



Egoli Estates Limited v Bluebill Enterprises Limited (Environment & Land Case E395 of 2021) [2024] KEELC 6740 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6740 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E395 OF 2021**

**JA MOGENI, J
OCTOBER 15, 2024**

BETWEEN

EGOLI ESTATES LIMITED PLAINTIFF

AND

BLUEBILL ENTERPRISES LIMITED DEFENDANT

JUDGMENT

1. This suit was commenced by way of Plaint dated 17/11/2021, the Plaintiff sought for the following reliefs against the Defendant: -
 - a. The Sum of Ksh 5,133,752/=
 - b. Costs of this suit
 - c. Interest on (a) and (b) above at Court Rates
2. The suit was contested by the Defendant vide a further amended statement of defence and counter-claim dated 29/08/2022.

Plaintiff's case

3. Briefly the case of the plaintiff is that the defendant's wall and its base has extended to the plaintiff's land parcel by 0.3 meters and by 0.5 meters of the column base of the apartments.
4. As a result of this extension, the plaintiff claims to have used a lot of expense in abating and correcting the encroachment by excavation, cutting and under pinning of the boundary wall.
5. Both the plaintiff and the defendant own parcels of land that are adjacent to each other the one for the plaintiff is title Number Dagoretti/Riruta/3095 and the defendant's is Dagoretti/Riruta/3096 and they share a common boundary.



6. It is the plaintiff's claim that while excavating to commence construction works on its land parcel in August 2019 conducted a survey and it is through the survey that he discovered that the defendant's boundary walls and apartments had encroached into the plaintiff's land parcel.

Defendant's Case

7. On its part the defendant filed a defence dated December 20, 2021 which through an application dated 20/04/2022 sought to amend and the court through a ruling dated 27/06/2022 granted the orders for amendment leading to filing of a further amended defence and counter-claim dated 29/08/2022 where the defendant denied all claims in the plaint. He stated that the plaintiff never involved them in the process of abating and making good the alleged encroachment and therefore any costs being claimed are denied. The defendant in its counter claim sought for compensation following falling debris and other building materials including steel pipes, timber, and block boards onto the defendant's property.
8. The defendant has alleged negligence on the part of the plaintiff by failing and or neglecting to secure its property during construction process and as result leading to the falling materials which have damaged the defendant's property. This has led to the loss of rental revenues since the tenants have opted to move out to avoid damage to their properties and injury on their physical person and on the children.
9. The defendant prays for general damages and special damages in terms of loss of rental income, costs of repainting the wall due to water seepage to the property, refund of money paid to the tenant due to damaged property. Thus the defendant prays that the plaintiff's case be dismissed with costs and the court to enter judgment for:
 - a. Special damages amounting to Kshs. 2,379,450
 - b. General damages
 - c. Costs of this suit
 - d. Interest of (a), (b) and (c) above at court rates
 - e. Any other relief that the honorable court may deem fit

Plaintiff's Evidence

10. Eric Bengi testified as PW1 and as director of the Plaintiff. He adopted his witness statement dated 17/11/2021 as part of his sworn evidence-in-chief. He produced a list of documents of even date containing eleven (11) documents which he sought to have adopted as his exhibits. There being no objection to the production of the said documents the list was adopted.
11. It was PW1's testimony that there was encroachment on its suit property and that they tried to have an amicable settlement and the defendant was not willing to cooperate and as such the plaintiff claims Kshs 5,133,752 as a result of the encroachment. It is his testimony that they started building on their property on 1/08/2020 which property neighbours that of the defendant and that by the time they started construction, the defendant's property had already been built. That when they excavated they noted that the wall of the defendant had extended beyond the beacons placed on the plaintiff's land. That the encroachment was underground and was 1 metre deep.
12. That the base was the one that had encroached and it was underground. For the wall the encroachment was 0.3 meter and for the base the encroachment was 0.5 meters from the front to the back. That upon noting the encroachment he tried to contact the neighbor who is the defendant and through an email which is produced at page 13 of the plaintiff's bundle and a letter as produced at page 20. That



- through letter the plaintiff sought for Kshs. 4,738,011 which was the initial figure. PW1 added that the defendant has denied the encroachment but that the photograph number 2 produced at page 23 of the bundle show the encroachment and that it was more than 5 inches from the beacon.
13. PW1 further testified that the claim is for Kshs 5,133,572 and that these are special damages and that he had attached the contractor's bill at page 40 which is itemized. Further that the demand note sent to the defendant did not include vat because construction had not been done. He also stated that Items A to F in the bundle have relevance to the works that had been done. He testified that he appointed a surveyor who concluded from the report presented that there was encroachment on the plaintiff's land.
 14. On re-examination he testified that the plaintiff discovered encroachment when they started excavation and that the 2nd survey was conducted on 24/08/2024 and it stated that there was encroachment The plaintiff testified that the defendant was not cooperative and that though the plaintiff had offered to demolish the whole boundary wall and fix it due to the delay it emerged that the defendant was not cooperative and therefore the plaintiff went on to fix his side of the wall.
 15. PW2- Alex Njenga a Land Surveyor at Geotech Mapping Solutions Ltd stated that they prepared the 1st survey report in August 2019 and it tallied well with the registration map that showed that there was no encroachment at that time. That the second survey report the client required Geotech to examine the protruding base, the wall and column bases for the building. This report was done on 4/09/2020 and the finding was that the entire wall has a protruding base of 0.3 metres towards the side of parcel No. LR 3095. That the report confirmed that there were some column bases that encroached by 0.5 metres.
 16. Upon cross-examination he clarified that the document dated 09/09/2020 is the second report. He testified that the plaintiff gave the company instructions in writing but he was not able to produce the said letter. He also clarified that the letter at page 3 of the plaintiff's bundle is addressed to BMA Associates and it does not mention Egoli Associates.
 17. He further stated that they never did a search to know who the owner of Parcel 3095 is. It his testimony that the 1st letter states that there is no encroachment that the consultants observed. That the purpose of the second survey was to conduct a deeper investigation since there were new findings due to excavation.
 18. It is thus his testimony that following the 2nd survey they found that the bases had extended by 0.3 of a meter of the extending base of the wall. He stated that Figure 1 at page 9 of the plaintiff's bundle show the protruding base and the wall from parcel LR 3096 which is adjacent to plot parcel Number 3095. Further that in their survey, they never established whether the protrusion goes into the defendant's wall but it was clearly attached to the wall so he assumed that it goes to the defendant's parcel. He further stated that from a survey point they could not tell if it the protrusion goes into the defendant's parcel.
 19. It was PW2's contention that they had no instructions to deal with a boundary dispute but to give survey coordinates and therefore they never invited and met with the defendant. He stated that when they undertook the survey there was no wall and that the red lines depicted in the diagram at page 19 of the plaintiff's bundle show the encroachment since it is beyond the beacon lines. This shows that the defendant's building extends to the plaintiff's land.
 20. Upon re-examination he stated that purpose of the 1st survey was to confirm boundaries and topographical features and that BMA Associates were the lawyers who instructed Geotech on behalf of Egoli.
 21. The third witness PW3 is Khalid Al Kizim who testified that he is a registered consulting Engineer and that he works with Matrix Consulting Agency. He produced his report as his evidence and stated



- that the purpose of the report is to show the encroachment on Egoli side. It was his testimony that for Egoli to fully utilize their plot they had to deal with the encroachment. That in the report they have recommended that the base of the suit property had to be cut in sections of 3 meters so as not to affect the stability of the neighbouring plot. That they did a support of the structure below the base and they put in steel to support the base. He stated that he issued a letter dated 16/10/2020 confirming that remedial measures were done.
22. Upon cross-examination he testified that the letter at page 2 refers to the property on the eastern side which was found that the base of the boundary wall was protruding along the whole boundary by 3 meters and it was about one and a half meters under the ground. He stated that the contractor is the one who told him about the encroachment he however stated that he had no letter to support his testimony.
 23. He testified that there were meetings about to discuss the protrusion and that the minutes of one of the meeting is as per the document at pages 38 of the Defendant's bundle. That at the meeting it was agreed that the construction was to continue after cutting the base but Mr. Lang'at the engineer of the defendant never committed to anything. He further testified that they could not use a sledge hammer to demolish the protruding part because it would have led to collapse of the wall. When cross-examined about the bill sent to the defendant, he stated that the bill sent was due to the process undertaken in addressing the encroachment. He told the court that his consulting agency was satisfied with the work done because the methodology they advised was followed. Further that the neighbor who is the defendant was involved through the two engineers that represented him.
 24. He stated that there was encroachment and that the defendant who is the neighbor was notified and his lawyer and engineers came to the site. Upon re-examination he stated that at the meeting of 24/08/2020, those in attendance were two engineers represented Ambassador Rotich and they agreed to the methodology which had been proposed by the consulting firm that the base be cut and that they also addressed the issue of costs. With this the plaintiff closed its case.

Defendant's Evidence

25. The defendant led evidence by Ambassador Nehemiah Rotich who testified as DW1. He adopted his witness statement dated 20/12/2022 and a further witness statement dated 7/04/2022 as part of his sworn evidence-in-chief. In addition, he attached a list of documents as exhibits and it is contained at pages 24-76 of the defendant's bundle. He stated that he was a director of the defendant company and the beneficial owner of land parcel number 3096. He further stated that he had made a counter claim against the plaintiff for Kshs. 2,379,350.
26. Upon cross-examination he testified that he purchased the suit property in 2001 and he constructed apartments and that he found an embedded concrete slab but that he did not take any steps to address the embedded slab since the neighbouring plot was empty. It was his testimony that the beacons are in place and that he never conducted any survey though after purchasing his plot.
27. He testified that he received communication which he referred to his lawyers on 25/08/2020 since the issues in the instant suit were the same as those in ELC 103 of 2020. In the latter referenced case the court never granted the defendants injunctive orders to stop the construction on the suit property by the plaintiff. It was his testimony that there was a joint inspection that was to be conducted but that the same did not happen.
28. In his testimony he confirmed that the engineers visited the site and further that the plaintiff complied with conditions of construction for him to get approvals from the relevant bodies. He testified that the information at page 15 of the 1st defendant's bundle and at paragraph 6 state that the plaintiff's actions affected the tenants and it affected the rent. DW1 stated that he however did not have the tenancy



- agreement produced in court. He also stated that he had a letter from the National Construction Authority produced at pages 58 of the defendant's bundle. It was his testimony that they did not take any legal action against the plaintiff because they complied with the requirements.
29. DW1 testified that he has not attached any assessment report showing the damage caused on the property of parcel number 3096 but he has photographs that he took. That in the further witness statement at pages 16 he had stated that the tenants terminated the tenancy due to the plaintiff's construction processes but that he did not have any termination letter to support his claim.
 30. DW2- Benjamin Boit Lang'at testified and adopted his witness statement dated 07/04/2022. Upon cross-examination he stated that he had a diploma in building construction but that he was not a professional engineer nor a surveyor. It was his testimony that DW1 called upon him on 12/08/2020 to examine the alleged encroachment and he examined and inspected the works and made recommendations despite not being a qualified engineer.
 31. He testified that the plaintiff shared a structural report dated 18/08/2022 but that he never filed any report based on his observations made at paragraph 8 of his witness statement. That though the plaintiff shared Bills of Quantities (BQs) with the defendant the witness testified that he had commented that the said BQs were not actual valuation. He testified that he never got instructions to act on 24/08/2020. It was his testimony that he never took measurements from the plaintiff's property but that he developed his opinion based on diagrams on paper. Further that whereas the suit property was next to the defendant's property he never visited the plaintiff's property.
 32. He stated that on 24/08/2020 they were going for an inspection but they were diverted to an office and that he is not aware that the plaintiff alerted National Construction Association for remedial action. Further that he did not have the plaintiff's building plan. Upon re-examination he stated that he was a building works officer with a higher national diploma and that he has been working for over 20 years. He testified that he did not need to be an engineer with a degree to write a building report. Therefore, he stated that he was qualified to make the observations he made at paragraphs 8 and 9 of his witness statement.
 33. DW-3 Eng. Maxwell Kosgey Mengich testified that he was a professional Engineer having graduated in 1984 and he adopted his witness statement dated 3/04/2022. On cross-examination he testified that whereas they had hoped they would visit the site, the plaintiff at the meeting of 24/-08/2020 introduced another methodology instead. Further that the Engineer from Matrix had already issued instructions to the contractor and whereas his team and himself were satisfied with the new methodology they did not accept the liability for the protrusion.
 34. He testified that they never prepared a report on their part since they understood the procedure to be that they were to visit the site first then a report would be done. He denied being aware that there was an email for site visit as seen at pages 5-6 of the plaintiff's bundle and further he denied that the plaintiff wrote to the defendant. He however confessed being aware that the plaintiff was issued with BQs.
 35. He testified that construction of buildings have a start and finish date and so the plaintiff had to make remedial actions because it is the responsibility of incoming contractor to maintain structural stability. He denied that there was any delay on the defendant's part since he stated that they availed themselves on 24/08/2020.
 36. On being re-examined, he stated that he cannot say what protrusion is and that he never saw a protrusion. He testified that right now if one visits the site they will notice that there is a gap of 150 mm between the properties of the plaintiff and the defendant. That whereas the plaintiff complains about protrusion, the point of reference is a problem.



37. He testified that they never signed any minutes since they met in an office. It was his contention that at paragraph 10 he stated that they visited the site but that he never saw any protrusion but that visit was for a different case – ELC 103/2020. He stated that as a professional he holds the view that building regulations must be adhered with and so it was important for Egoli to support the structure of Bluebill Limited. With this the defendant closed their case.

Plaintiff Submissions

38. The plaintiff filed their submissions through M/s A.K Muchiri & Company Advocates. They deciphered the following as the main issues that fell for determination in the suit:

- (i) Whether the plaintiff has established that the defendant has encroached onto his land;
- (ii) whether the plaintiff is entitled to the reliefs sought and
- (ii) whether the defendant has proved his counter claim. On the first issue the plaintiff contends that there is no dispute about the ownership of the suit properties by the plaintiff and the defendant who are neighbours. Despite being neighbours through the properties that the dispute at hand is not a boundary dispute. That a private surveyor through the report of 9/09/2020 proved encroachment and a subsequent second report affirmed that the defendant's construction has protruded onto the plaintiff's property. The reports remain unchallenged and neither were they invalidated when they were produced in court. Thus the plaintiff submits that in line with Section 107 of *Evidence Act* it had discharged its duty of proofing the allegations of encroachment.

39. On the second issue the plaintiff contends that the defendant failed to engage with the plaintiff on the remedial measures. That the defendant's witnesses Benjamin Lang'at and Engineer Maxwell Mengich testified that they were in agreement with the methodology discussed at the meeting of 25/08/2020 which was to be used to abate the encroachment. That the plaintiff's contractor undertook the remedial measures although the defendant's engineer never visited the site. The plaintiff presented a quote from the Contractors which itemized the work to be done and the cost of each intervention.

40. On the 3rd issue about the defendant proving the counter-claim the plaintiff has submitted that it is trite under Sections 107 and 109 of the *Evidence Act* that he who alleges must prove. Thus that the defendant is claiming special damages but has not presented any receipts to support the claim. On the tenancy agreement between the defendant and its tenant the plaintiff states that there is no nexus between the plaintiff and the defendant's tenants which would tie the loss of income to the plaintiff's action. The receipts attached and produced as part of the defendant's list of documents are just that – receipts and they do not tell any other story about loss of income or termination of tenancy.

41. The plaintiff has referred to the cases of Clerkson Onyango Bolo vs James Asaka & 2 Others [2021]eKLR, Curzon Properties Limited vs Brookside Hill Limited [2021] eKLR and Savings & Loan (K)Limited vs Kanyenje Karangaita Gakombe & Another [2015]eKLR.

42. By the time of writing this judgment the defendant had not filed their submissions.

Analysis and Determination

43. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common statement of issues to be determined by the court.



44. Taking into account the parties' pleadings, evidence and submissions, the following are the key issues that fall for determination in this suit: (1) Whether the reliefs sought by the plaintiff are merited;
2. Whether the counterclaim of the defendant is merited;
3. What order should be made in relation to costs of the suit.
45. I will dispose the three issues sequentially in the above order. Before I delve into the issues raised I am of the view like it was observed in the case of Nakuru Industries Limited...Vs...S.S Menta & Sons (2016) eKLR, that the action being contested by the parties is one of nuisance although the plaintiff has not stated so. The court has defined 'Nuisance' as was defined in Clerk and Lindsell on Torts at page 1354 para 24-01 as:-
- “An act or omission which is an interference or 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 persons actions on his land are not confined to the land, but escape to his land causing an encroachment and causing Physical damage or unduly interfering with the neighbours use and enjoyment of his land.”
46. It was the Plaintiff's evidence when it came to court that when it wanted to construct on its parcel it noted that during excavation that the defendant's boundary wall and apartments had encroached into the plaintiff's land parcel. Thus the defendant's development had adversely affected the plaintiff's development. They contended that the defendant's development has encroached on the plaintiff's land where the building and boundary wall bases are buried into the plaintiff's land by approximately 0.4 metres along and 30 metres long boundary wall. The plaintiff has supported this contention by filing a surveyor's report dated 09/09/2020.
47. Going by the definition of Nuisance and the material placed before this court, it is not in doubt that the Defendant interfered with the Plaintiff's use and occupation of land. This Court therefore finds that there was nuisance caused by the Defendant.
48. The defendant had argued in its defence stated that when it bought the property from its previous owner there was already a concrete slab inferring that there was already the encroachment, the plaintiff therefore cannot now complain, because when he bought the plot, the structure was already in existence. With due respect to the defendant I find this argument lacking of substance. This is because, merely because a previous owner has not raised issue regarding an encroachment of his land does not bind any successive owner of the land. An owner of land has every right to insist on enforcement of the rights that vest on him irrespective of whether the previous owner chose not to, unless the new owner is barred by the law from doing so.
49. The right to property as encapsulated in Article 40 of our Constitution entitles the owner its rights over every portion of that property and not just part of it. An owner is thus fully entitled to complain, even where only an inch of that property is in issue. The owner in this case being the plaintiff is entitled to rights over the whole of the property irrespective of whether the slab was there before the plaintiff bought the suit property in question.
50. The arguments by the defendant about damage to its suit property caused by debris falling from the construction of the plaintiff is not a justification of encroachment onto the plaintiff's parcels of land. When they built on their parcel the defendant should have ensured that there was no encroachment. It is baffling to hear the defendant state that they never conducted a search nor undertook a survey to establish the beacons. In his evidence, the DW2 stated that he never called for the services of a surveyor when the issue of encroachment was raised even when he was advising the DW1.



51. In not doing so, the defendant embarked on a gamble that had potential to backfire and it can blame no one but themselves when it is established that there is encroachment coming from its action of constructing on a protruding slab which has overrun the beacons. In essence the defendant is actually a trespasser although the plaintiff chose not to refer to the action as trespass but encroachment.
52. But what is encroachment? It is defined an unauthorized intrusion onto a neighboring property through the creation or extension of a physical structure (including flora) above or below the surface of land. Thus, when a person decides to encroach another's land they take upon themselves the risk of suffering loss if the owner insists on their rights. They cannot be heard to complain that they will suffer loss by the registered proprietor asserting their rights. I have not been persuaded by the defendant that the defence and claim of loss is available to them.
53. I will now turn to the question whether the plaintiff is entitled to the damages. He has pleaded that they incurred damages of Kshs. 5,133,752,40/=. I need to address myself whether the plaintiff has proved the same. The plaintiff has produced a profoma invoice from Metrix Limited dated 21/10/2020 which states that it is for design and supervision of neighbouring plot encroachment seeking a payment of Kesh 155,250. At the same time Metrix Consultancy has written a letter dated 16/10/2020 confirming that the remedial measures undertaken by M/S R.J Varsani are satisfactory and in accordance with recommendations they made in a letter dated 18/08/2020 although the said letter was not produced in evidence.
54. This claim is supported by the testimony of PW1, PW 3, DW2, and DW3 who stated that there was a meeting on 24/08/2020 where the methodology was discussed. In his testimony DW-3 in cross-examination admitted that that the Engineer from Matrix Consultancy had already been issued with instructions and that on their part representing the defendant they were satisfied with the methodology but they did not accept the liability of the protrusion.
55. Despite the testimony of DW3 that they did not accept the liability they did not present the alternative cost of what it would take to do the work using the agreed methodology. It is not the business of this court to call for evidence about cost of the methodology.
56. I am thus persuaded that the plaintiff did indeed engage contractors and engineers to correct the protrusion and is thus entitled to compensation.
57. The defendant on his part has made counter allegations to the effect that the plaintiff has disrupted the quiet occupation of its tenants leading to termination of tenancy agreements. The tenants have left the occupation of the defendant's apartments leading to financial losses. This allegation was not supported with any report or documents. The receipts filed by the defendant only indicate payment of rent and so one is not able to deduce whether they are a loss as a result of the plaintiff's construction. At the same time the defendant has filed a counter-claim and seeks compensation of Kshs. 2,379,450 countering the claim of Kshs 5,133,752 made by the plaintiff as the expense in abating and making good the encroachment being the contractors' and engineers' cost.
58. Again, I have scrutinized the claim made out under the filed Counterclaim, for the alleged loses incurred from the termination of tenancy due to the ongoing construction work, and find myself concluding that it is difficult to find for the defendant. The defendant has not filed any tenancy agreements nor any letter from any one of the tenant(s) terminating the existing tenancy and stating that it is the plaintiff's work of construction that has led to the termination. It is trite that he who alleges must proof.
59. At the same time there is no report filed by the defendant to counter or place before the court evidence contrary to what the plaintiff has alleged. As it were the plaintiff's report remain unchallenged and not



invalidated at all. It therefore follows that the construction on the defendant's parcel indeed encroached on the plaintiff's parcel. The legal maxim "Ex Turpi Causa non oritur action" is thus applicable here that it's the Defendant who committed the wrong in the first place and should not be made to benefit from the said wrong. Two wrongs do not make a right. For these reasons therefore, the Counterclaim fails to succeed for lack of merit whatsoever.

60. On the issue of costs, it is now well established that the issue of Costs is at the discretion of the Court See Shah – Versus – Mbogo case [1968] EA 93. Costs means any award that is granted to a party after the conclusion of a legal action, process and proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, 2010 provides that costs follow the event. By event here as has been agreed from myriad of the Courts decisions and precedents it is the result (or outcome) of the said legal action, process and proceedings.
61. In the instant case, I find that while the Plaintiff has been successful in establishing that there is encroachment which the contractors and engineers placed the cost at Kshs. 5,133,752 whereas the defendant in its Counter Claim has failed to elaborate and proof reasons presented in seeking Judgement against the plaintiff. For that reason, therefore, the Plaintiff is entitled to costs of both the suit and for defending the failed Counter Claim.

Disposition

62. Given the foregoing I make the following disposition:
- a. The plaintiff shall be paid the sum of Kshs. 5,133,752/=
 - b. The costs of this suit and counter-claim are awarded to the plaintiff

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF OCTOBER 2024

MOGENI J

JUDGE

In the Virtual presence of: -

Mr. Otieno for Plaintiff

Ms. Njoroge holding brief for Mr. Mereka for Defendant/Respondent

Caroline Sagina - Court assistant

