



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC CIVIL SUIT NO. 205 OF 2008

CHRISTOPHER JOHN KIRUBI.....PLAINTIFF

VERSUS

ALI KHAN ALI MUSES.....DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that defendant has encroached into his land and developed it; defendant refuting this and claiming that the developments were on his (defendant's) land; mandatory injunction issued in the course of the proceedings directing the defendant to demolish the structures; defendant refusing to do so and plaintiff undertaking the demolition and now claiming the costs thereof; ample evidence from a licenced surveyor and a topocadastral survey showing that the developments undertaken by the defendant were on the plaintiff's land; defendant cannot complain for failing to demolish the structures despite the orders of court and must compensate the plaintiff for the cost thereof; judgment entered for the plaintiff)

1. This to me is a straightforward case and my delivery will therefore be brief. I am in fact surprised that this case has taken 12 years to conclude.

2. The suit was commenced through a plaint which was filed on 12 August 2008. The plaintiff is the registered owner of the land parcel Kwale/Galu Kinondo/47 (Plot No. 47) whereas the defendant is the registered owner of the land parcel Kwale/Galu Kinondo/50 (Plot No. 50). The two plots are next to each other. In his plaint, the plaintiff complained that the defendant had encroached into the Plot No. 47 and proceeded to erect a wall and other structures. In his suit, the plaintiff asked for the following orders :-

(a) An injunction restraining the defendant whether by himself or through his agents or servants and/or in any other manner whatsoever from trespassing on and continuing to build and/or erect structures on the plaintiff's property;

(b) An order that the defendant do forthwith pull down and remove the wall and that part of the structures that encroach on the plaintiff's property;

(c) Damages;

(d) Further or other reliefs;

(e) Costs of and incidental to this suit.

3. The defendant filed defence through which he acknowledged erecting the wall, which he said to be a boundary wall, and averred to also have built a hotel. He pleaded that the plaintiff had been guilty of laches.

4. Several applications were filed in the matter, but I need not mention all, save for an application filed by the plaintiff, seeking orders of a mandatory injunction for the defendant to pull down the wall and all structures erected in the plaintiff's Plot No. 47. That application was allowed in a ruling delivered on 12 March 2012, and later, the wall and some structures built by the defendant and said to be on the plaintiff's land were demolished by the plaintiff at his cost.

5. Probably as a result of this, the defendant proceeded to amend his defence to include a counterclaim. In his counterclaim, he pleaded that the plaintiff encroached into his (defendant's) land by demolishing a wall right inside his (defendant's) property which is an act of trespass. He further pleaded that the plaintiff has now put up a wall inside his (defendant's) land and has denied the defendant access to his property. He sought the following orders :-

- (a) *The plaintiff's suit be dismissed;*
- (b) *A declaration that the plaintiff has encroached/trespassed on the defendant's property known as Kwale/Galu Kinondo/47 (sic) and ought to vacate it forthwith;*
- (c) *A declaration that the plaintiff has illegally erected a wall on the defendant's property known as Kwale/Galu Kinondo/47 (sic) and ought to pull it down forthwith;*
- (d) *A declaration that the plaintiff has illegally demolished the defendant's on-going hotel and ought to compensate him;*
- (e) *A permanent injunction restraining the plaintiff from entering upon, remaining on, carrying out any construction or activity or having any adverse dealing the defendant's property known as Kwale/Galu Kinondo/47;*
- (f) *Costs of the original suit and the counterclaim.*

6. A reply to defence and defence to counterclaim was filed principally joining issue with the defendant. It was further pleaded that the true owner of Plot No. 50 was Samuel Kamau Macharia. The plaintiff further pleaded that he undertook the demolition after an order of court and that he incurred the sum of Kshs. 7,362,158/= which the defendant has failed to compensate him. The plaintiff pleaded that this amount be incorporated as special damages in the suit.

