



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E288 OF 2021

CURZON PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BROOKSIDE HILL LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the Plaintiffs' Notice of Motion application dated 15th July 2021. The application seeks the following orders:

i) *Spent.*

ii) *That upon interparties hearing of the application, a mandatory injunction do issue compelling the defendant to demolish the encroaching boundary wall/fence erected between the plaintiff's property known as Land Reference No. 1870/III/202 and the defendant's parcel of land reference no. 1870/III/555 at the defendant's costs, failing which the plaintiff be at liberty to demolish the boundary wall at the defendant's costs.*

iii) *That any subsequent boundary wall to be constructed between the plaintiff's property known as L.R No. 1870/III/202 and the parcels of land known as L.R no. 1870/III/202 and L.R no. 1870/III/555 shall strictly comply with the findings of the surveyor's report prepared by Eric Nduhiu in relation to the boundary between the two parcels.*

iv) *THAT the OCS parklands police station shall supervise the enforcement of the order to demolish the boundary wall to ensure that the demolish exercise is undertaken peacefully.*

v) *That the honourable court be pleased to grant any other or further order it may deem fit and just to grant in the circumstances.*

vi) *THAT costs of this application shall be borne by the defendant.*

2. The application is based on the grounds on its face and supported by the affidavits sworn by **Noorali Manji** the plaintiff/applicant herein on 15th July 2021. The Plaintiff's case is that they are the registered owner of the parcel of land known as L.R no. 1870/111/202 whereas the defendant the registered owner of L.R No. 1870/111/555 along Brookside drive within Nairobi. The two properties are adjacent each other and separated by a boundary wall. It is also the plaintiffs' case that on or mid-February 2019 the plaintiff brought to the attention of the defendant that the boundary fence put up by the defendant had encroached on the plaintiff's property. The plaintiff further contended that they had engaged the defendant through its advocates to remedy the encroachment but all was futile. The plaintiff further obtained a report from the surveyor which report confirmed the extend of the encroachment.

3. When the application came up for hearing on 30th September 2021, Counsel for the Plaintiff **Ms. Wangari holding brief for Mr. Kisilu** informed the court that the application had been served upon the defendant and the same was not opposed as no response had been filed to date. She further urged the court to consider the same and allow the application while granting the prayers sought therein.

4. I have considered the application, the affidavit in support thereof and the oral submissions made by **Ms. Wangari**.

5. It is not in dispute that the Plaintiff is the registered proprietor of the parcel of land known as L.R No. 1870/III/202. All the records reveal that the Plaintiff is the registered and beneficial owner of the said property and it is also not in dispute that the defendant is the owner of the adjacent property known as L.R No. 1870/III/555 both located along Brookside Drive, within Nairobi.

6. The dispute involves an encroachment of the plaintiff's property by a boundary wall put up by the defendant. The plaintiff has even submitted a surveyor's report from Eric Nduhiu dated March 2021 confirming the extend of encroachment into the plaintiff's property by 72 square metres.

7. The plaintiff now seeks a mandatory injunction seeking for demolition of the encroached boundary wall.

8. Under Section 18 and 19 of the Land Registration Act No.3 of 2012, the Land Registrar and the Surveyor who are the custodian of the land records have been given the power and mandate to handle issues relating to boundaries disputes.

Section 18 and 19 of the Land Registration Act provides follows: -

(1) Except where, in accordance with [section 20](#), it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under [section 19\(3\)](#), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act ([Cap. 299](#)).

Section 19. Fixed boundaries

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

9. The Director of Survey is empowered under Section 15 - 17 of the Land Registration Act to alter and rectify a boundary lines or position of a boundary based on a cadastral map based on subdivision plan, combination plan or any other approved plan necessitating the alteration of the boundary.

10. As correctly stated in the plaint, the boundary in this case is a fixed boundary which does not fall within the jurisdiction of the land's registrar. I have perused the report by the surveyor and noted that it found *inter alia* that the total encroachment by LR. No. 1870/III/555 on 1870/III/202 was computed as 72 square metres. The report further indicated that the wall running from beacon **KB -89** was mapped against the beacons area two beacon line and was found not to accurately follow the line as defined by the beacons. As per the report, the average departure from the beacon line was measured as 0.8m. However, there is a kink (where the wall is not straight) where the biggest departure was noted at 1.7m from the beacon line.

11. The orders sought in this application is a mandatory injunction seeking to compel the defendant to demolish the encroached boundary wall.

12. A mandatory injunction is different from a temporary injunction in the sense that while in a temporary injunction the applicant must, as was stated in the celebrated case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**, establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favor, an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in temporary injunctions.

13. In the case of **Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR**, the Court of Appeal stated as follows on mandatory injunctions.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the case of **Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR**, the court of appeal said:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted”

14. The above cited cases lay down the principles of law to be considered in an application for mandatory injunction and the condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction.

15. In the instant case, the respondent did not file any replying affidavit in court in respect to the plaintiff's application. The contentions made by the applicant in his affidavit were not controverted or denied by the respondent.

16. Effectively, the Plaintiff has established a prima facie case with chances of success when it states that the defendant's boundary wall/fence has encroached into the suit property without the Plaintiff's consent and permission. I find that the applicant has demonstrated to the satisfaction of this court, that there are special and exceptional circumstances that warrant the granting of the orders of mandatory injunction sought. The applicant has, through his affidavit in support of the application together with the annexures, demonstrated with clear evidence the encroachment by the defendant. The court finds that the boundary wall has encroached into the plaintiff's property.

17. I also conclude that the circumstances and facts of this case would dictate that the transgression is dealt with and disposed of summarily. There is no reason to deny the mandatory orders sought by the plaintiff.

18. Having found that the instant application meets the threshold of special circumstances for the grant of orders of mandatory injunction, I allow the application in the following terms:

a) An interim mandatory injunction is hereby issued compelling the defendant to demolish the encroaching boundary wall/fence erected between the plaintiff's property known as Land Reference No. 1870/III/202 and the defendant's parcel of land reference no. 1870/III/555 at defendant's cost within thirty (30) days from today.

b) That should the defendant not have complied with order (a) above after the thirty (30) days period, the plaintiff be at liberty to demolish the encroached boundary wall at the defendant's costs.

c) The OSC parklands police station shall supervise the enforcement of the order to demolish the boundary wall to ensure that the demolition exercise is undertaken peaceful.

d) Each party to bear its own costs of the application.

19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Wangari for the Plaintiff/Applicant.

N/A for the Defendant/Respondent.

Court Assistant; Caroline