



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 50 OF 2016

RATILAL GHELA SHAH & 2 OTHERS.....PLAINTIFFS

VERSUS

CHAIRPERSON MVITA CDF COMMITTEE & 2 OTHERS.....DEFENDANTS

JUDGMENT

1. The plaintiffs commenced this suit by way of a plaint dated 31st March, 2016. The plaintiffs aver that they are the joint registered owners of the leasehold property known as Mombasa/Block XV/647 (hereinafter referred to as the suit property) situated in Majengo Mvita within Mombasa County. The plaintiffs claimed that the defendants encroached into their property by constructing a permanent house thereon. The plaintiffs aver that the defendants' action is an act of trespass, illegal acquisition/grabbing of private property and a clear breach and interference with the plaintiffs constitutionally guaranteed property rights. That by reason of the defendants' action, the plaintiffs have suffered and continue to suffer loss and damage. The plaintiffs pray for judgment against the defendants for:-

(a) A permanent injunction to restrain the defendants, by themselves, representatives, agents, employees, servants, committees or whosoever is acting on their behalf from entering, trespassing onto, erecting, constructing, building or in any manner whatsoever interfering with the property Mombasa/Block XV/647.

(b) An order to evict and remove the defendants by themselves, representatives, agents, employees, servants, committees or whosoever is acting on their behalf from the property Mombasa/Block XV/647.

(c) An order for demolition and carting away of all and any of the portion of the building encroaching onto the property Mombasa/Block XV/647 at the defendants' costs.

(d) An order directing the Officer Commanding Station (OCS) Mvita to provide security, supervise and enforce the court orders granted herein.

(e) General damages for trespass and wrongful occupation.

(f) The costs of this suit.

(g) Any other order as the court may deem fit and appropriate.

2. The 1st plaintiff, Ratilal Ghela Shah adopted his witness statement dated 31st March, 2016 and testified that in or about January 2016, while on a visit to the suit property, discovered that a construction was being carried out on the neighbouring property and part of the construction encroached onto the suit property. To ascertain the extent of the encroachment, the plaintiffs engaged the services of Edward Kiguru Land Surveyors who established that part of the construction of about 0.0059 hectares encroached onto the suit property. The plaintiffs produced a letter dated 19th January 2016, Survey Report, Certificate of Lease, survey map and photographs of the construction site as exhibits.

3. Mr. Edward Kiguru also testified as PW2 and reiterated the contents of his report dated 19.1.2016 which he produced as an exhibit. His findings were that there was a house and construction which had encroached into the suit property. He identified the area encroached to be measuring 0.059 hectares.

4. PW3 was Peter Juma Wanyama, the Regional Surveyor, Coast and also the surveyor in charge of Mombasa County. Pursuant to an application by the plaintiffs, the court had ordered him to undertake boundary determination in respect of the suit property and file a report. The report dated 17th December, 2018 was filed in court on 18th December, 2018 and was adopted and produced by PW3 as part of his

evidence. He testified that there were two parcels adjacent to each other, namely Mombasa Block XV/647 and Mombasa/Block XV/708. PW3 testified that upon determining the boundaries of the two parcels of land, he found out that there was a building put up by the defendants on plot No. Mombasa/Block XV/708 which encroached on parcel No. Mombasa/Block XV/647 by 0.0051 hectares. PW1 stated that all the evidence on site including the building shows that plot Mombasa/Block XV/708 is owned by the Mvita Constituency Development Fund. Mvita Constituency.

5. The 1st and 2nd defendants did not enter appearance or file defence and the plaintiffs' case against them proceeded by way of formal proof. The 3rd defendant entered appearance and filed defence denying the plaintiffs claim and called one witness, Simon Maina Ndweka, the 3rd defendant's Corporation Secretary. He adopted his witness statement dated 18th September, 2019 and filed on 25th September, 2019. He testified that the 3rd defendant did not own plot No. Mombasa/Block XV/708, neither did it fund nor implement the contentious development. He testified that the implementation of such developments are always done by the CDF Committees.

6. In their written submissions filed on 11th March, 2020, the plaintiffs advocates, K'Bahati & Company Advocates submitted that there was overwhelming evidence that the building on Plot Mombasa/Block XV/708 encroached onto the suit property. That the issue is whether the construction encroached onto the suit property, not whether the owners of the adjoining property encroached onto the suit property. It was submitted that the owners of the project/construction as opposed to the registered owner of the said property are the ones liable to answer to the claim before court. It was submitted that on the basis that the construction carried out encroaches on the plaintiffs' suit property, *ipsa facto* the defendants do not have any interest or rights on the encroached portion. That the said portion is part of the suit property, which belongs to the plaintiffs. That equally, the defendants have not presented any evidence to rebut the assertion that they are the ones constructing on the suit property.

7. The plaintiff's advocates submitted that the defendants action is plain and obvious trespass, adding that the plaintiffs have since January 2016 been deprived of the use and occupation of the suit property and are entitled to damages. The plaintiffs relied on the case of **Nakuru Industries Limited –v- S. S. Melita & Sons (2016) eKLR** and **Duncan Ndegwa –v- Kenya Pipeline HCCC No. 2577 of 1990** and urged the court to award general damages of Kshs3,000,000/=. The plaintiffs submitted that although project implementation is the mandate of the 1st Defendant, the project remains the property of the Board by dint of section 36(3) of the National Government Constituencies Development Fund Act and that in the circumstances the project is the project of the 3rd defendant. The plaintiffs submitted that even if the court were to absolve the 3rd defendant from any blame for the trespass, it cannot shackle the plaintiff with the 3rd defendant's costs because the basis of bringing it to court was not frivolous or unfounded but based on strong legal foundation.