7. The plaintiff listed himself and three others as witnesses and witness statements were recorded and filed. There was also listed a bundle of documents with the documents attached. These statements and documents were admitted by consent. There is not really much in the statements, other than the assertion of ownership by the plaintiff of the Plot No. 47, and the claim of encroachment by the defendant. The documents include documents of title of the plaintiff to the Plot No. 47, and the documents for payment for demolishing the wall after the order of mandatory injunction. The plaintiff nevertheless called Mr. Phillippe Zimmerlin, one of his listed witnesses to testify. He is a licenced surveyor of long experience and he gave evidence that the wall and structures built by the defendant were built on the plaintiff's plot No. 47. He also produced a topocadastral survey of the two properties, prepared in October 2012 by B.C Mwanyungu, Licenced Surveyor. That topocadastral survey shows the boundaries of the two plots and further demonstrates that the wall and other structures built by the defendant fell on the plaintiff's land.

8. The defendant gave evidence where he inter alia stated that he is the owner of Plot No. 50. He asserted that the wall he built surrounded his plot following boundaries pointed out by the District Surveyor. He complained that the plaintiff not only demolished the wall but his whole hotel as well.

9. I invited counsel to file submissions which they did and I have taken these into account before arriving at my decision.

10. After assessing the evidence, I am fully persuaded that the defendant built a wall and other structures on the plaintiff's Plot No. 47. That is clear from the evidence of Mr. Zimmerlin and from the documents he referred to. The defendant did not call any expert evidence to rebut that of Mr. Zimmerlin. The defendant has absolutely nothing to support his assertion that he built on his own Plot No. 50, forgetting for a moment that there is some controversy on whether or not it is him, or a third party, who is entitled to ownership of this Plot No. 50. I have nothing before me that would dispel the evidence of Mr. Zimmerlin or even put me in doubt. I find therefore that the defendant encroached into the Plot No. 47 owned by the plaintiff and proceeded to illegally build a wall and other structures on it.

11. There is complaint by the defendant in his counterclaim that the plaintiff illegally demolished the wall and his structures. I see no basis for this complaint. There was a ruling delivered where a mandatory injunction was issued directing the defendant to pull down the wall and the other structures in issue. The defendant did not do so, and the plaintiff made an application to be permitted to pull down the wall and these structures, which the court allowed. If the defendant wished to mitigate his damage, he should simply have complied with the order of mandatory injunction, and since he put the plaintiff into expense, for doing what he (defendant) ought to have done, I see no basis for his complaint. The amount spent by the plaintiff has been pleaded at Kshs. 7,362,158/=. I have gone through the documents tabled, which consist of invoices, cheques, bank transfer instructions and certificates of works. I will rest at the figure of Kshs. 7,192,000/= which appears to be the value of the works as noted in the document dated 9 October 2015 which is a Certificate of Works. I have no reason to doubt that this money was used to demolish the wall and the other structures on the plaintiff's land. I will therefore make an award for this money.

12. It will be seen from the foregoing that I am of opinion that the plaintiff has proved his case to the required standard. The defendant on the other hand has failed to prove his counterclaim. The plaintiff's suit is thus allowed and the defendant's counterclaim is dismissed.

13. I now make the following final orders :-

- (a) *That it is hereby declared that the true boundaries of the land parcels Kwale/Galu Kinondo/47 is as contained in the topocadastral survey drawn by B.C Mwanyungu, Licenced Surveyor, in October 2012.*
- (b) *That it is hereby declared that the wall and other structures that the defendant built fell within the plaintiff's land parcel Kwale/Galu Kinondo/47.*
- (c) *That there is hereby issued a permanent injunction restraining the defendant, whether by himself or through his agents or servants, from entering, being upon, encroaching, or developing the plaintiff's land parcel Kwale/Galu Kinondo/47.*
- (d) *That judgment is entered for the plaintiff in the sum of Kshs.7,192,000/= as special damages for the cost of pulling down the wall and other structures that the defendant built on the plaintiff's land.*

(e) That the plaintiff will have the costs of the main suit and of the counterclaim.

14. Judgment accordingly.

DATED AND DELIVERED THIS 14TH DAY OF MAY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA