



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 11 OF 2016**

**CLERKSON ONYANGO BOLO.....PLAINTIFF**

**-VERSUS-**

**JAMES ASAKA.....1<sup>ST</sup> DEFENDANT**

**JACK OOKO.....2<sup>ND</sup> DEFENDANT**

**PRISCAH ASAKA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

*(Suit by plaintiff claiming that the defendants have encroached and developed in a portion of his land; plaintiff further alleging that the defendants have demolished his wall and seeking special damages; defendants stating that they were given permission to develop on a road reserve and did not encroach into the plaintiff's land; defendants further contending that when the plaintiff purchased the land, their development was already in existence and the previous owner did not disturb them thus the plaintiff ought not sue them; survey evidence demonstrating that part of the developments made by the defendants encroach into the plaintiff's land; immaterial that the previous owner did not enforce his rights; defendants had a duty to ensure that their development did not encroach into neighbouring land; no judgment however for special damages which lacked proof.)*

1. This suit was commenced by way of a plaint which was filed on 2 February 2016. It is the case of the plaintiff that he is the proprietor of the land parcel L.R. No. 2237/I/MN situated in Shanzu, Mombasa (the suit land). He has pleaded that sometime in 2013, without his consent, the 1<sup>st</sup> and 3<sup>rd</sup> defendants encroached into the suit land, and built a semi-permanent rental house, where the 2<sup>nd</sup> defendant is a tenant. The plaintiff contends that he did not allow the defendants to encroach and build a house on a portion of his land. He also claims that the defendants demolished his wall on the suit land and claims special damages. Specifically, the plaintiff has asked for the following prayers as drawn in his plaint :-

*a) A declaration that the plaintiff is the proprietor of the parcel of land LR No. 2237/I/MN.*

*b) A permanent injunction against the defendants and their agents , servants, legal representatives and hirelings from having any dealings with the suit property and from interfering with the plaintiff's quiet possession, occupation, use and enjoyment of LR No. 2237/I/MN.*

*c) An order that the 1<sup>st</sup> and 3<sup>rd</sup> defendant do demolish their house which is on the plaintiff's suit land LR No. 2237/I/MN and on the road reserve and all the defendants do give vacant possession of the plaintiff's portion of the suit land.*

*d) Special damages of Kshs. 37,140/=.*

*e) Costs of and incidental to this suit*

*f) Interest on (d) and (e) at court rates from the date of filing this suit.*

2. The defendants filed a joint statement of defence. They denied encroaching into the plaintiff's land. They pleaded that the house they built was erected long before the plaintiff acquired the suit land. They denied demolishing the plaintiff's wall and denied that the plaintiff is entitled to claim the special damages of Kshs. 37,140/=.

3. Alongside the plaint, the plaintiff filed an application seeking interlocutory orders of injunction. The court ordered that status quo be

maintained until the conclusion of the suit.

4. The matter first came up for hearing on 20 November 2017 before my predecessor, Omollo J when the plaintiff testified. He introduced himself as an accountant and also operating a college. He explained that the 1<sup>st</sup> and 3<sup>rd</sup> defendant are a couple whereas the 2<sup>nd</sup> defendant is the brother of the 3<sup>rd</sup> defendant. He came to know them in the year 2012. He had a written statement which he adopted as his evidence. In it, he stated inter alia that in the year 2013, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants unlawfully built a residential house on a road reserve fronting the suit land. He stated that he lodged a complaint with the County Government of Mombasa. He himself has a structure on the road reserve and he claimed that the defendants demolished the wall of the structure that he built. He stated that the 1<sup>st</sup> and 3<sup>rd</sup> defendants' house on the road reserve encroach into his land. He stated that the County Government of Mombasa gave the 1<sup>st</sup> defendant notice to demolish the said house but the 1<sup>st</sup> defendant has failed to do so. He mentioned that he acquired the suit property in 2013, and he produced a copy of the title to the suit land. He testified that part of the house of the 1<sup>st</sup> and 3<sup>rd</sup> defendants, and their soak pit, is in his (plaintiff's) land, and that despite notice being issued to them to fill up the soak pit, they have failed to do so.

5. Cross-examined, he stated that in the year 2012, he leased from the 1<sup>st</sup> defendant part of the alleged offending house for a shop. He acknowledged that the 1<sup>st</sup> defendant's structure was therefore already in existence. In his opinion, it was built around the year 2008. He was a tenant for two years. Subsequently, he purchased the adjacent plot (now the suit land). He stated that the 1<sup>st</sup> defendant did not have the permission of the previous owner of the suit land to build on it, and though he had no tangible evidence, he claimed that the previous owner had planned to remove him. He was aware of this alleged offending structure when he presented his building plans. On the issue of the wall, he testified that the 1<sup>st</sup> defendant was to reconstruct it, but he failed to do so, and because of security reasons, he (plaintiff) therefore proceeded to reconstruct it. He testified that at some point he was charged with developing a building without permission.

6. Re-examined, he reiterated that part of the 1<sup>st</sup> and 3<sup>rd</sup> defendant's house is on his land and so too the soak pit. He said that it was in the year 2013 when he had started constructed that he realised the encroachment. He added that the 1<sup>st</sup> and 3<sup>rd</sup> defendant's house was built without approved building plans.

7. PW-2, was Mr. Teddy Mulusa, a surveyor with the Ministry of Lands. He produced the survey report relied upon by the plaintiff to support his case. The report was prepared by a Mr. Mukenyang who was Mr. Mulusa's colleague before being transferred. Mr. Mulusa produced the survey report and a topocadastral map which he stated demonstrate the positions of the houses on the suit land. He could identify both the plaintiff's house and the alleged offending house of the 1<sup>st</sup> and 3<sup>rd</sup> defendants on the suit land. He pointed out that part of the house of the 1<sup>st</sup> and 3<sup>rd</sup> defendants occupies a portion of the suit land.

8. With the above evidence, the plaintiff closed his case.

9. I took over this matter from this juncture, as Omollo J had been transferred, with parties being in consensus that the matter could be continued where it had reached. The 2<sup>nd</sup> defendant testified on behalf of all the defendants.

10. In his evidence, he acknowledged that the house said to be encroaching onto the plaintiff's land belongs jointly to him, the 1<sup>st</sup> defendant (Mr. Asaka) and Mr. Asaka's wife, one Mary Adhiambo Asaka. He did not know the 3<sup>rd</sup> defendant described as Prisca. He stated that their house is developed on a road reserve and was built in the year 2003. They were granted permission to develop from the Municipal Council of Mombasa and that their building plans were approved. He stated that they did not develop out of the permissions given and that they built within the space given to them by the Municipal Council of Mombasa. He came to know the plaintiff when he asked to rent a room for an office within the same structure. He was given a room and thus became their tenant. He (plaintiff) then got space within the same road reserve and started building. He (plaintiff) then moved into his structure in the road reserve. He (plaintiff) was later offered to buy the plot behind (now the suit land) and he bought it in the year 2013. He (plaintiff) subsequently demanded that they should demolish their house as it is within the suit land. He explained that the problem about the wall is that the plaintiff built it but it adjoined their rear exit so that they could not move out of their house from the rear. He stated that they had a meeting before the Chief where it was agreed that he (2<sup>nd</sup> defendant) could demolish a part of it so that he can have an exit from the rear. He produced minutes of this meeting. After he put the gate on the rear, the plaintiff came and broke it and proceeded to re-do the wall and even extended it to cover a window of their house so that the window cannot be opened and they suffer from lack of light. He testified that the plaintiff went to the County Government of Mombasa and got a letter telling them that their structure will be pulled down after 21 days. They responded to that letter and he said that the County Government did not disturb them. He stated that the plaintiff and his worker were arrested for erecting a *mabati* (iron sheet) structure that enclosed them. They had been given permission to hoard their plot but what they did was surround their (defendants') plot with the *mabati*. He mentioned that the plaintiff removed the *mabati* after being given notice by the County Government.

11. In cross-examination, the 2<sup>nd</sup> defendant acknowledged that the plaintiff owns the suit land and that he has all rights within that plot and further that he could take steps to remove anything in that plot. He acknowledged that a plot has boundaries. When he built his house he did not use the services of a surveyor. He stated that he built on a space pointed out to him but he did not measure the extent of the road reserve or the extent of the suit land. He did not dispute the surveyor's report which shows that a portion of his house encroaches into the suit land. The permission he was given was to build on a road reserve but he was never issued with a temporary occupation license and no document of occupation. He conceded that the plaintiff built a wall on his plot. He denied that he was forcing access through the plaintiff's plot and did not dispute that the plaintiff is at liberty to deny access. He stated that according to him the septic tank he has built is on the road reserve though he could see the surveyor's report which shows the tank is split partly into the road reserve and partly to the neighbouring plot which he stated did not belong to the plaintiff. He denied blocking access to the plaintiff. He conceded that they have no counterclaim.

12. With the above evidence, the defendants closed their case and I invited counsel to file written submissions.

13. Mr. Obara, learned counsel for the plaintiff, submitted inter alia that the 2<sup>nd</sup> defendant confirmed that part of his building is on the plaintiff's plot. Counsel also submitted that the 2<sup>nd</sup> defendant admitted receiving notices from the County Government of Mombasa to

demolish the structure he built without approved building plans and he referred me to the exhibits adduced by the plaintiff. Counsel submitted that there is no evidence on record that the 2<sup>nd</sup> defendant was issued with a temporary occupation license (TOL) to build on the road reserve which was a requirement pursuant to Section 40 of the Government Land Act (repealed) and Section 20 of the Land Act 2012. Counsel submitted that the 2<sup>nd</sup> defendant has not refuted the plaintiff's evidence that part of the defendants' house and soak pit has encroached into the suit land. On the special damages, counsel explained that the cost of reconstruction of the demolished wall is Kshs. 26,140/= and that Kshs. 11,000/= is for damages for the time wasted, and therefore, the plaintiff had proved on a balance of probabilities his claim for Kshs. 37,140/=.

14. Ms. Nduku, learned counsel for the defendant, submitted that the plaintiff's claim of encroachment is trivial as he has not stated that he stands to be prejudiced in any manner by the minor encroachment that is estimated by the surveyor to be about 10% of the 2<sup>nd</sup> defendant's house. Ms. Nduku submitted that it is evident that the plaintiff acquired the suit land with full knowledge of the defendants' premises. Counsel also submitted that the defendant cannot operate without a lavatory and a soak pit, and constructing new ones on the road reserve may not be without unnecessary costs and expenses. Counsel referred me to the case of *Lucy Wangui Gachara v. Minudi Okemba Lore (2015) eKLR* as cited in the case of *INN v. NK (2020) eKLR* where the court held that the court will not grant a mandatory injunction if the damages feared by the plaintiff is trivial, or where the detriment that a mandatory injunction would inflict is disproportionate to the benefit it would confer. Ms. Nduku submitted that the plaintiff will suffer no prejudice as a result of the purported encroachment so as to warrant the grant of a permanent injunction but that the defendant stands to suffer great loss, should the orders sought be granted. Counsel submitted that the purported encroachment was not deliberate to deprive the plaintiff of his property. She added that the defendants built their house in 2003, and the former owner of the suit land overlooked the supposed encroachment for 10 years, and that the plaintiff was fully aware of this position when he purchased the land. Counsel submitted that the plaintiff's claim is time barred. She relied on the case of *Saade Ahmed Abdalla vs. Safari Kadenge & 3 Others (2019) eKLR* where the court cited the provisions of Section 7 of the Limitations of Actions Act. Counsel further submitted that by the time the plaintiff commenced this suit in 2016, the defendant had supposedly encroached on the suit land for 13 years and had acquired statutory protection by virtue of Section 28 of the Land Registration Act and Section 7 of the Limitation of Actions Act, thus the plaintiff is estopped by statute and common law from seeking injunctive orders against the defendants. On the claim for special damages, counsel submitted that the demolishing of the wall was done pursuant to an agreement between the plaintiff and the defendants during a meeting with the area chief and the plaintiff cannot now make a claim on it. She further submitted that special damages ought to be specifically pleaded and proved which has not been done. Counsel submitted that it will amount to great injustice and prejudice to the defendant to be compelled to remove 10% of their house that encroaches even when it is evident that the plaintiff is not prejudiced in any manner.

15. I have considered the pleadings of the parties, the evidence, and the rival submissions. I am of the following view.

16. Let me start by saying that there is common ground that the plaintiff is the registered owner of the suit land. Ownership of the suit land by the plaintiff is not disputed by the defendants. There is also ample evidence that part of what the defendants have developed has encroached into the suit land. This is indeed clearly shown by the survey report relied upon by the plaintiff. The survey report does show that the defendants' house has partly encroached into the plaintiff's land. This report was not invalidated by the defendants, and in fact, I did not find any contest from the defendants that what they have built does not encroach on the suit land. The plaintiff in his testimony stated that the defendants' soak pit has encroached in his land and this was also not disputed by the defendants.

17. The defence of the defendants is that they built prior to the plaintiff purchasing the plot and what the plaintiff built came after their construction. They claim that they built in the year 2003 and therefore the claim of the plaintiff is barred by limitation. They also contend that any encroachment is trivial and therefore issuing an order of a permanent injunction would be drastic in the circumstances. There was an issue raised in the evidence of the defendants' witness that the 3<sup>rd</sup> defendant is not known as the wife of the 1<sup>st</sup> defendant is Mary and not Prisca as mentioned in the plaint. I think it is obvious who the plaintiff wished to sue, that is the spouse of the 1<sup>st</sup> defendant, and at times it may not be clear to a claimant what the correct name of the person sued is. In any event, I was not given tangible evidence that the spouse of the 1<sup>st</sup> defendant is Mary and not Prisca. Whatever the case may be, the 3<sup>rd</sup> defendant, however described, is the spouse of the 1<sup>st</sup> defendant and this judgment binds her as she is the person the plaintiff intended to sue. Let me now assess the defences raised.

18. Starting with the defence of limitation, I am not persuaded that this is available to the defendants. Parties are bound by their pleadings. I have not seen any pleading in the defence of the defendants that pleads limitation of time and to me this is an ambush being presented at the time of submissions. In other words, the plaintiff was never informed that the defendants would raise the issue of limitation as a defence. If he was so warned, he would probably have countered this with further pleading and further evidence. There is also no pleading in the defence that the house that was built was actually developed in the year 2003. Again if this was pleaded the plaintiff would have had an opportunity to either concede to that allegation of fact or bring contrary evidence. Moreover, there is no counterclaim by the defendants pleading for the portion of the land by prescription. Again, if this were pleaded, probably the plaintiff would have addressed himself on this issue and presented evidence to demonstrate that the defendants cannot be entitled to the land through prescription or any bar of limitation of time. In brief, I do not find that the defendants can avail themselves of the defence of limitation.

19. Closely tied to the defence of limitation was the contention that the defendants' occupation has acquired statutory protection by virtue of Section 28 of the Land Registration Act, No. 3 of 2012 which provides as follows :-

#### *Overriding interests*

*Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—*

(c) *rights of way, rights of water and profits subsisting at the time of first registration under this Act;*

(d) *natural rights of light, air, water and support;*

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) deleted by [Act No. 28 of 2016](#), s. 11(b);

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law,

Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.

20. It was not specified by counsel for the defendants exactly which subsection above and which part of overriding interest the defendants lay claim to. If it is (h), which touches on limitation and prescriptive rights, I have already addressed myself that it is not available to the defendants. I am unable to speculate as to which other part of Section 28 the defendants rely on so that I can make an analysis of the same. I am not therefore persuaded that the defendants can seek refuge under Section 28 of the Land Registration Act.

21. There is the further contention that because the previous owner did not complain about the encroachment, the plaintiff cannot now complain, because when he bought the plot, the structure was already in existence. There is no substance in this argument. 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.

22. On the argument that the encroachment is trivial I have looked at the authority of *Lucy Wangui Gachara v. Minudi Okemba Lore (2015) eKLR* supplied to me by counsel for the defendants. I have discerned that this was an appeal from a ruling where the High Court had given a mandatory order of injunction at an interlocutory stage. The subject matter therefore touched on issuance of mandatory injunctive orders at an interlocutory stage, not upon the hearing of the matter. The decision in that case is therefore clearly distinguishable from the issue here as this case has now been heard and concluded and is no longer at an interlocutory stage.

23. My view of the matter is that an owner of property is entitled to 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, and I am not persuaded that a trespasser can claim that an owner is not eligible to make a claim because the encroachment, in his opinion, is trivial. As owner, the plaintiff is entitled to rights over the whole of the property. I am thus not moved by the argument of the defendants that their encroachment is only on a small portion of the property.

24. I am in fact not sympathetic to the defendants at all. When they built on the road reserve, and it is really immaterial to me whether the building was approved or not, they ought to have ensured that they do not encroach into any of the neighbouring titled properties. In his evidence, the 2<sup>nd</sup> defendant did concede that he never called for the services of a surveyor when they commenced construction. In not doing so, the defendants embarked on a gamble that had potential to backfire and they can blame no one but themselves when the rightful owner came calling. When a person decides to build on another's land he takes upon himself the risk of suffering loss if the owner insists on his rights. He cannot be heard to complain that he will suffer loss by the registered proprietor asserting his rights. I have not been persuaded by the defendants that the defence of loss is available to a trespasser.

25. It will be seen from the discourse above that I am persuaded that the plaintiff has proved that he is entitled to the orders for the demolition of the defendants' premises and/or developments and improvements that encroach on his land. He is also entitled to a permanent injunction barring the defendants from any further encroachment into his land.

26. I will now turn to the question whether the plaintiff is entitled to special damages. He has pleaded special damages of Kshs. 37,140/= . I need to address myself whether he has proved the same. No receipts or other supporting documents were produced by the plaintiff. What he produced was a letter pointing out to the defendant the breakdown of the claim for Kshs. 37,140/= as follows :-

- Blocks – Kshs. 4,840.00

- Cement – Kshs. 6,800.00

- Sand – Kshs. 10,500.00

- Labour – Kshs. 4,000.00

- Damages – Kshs. 11,000.00 (comprising of time wastage of 2 days, Kshs. 4,000.00; fuel consumed 2 days, Kshs. 1,000.00; Facilitation expenses in the chief’s office, Kshs. 1,000.00; wrongful accusation in the chief’s office that pictured him in bad light, Kshs. 5,000.00)

Putting aside the contestation whether the pulling down of the wall and its reconstruction was agreed or not, there is no proof provided of this breakdown of special damages. Thus, even assuming that the wall was wrongly damaged by the defendants, the plaintiff cannot succeed in his claim for special damages for want of proof. Proof, in the circumstances herein would have been provided by way of receipts paid for the items specified. You would expect that there be receipts for purchase of cement, building blocks and the like. None were provided. Moreover, some of those claims alleged to be special damages are not even special damages such as the claim for wastage of time. The plaintiff’s claim for special damages is thus disallowed.

27. I believe that I have dealt with the matters in issue and I now make the following final orders :-

*a) That the defendants are hereby ordered to remove all their developments and structures that encroach into the plaintiff’s land parcel LR No. 2237/I/MN within the next 60 days. If they do not so remove the said structures and/or developments, the plaintiff is at liberty to proceed to do so at the cost of the defendants.*

*b) That there is hereby issued a permanent injunction restraining the defendants, whether by themselves or through their agents or servants, from entering, being upon, encroaching, or developing on the plaintiff’s land parcel L.R.2237/I/MN.*

*c) That the plaintiff will have the costs of this suit.*

28. Judgment accordingly.

**DATED AND DELIVERED THIS 16TH DAY OF JUNE 2021.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**