8. On their part, the firm of Simiyu, Opondo, Kirangu & Company Advocates for the 3rd defendant filed their written submissions dated 15th March, 2020 on 16th March, 2020. They submitted that the plaintiffs have not produced any evidence to link the 3rd defendant to the offending property, Mombasa/Block XV/708. They cited the maxim on the rule of evidence that he who alleges must prove and cited Section 107 of the Law of Evidence Act and relied on the case of **Evans Otieno Nyakwana –v- Cleopas Bwana Ongaro (2015) eKLR**. It was submitted that the plaintiffs did not prove that the 3rd defendant authorised, founded or implemented the said project. The 3rd defendant wants the plaintiffs' case against it dismissed with costs.

9. I have reviewed and considered the pleadings, the evidence by the plaintiffs and the 3rd defendant and the submissions made. The court identifies the following issues for determination:-

(i) Whether the defendants trespassed into the suit land.

(ii) Whether a building was put up by the defendants which has encroached on the suit land.

(iii) What are the remedies available.

10. PW1, the 1st plaintiff in his evidence stated that in or about January 2016 while on a visit to the suit property, he discovered that a construction was being carried out on the neighbouring property, which is Mombasa/XV/708, and part of the construction encroached onto the suit property. To ascertain the extent of the encroachment, the plaintiffs engaged the services of Edard Kiguru Land Surveyors. Upon conducting the Survey, the surveyor (PW2, Edward Kiguru) established that part of the construction of about 0.0059 hectares encroached onto the suit property. The survey report and supporting documents form part of the document produced by the plaintiffs as exhibits. The Coast Regional Surveyor, Mr Peter Juma Wanyama (PW3) also undertook a boundary determination in respect of the suit property and filed and produced the report as an exhibit. He also confirmed that he found a permanent structure on neighbouring property Mombasa/Block XV/708 having encroached onto the suit property resulting in the reduction of the acreage of the suit property by 0.0051 hectares. PW3 further stated that all the evidence on the site, including the building itself showed that it is owned by the 1st and 2nd defendants. This evidence fortifies the plaintiffs' evidence as shown in the documents and photographs produced as exhibits. In this case, there is overwhelming evidence that the building on Mombasa/Block XV/708 encroaches onto the suit property.

11. In this case, the 1st and 2nd defendants failed to enter appearance or file defence. That means that not only does the evidence rendered by the plaintiffs unchallenged but also remains uncontroverted. The defendants, other than the 3rd defendant, did not deny that they are the ones carrying out the construction that has encroached onto the suit land, and thus are liable. The 1st and 2nd defendants have not pleaded or presented any evidence to either show that they have any interest or right on the part of the suit property constructed on or the entire suit property. The 3rd defendant led evidence to the effect that it is not the registered owner of Plot Mombasa/Block XV/708 and that it did not approve any project or development on the said plot. There was no evidence in support of the plaintiffs' assertion that the 3rd defendant bears responsibility for the project carried out by the 1st and 2nd defendants. From the evidence on record, this court cannot safely arrive at a finding that the project that has encroached onto the suit property is the property of the 3rd defendant. The court cannot base its findings on assumptions as submitted to by the plaintiffs.

12. I find the evidence on record sufficient to prove that the plaintiffs have proved their case against the 1st and 2nd defendants on a balance of probabilities. However, I also find that the plaintiffs have failed to prove their case against the 3rd defendant on a balance of probabilities. Accordingly, the suit against the 3rd defendant is dismissed.

13. In this case, the plaintiffs' title to the suit property was not contested. There is humble evidence that the 1st and 2nd defendants unlawfully, forcibly and without any colour of right encroached onto the suit property, and upon trespass, proceeded to construct a permanent structure thereon. Once trespass is established, it is actionable *per se* and no proof of damage is necessary for the court to award general damages. There is no doubt that the plaintiffs have since January 2016 been deprived of the use and occupation of the portion of the suit property that has been encroached on and have suffered loss and damage, and are therefore entitled to damages. The plaintiffs have urged the court to award them general damages of Kshs.3,000,000/=. The plaintiffs herein did not adduce any evidence as to the state of their property before the trespass. However, since I have found the 1st and 2nd defendants did trespass onto the plaintiffs' land and constructed some permanent structure thereon, I award the plaintiffs damages in the sum of Kshs2,000,000/=.

14. The upshot is that judgement is entered for the plaintiffs against the 1st and 2nd defendants in the following terms:-

a. A permanent injunction is hereby issued to restrain the 1st and 2nd defendants, by themselves, agents, employees, servants, committees, or whosoever is acting on their behalf from entering, trespassing onto, erecting, constructing, building or in any manner whatsoever interfering with the property Mombasa/Block XV/647.

b. An order for the demolition and carting away of all and any portion of the building encroaching onto the plaintiffs property Mombasa/Block XV/647 at the 1st and 2nd defendants cost and deliver vacant possession to the plaintiffs within sixty (60) days from the date of service of the decree upon them failing which the plaintiff shall be at liberty to demolish and remove the said structure at the 1st and 2nd defendant' cost.

c. General damages of Kshs.2,000,000/= are awarded to the plaintiffs against the 1st and 2nd defendants.

d. The Officer Commanding Station (OCS) Mvita to provide security, supervise and enforce and enforce the orders granted herein.

e. The plaintiffs' suit against the 3rd defendant is dismissed with no order as to costs.

f. Costs of the suit are awarded to the plaintiffs to be borne by the 1st and 2nd defendants jointly and severally.

g. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 27th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE