



Shah (Suing as the Legal Representatives of the Estate of Vinodrai Hirji Shah) v Co-operative Society Limited & another (Environment & Land Case 605 of 2016) [2022] KEELC 2192 (KLR) (5 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 605 OF 2016**

OA ANGOTE, J

MAY 5, 2022

BETWEEN

VINODRAISHAH (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF VINODRAI HIRJI SHAH PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF VINODRAI HIRJI SHAH

AND

CO-OPERATIVE SOCIETY LIMITED 1ST DEFENDANT

COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

Background

1. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 23rd May, 2016 seeking for the following reliefs:
 - i. An order that the Defendants demolish the extension that encroaches onto the Plaintiffs' property known as Land Reference Number 209/1431/1 Kolobot Road, Ngara in Nairobi.
 - ii. In the alternative to prayer (a), an order that the Defendants purchase the whole of the Plaintiff's property known as Land Reference Number L.R 209/1431/1 Kolobot Road, Ngara in Nairobi.
 - iii. General Damages for Trespass of the Plaintiff's property known as Land Reference Number 209/1431/1 Kolobot Road, Ngara in Nairobi.



- iv. Costs of this suit with interest thereon at court rates from date of judgment until payment in full.
 - v. Such other of further relief that this Honourable Court may deem fit to grant.
2. The Plaintiffs have averred in the Plaint that they are the personal representatives of the Estate of Vinodrai Hirji Shah (deceased); that the deceased is and was at all material times the registered owner of all that property known as L.R No 209/1431/1 Kolobot Road, Ngara in Nairobi (herein the suit property) and that the Defendants requested and were granted permission to facilitate their project by using the rear side of the suit property to hoard anchorage and a by-pass of a sewer which entailed demolition of the property's boundary wall and erection of a scaffolding to the top floor of the property.
3. It was averred by the Plaintiffs that the Defendants expressly undertook to rebuild the boundary wall after completion of the project; that the Defendants, despite having completed the project, have failed and/or refused to rebuild the boundary wall; that the Defendants have equally constructed a building on the Plaintiffs premises causing a permanent encroachment thereon which has affected the marketability of the property and that the construction has further restricted the Plaintiffs' access to the suit property.
4. The 1st Defendant filed a statement of Defence and denied the averments set out in the Plaint. The 1st Defendant averred that they did not request to use the rear side of the suit property as alleged and neither did they demolish the Plaintiffs' boundary wall and that they have not encroached on the Plaintiffs' property as alleged or at all. The 2nd Defendant did not participate in the proceedings.

Hearing & Evidence

The Plaintiffs' case

5. The matter proceeded for hearing on 10th November, 2021. PW1 was Kamal Vinodrai Shah. He adopted his witness statement dated 23rd May, 2016 as his evidence in chief and produced the documents as PEXHB1-8. PW1 informed the court that he is the personal representative of the Estate of Vinodrai Hirji Shah (deceased) and that the deceased is the registered proprietor of the suit property.
6. PW1 stated that vide a letter dated 24th September, 2012, the Defendants sought permission to use the rear of the suit property to hoard anchorage and a by-pass of a sewer in facilitation of a project; that the Defendants wrote a further letter dated the 26th November, 2013 seeking to demolish the property's boundary wall in furtherance of the project and that the Defendants undertook to rebuild the said boundary wall on completion.
7. PW1 stated that they granted the Defendants permission to deal with the suit property as requested; that despite having completed the project, the Defendants have neglected and/or refused to reconstruct the boundary wall and that the Defendants have constructed a permanent structure that encroaches on the wall.
8. On cross-examination, PW1 stated that he had produced the letters dated 24th September, 2012 and 26th November, 2013 through which the 2nd Defendant sought permission to use the suit property; that it is the 2nd Defendant who demolished the house; that the Plaintiffs did not have any communication with the 1st Defendant; that the encroachment by the Defendants has hindered the Plaintiffs access to the suit property and that the Defendants have not rebuilt the wall and have blocked access of the suit property using mabati.



9. PW2 informed the court that he is a land surveyor and a registered member of the Institute of Surveyors of Kenya; that he authored a survey report sometime in November 2015; that he was engaged to identify the beacons on the suit property; that he referenced the beacons using the available maps from survey of Kenya and that he has provided a sketch map showing the extent of the encroachment on the suit property. The Defendants did not testify.

Submissions

10. The Plaintiffs, through their counsel, submitted that the deceased is and was at all material times the registered proprietor of the suit property, which fact has not been challenged and that the nature of the dispute herein is with respect to the boundary between the suit property and the 2nd Defendants' property, which boundary has been clearly defined and as such does not fall within the disputes envisaged under Section 18 of the *Land Registration Act*. Reliance was placed on the Court of Appeal case of *Azzuri Limited vs Pink Properties Limited* [2018] eKLR where the court distinguished between disputes over general boundaries and disputes over fixed boundaries.
11. It was submitted that the 1st Defendant has encroached on the suit property as evinced by the surveyors report as well as photographic evidence by the Plaintiffs. Counsel cited the case of *Clerkson Onyango Bolo vs James Asala & 2 Ors* [2021] eKLR in which the court reiterated that the owner of a property has rights to every part of the property and is entitled to complain however trivial the encroachment is.
12. Counsel submitted that the Defendants' actions in constructing on the Plaintiffs' property constitutes continued trespass and that the Plaintiffs have been deprived of the use of the suit property. Reliance was placed on the cases of *Obadiab K Macharia vs Kenya power & Lighting Company Limited* [2016] eKLR and *Telkom Kenya Limited vs County Government of Muranga* [2019] eKLR which defined the concept of trespass and the case of *Ajit Bhogal vs Kenya Power and Lighting Co Ltd* [2020] eKLR where the court affirmed that trespass is actionable per se.
13. Counsel submitted that the sum of Kshs 10,000,000 would suffice as general damages for trespass. Counsel relied on the case of *Rhoda S Kiilu vs Jiangxi Water & Hydropower Construction Kenya Limited* [2019] eKLR and that the Defendants are in breach of the promise to rebuild the wall.
14. The 1st Defendant, through its counsel, submitted that the letters dated 24th September, 2012 and 26th November, 2013 were written by the 2nd Defendant and subsequently, the 1st Defendant is not liable for any obligations created by the said letters and that no action for trespass can lie against the Defendants because the Plaintiffs gave consent for the Defendants to enter the property.
15. Counsel cited the cases of *Fleetwood Enterprises Ltd vs Kenya Power & Lighting Co. Ltd* [2015] eKLR where this court sitting in Malindi held that the award of damages for trespass is discretionary in nature as well as the cases of *Attorney General vs Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) where the Supreme Court set aside an award for damages resulting from a claim for compulsory acquisition where the Appellate Court had awarded damages for the whole of the suit property including the un-acquired portion.
16. It was submitted that the encroachment only affected a small section of the suit property being 3.92 square meters; that an order compelling the 1st Defendants to purchase the whole of the suit property would be unjust since the Plaintiffs' remedy for encroachment ought to be limited to the portion of land that has been encroached on by the 1st Defendant.



Analysis & Determination

17. The Plaintiffs instituted this suit against the Defendants seeking to inter-alia have the Defendants demolish a portion of their construction that encroaches onto the suit property and in the alternative, an order compelling them to purchase the suit property. The Plaintiffs also claim general damages for trespass.
18. The 1st Defendant filed a Defence denying the Plaintiffs' assertions. The 2nd Defendant did not participate in the suit. Despite filing the Defence aforesaid, the 1st Defendant did not adduce any evidence nor participate in the hearing. Subsequently, the Plaintiffs' evidence is uncontroverted.
19. The above notwithstanding, the burden on the Plaintiffs to prove their case remains the same and that burden of proof is in no way lessened because the Defendants did not adduce any evidence. As expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR;

“The suggestion, however implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...”

While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The [Evidence Act](#) is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

20. It is common ground that the deceased is the registered owner of all that property known as L.R No 209/1431/1 Kolobot Road, Ngara in Nairobi (I.R 8250/1) having been so registered sometime in 2008. The Plaintiffs' claim is essentially premised on the tort of trespass.
21. In a nutshell, the Plaintiffs contend that they granted the Defendants permission to demolish their rear boundary wall to enable the Defendants undertake construction on their premises and that the permission was granted on the Defendants' undertaking that they would rebuild the wall once they completed construction.
22. According to the Plaintiffs, the construction has been completed and that the Defendants have yet to rebuild the wall. It has been alleged by the Plaintiffs that the Defendants have constructed a permanent structure that encroaches on the Plaintiffs' property.
23. The Plaintiffs adduced in evidence a copy of the title to the suit property, a grant of probate dated 4th January 2016, letters by the 2nd Defendant dated 24th November, 2012 and 26th November, 2013 requesting for permission to use the property, a survey report indicating encroachment on the suit property and photographs showing the alleged encroachment.
24. As aforesaid, it is undisputed that the Plaintiffs are the owners of the suit property and as such they have rights over the property as expressed under Section 24(a) of the [Land Registration Act](#) which provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”



25. Indeed, one of the rights and privileges belonging to an owner of land is the right to have the use and possession of the land to the exclusion of others, subject to the doctrines of eminent domain and police power (see Article 40 and 66 of *the Constitution*). Having affirmed the Plaintiffs' proprietorship of the suit property, the next question to address is whether the Plaintiffs have demonstrated that the Defendants have illegally and unlawfully encroached thereon.
26. According to *Black's Law Dictionary 8th Edition*, Trespass is defined as follows:
"An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property"
27. Whereas a continuing trespass is defined as:-
"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property"
28. Section 3 (1) of the *Trespass Act*, provides that:
"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."
29. Counsel for the 1st Defendant submitted that the Plaintiffs admitted to having granted the Defendants permissions to enter into the suit property and therefore the question of trespass cannot lie. Indeed, the Plaintiffs admitted that they allowed the Defendants onto the suit property. However, the letters adduced in evidence leave no doubt as to the nature of the permission sought and granted to the Defendants.
30. According to the evidence on record, the Defendants were allowed by the Plaintiffs to use the rear of the suit property to undertake some construction works and thereafter return the property to its original state. It is uncontroverted that the project has been completed and that the suit property has not been returned to its original state.
31. There being evidence of encroachment as per the survey report, the court finds no difficult in holding that to the extent that the suit property has not been returned to its original form by the Defendants, the Defendants have trespassed on the land.
32. The 2nd Defendant is a construction company which was at the material time carrying on construction on the 1st Defendant's property. That being so, there is an inference that the 2nd Defendant was acting as an agent of the 1st Defendant. Indeed, the said agency has not been expressly denied nor disproved save for the argument that the 1st Defendant is not bound by the letter authored by the 2nd Defendant.
33. Even if there was no agency relationship between the 1st and 2nd Defendants, it would not take away the fact that the trespass to the suit property was occasioned by the 1st Defendant property, whose property abuts the suit property. Indeed, the 1st Defendant cannot purport to on one hand assert that it was given permission to enter the suit property and on the other hand disassociate itself from the 2nd Defendant.
34. The legal position with respect to trespass is that the same is actionable per se. This means that once it has been established that trespass has occurred, the person against whom the trespass was committed



is entitled to damages. As articulated by the learned authors in *Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503*;

- a. If the Plaintiff proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

35. This position was affirmed by the Court of Appeal in *Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited* [2017] eKLR where the Court stated as follows;

“Trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case.”

36. The Plaintiffs opine that the award of Kshs 10,000,000 would be sufficient for trespass as guided by the decision in the case of *Rhoda S Kiilu vs Jiangxi Water & Hydropower Construction Kenya Limited(supra)*. In the Rhoda case, the acts of trespass committed by the Defendant included clearing trees and bushes, creating roads, quarries, deep gullies and carrying out acts of excavation of soil, murrum and rocks and carrying them for construction. The court in awarding the sum of Kshs 10,000,000 noted that the damage occurred in a rather expansive chunk of land.

37. In the instant case, the encroachment is admittedly minimal and although it has been averred that the trespass has affected the marketability of the property, there is no evidence of this. In view of the foregoing, the court opines that the Plaintiffs are entitled to nominal damages of Kshs 500,000.

38. The net result is that the court finds that the Plaintiffs suit against the Defendants has been proved on a balance of probabilities and proceeds to enter judgment in favor of the Plaintiffs as against the 1st Defendant in the following terms:

- i. An order be and is hereby issued for the 1st Defendant to demolish the extension that encroaches onto the Plaintiffs' property known as Land Reference Number 209/1431/1 Kolobot Road, Ngara in Nairobi within the next 60 days failure to which the Plaintiffs are at liberty to proceed to do so at the Defendants' costs.
- ii. The 1st Defendant to rebuild the Plaintiffs' demolished wall within 60 days, and if not, the Plaintiffs to rebuild the wall at the 1st Defendant's cost.
- iii. The 1st Defendant to pay the Plaintiffs Kshs 500,000 as damages for trespass.
- iv. The 1st Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF MAY, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Ms Wangui for Mr. Shah for the Plaintiffs



No appearance for the Defendants

Court Assistant – Caroline Kajuju

