to show them their boundaries. The topographical surveys carried out by both surveyors unearthed the complication recited above.

The plaintiffs then demanded on the basis of their surveyor's report that the defendant remove the septic tank and demolish the part of the wall of their house shown by the survey to be encroaching on plot No 1288. The defendant would not hear of it since that wall had existed there for about 30 years; hence this suit filed on 17.9.97. A temporary injunction was granted' pending the determination of the suit.

The main suit seeks four substantive orders, that is:
"(a) A permanent injunction to restrain the defendant from erecting or constructing or building or continuing to erect, construct or build any building, house, flat or any structure or to complete any part of any such building, flat house or structure upon plot No MSA/ BLOCK XVI1/1288 on any part thereof.

(b) A mandatory injunction to compel the defendant to demolish and remove from Plot No MSA/BLOCK XVII/1288 any building, wall structure, house or flat, together with all debris, masonry, blocks or dirt arising from the demolition.

(c) A mandatory injunction to compel the defendant to:-

(i) Empty completely the soak pit or sewage disposal hole dug up by the defendant into the plaintiffs' plot

and remove such dirt or sewage from the plaintiffs' plot.

(ii) Fill up completely with soil earth or sand such soak pit or sewage disposal hole, after emptying it of the dirt.

(iii) Cover and completely seal the said soak pit or sewage disposal hole.

(d) Damages for trespassing upon the plaintiffs' plot No MSA/BLOCK XVII/1288.

The parties framed and agreed on 9 issues for determination: -

1. Has the defendant, without the plaintiffs' permission, consent or authority encroached upon the plaintiffs plot No MSA/BLOCK/XVII/1288 by building, erecting or constructing a house, flat, structure or house on part thereof?

2. Has the defendant without the plaintiffs' permission, consent or authority dug up, or sunk a hole or soak pit or sewage disposal hole in the plaintiffs' plot No MSA/ BLOCK XV11/1288?

3. (a) Does the defendant dispose of or drain the sewage in the said hole of pit referred to above?
(b) If so, does the sewage let off an unpleasant odour into the plaintiffs' premises?

4. Has the defendant trespassed, and does he continue to trespass on the plaintiffs' plot No MSA/BLOCK XVII/l288.

5. Whether the plaintiffs are entitled to an injunction to restrain the defendant from trespassing or encroaching on plot No MSA/BLOCK XVI1/1288.

6. Whether the plaintiffs are entitled to a mandatory injunction to compel the defendant to demolish and remove from plot No MSA/BLOCK XVII/1288 the building, wall, structure, house or flat together with all debris, masonry, blocks or dirt.

7. Whether a mandatory injunction should issue compelling the defendant to empty the soak pit, fill it up with soil, and cover and completely seal it.

8. Quantum of damages.

9. Who should pay the costs of this suit?"

I will endeavour to answer them in the light of the background to the whole saga and the evidence on record.

On the first issue, learned counsel for the defendant Mr Khatib submitted that the defendant cannot be condemned in trespass when he played no part in it. There was no deliberate act of trespass. The plaintiffs' suit as framed must therefore fail on this issue as well as on the others.
Mr Kinyua learned counsel for the plaintiffs however went by the conclusions reached by the surveyors that portions of the existing building on plot 1287 was encroaching on plot 1288 and that amounted to trespass, whether it was wilful or not. In his view the question of buildings should be disregarded altogether and the title delineations honoured. It mattered not that a third party intervened. He is not a party to the suit and was not called as a witness. The plaintiffs were not concerned about the suffering of others but with enjoyment of the full extent of their plot as shown in the title they hold. I have considered these submissions.
Issue 1 and 4 go together. For if there was encroachment then it has to be decided whether it amounted to trespass. The straight answer to issue No l is of course that the house existed long before plot 1288 came into existence on 6.11.96. The defendant did not need the authority of the plaintiffs to construct it. He had the authority of the plot owner at the time of construction, one Swaleh Nguru. An independent agent who was not under the control or instructions of the defendant forced part of the building into the surveyed area of another.

By definition trespass to land consists in any unjustifiable intrusion by one person upon land in the possession of another. It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary. It is another thing if the act is wholly inadvertent or involuntary. See Clerk & Lindsell on Tort.
I must not lose sight of the evidence of the professionals called to testify in this matter on both sides. I may quote them verbatim. Per Mr Zimmerlin:

"It seems that the plots were constructed earlier than the survey and did not take into consideration the existing buildings. It is possible to resurvey if there is a court order or order of the Director of Surveys. We could not find beacon KT48 because it fell within an existing building. I cannot say it is not on the ground. But indications are that the surveyor never set foot on the ground. It appears the beacons exist on paper."
Per Mr Kiguru

"I observed that all the existing structures had encroached into the neighbourhood. My conclusion was that the original survey done by the surveyor had a serious flaw. It did not respect existing structures. The intention of the survey was to ensure that the existing structures fell within, the intended boundaries of each plot. That is not what happened. "
Mr Kiguru agreed with Mr Zimmerlin that mistakes were done by the surveyor and it was possible that there were no beacons fixed on the ground. Beacons could not have been fixed inside existing buildings. He suggested the scrapping of the survey and substitute with one that respected existing permanent structures.

On that evidence it seems to me that I would be condoning, nay giving a stamp of approval to, professional ineptitude and deception if I accepted

what the surveyors did. There may well be clear delineations of the plots on paper by someone, according to the evidence, who never set foot on the site. But I am not persuaded that as clear delineations exist on the ground to serve as an anchor for resolving disputes on trespass. The Land Registrar or the Director of Surveys may well have to be involved.
For purposes of this suit however I answer the two issues in the negative. The same answer, on parity of reasoning, goes to issues 2, 3, 5, 6, 7 and 8. I find none of the two parties to blame for the problems facing them. Each party shall bear its own costs.