



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 84 OF 2019**

**MBARAK BREK..... PLAINTIFF**

**VERSUS**

**NASSIR ABDALLA SAID.....DEFENDANT**

**RULING**

1. This ruling is in respect of the application dated 14<sup>th</sup> May, 2019 which was filed by the Plaintiff seeking to restrain the defendant either by himself, his agents, servants and/or employees from trespassing onto and/or discharging any form of sewage or waste onto the plaintiff's PLOT NO. MOMBASA/BLOCK XVIII/511 pending the hearing and determination of this suit. It is the plaintiff's case that he is the registered owner of the PLOT TITLE NO. MOMBASA/BLOCK XVIII/511 while the defendant is the registered owner of PLOT NO. MOMBASA/BLOCK XVIII/512. That said parcels are adjacent to each other and share a common boundary. It is the plaintiff's case that the defendant has deliberately moved the beacons on the common boundary between the two parcels of land and has thereby trespassed onto the plaintiff's plot and erected a perimeter wall inside the plaintiff's said parcel of land. The plaintiff further avers that the defendant has without permission dug up a sewage system which he has illegally connected into the plaintiff's septic tank, thus discharging all waste and sewage into the plaintiff's said septic tank. It is the plaintiff's case that the defendant's actions are illegal, oppressive, unwarranted and a nuisance and therefore should be restrained.

2. The plaintiff has sworn a supporting affidavit in which he has annexed a copy of title in his name for TITLE NO. MOMBASA/BLOCK XVIII/511. He has deposed that he bought the said land way back in 1983 from Ramadhan Azizi and Mohamed Saad and since then have lived with his family on the said land. He has annexed a copy of the Agreement for sale and Building plans. He deposed that the Government regulations and requirements in the area require that each plot should have its own septic tank and soak pits. He deposed that the defendant's actions have resulted into the plaintiff's septic tank filling up within short periods of the time causing the plaintiff to incur huge expenses in having the same emptied. He further annexed a receipt for expenses incurred lately in emptying the tank.

3. The defendant has opposed the application through a replying affidavit sworn on 18<sup>th</sup> October, 2019. He deposed that he is the registered owner of LAND PARCEL NO. MOMBASA/BLOCK XVIII/512 which is adjacent to the PLAINTIFF'S PARCEL NO. MOMBASA/BLOCK XVIII/511 and has annexed a copy of title deed. He has deposed that since time immemorial, there existed a septic tank on the common boundary of the two plots and on 8<sup>th</sup> September, 2008, an agreement was entered into by the parties on how the septic tank was to be used. He has annexed a copy of the said agreement. He has denied encroaching into the plaintiff's plot, adding that the dispute on boundary was determined long ago. He has annexed copies of some correspondence. He has contended that the plaintiff's application is vexatious, frivolous and an abuse of the court process as the issues herein had already been determined in **Mombasa RMC Criminal Case No. 2558 of 2011**. Copies of the proceedings and judgment have been annexed. The defendant has contended that the application is laced with malice and should be dismissed.

4. I invited counsel to file written submissions which they did and I have taken the same into account.

5. The issue for determination is whether the injunction orders should issue in favour of the applicant. The conditions for the grant for temporary injunctions were laid in the case of **Giella – Cassman Brown & Company Limited (1973) EA 358** as follows:

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

6. It is common ground that the plaintiff and the defendant are owners of their respective parcels of land and both share a common boundary. The plaintiff is the registered owner of PLOT NO. MOMBASA/BLOCK XVIII/511 while the defendant is the registered owner of PLOT NO. MOMBASA/BLOCK XVIII/512. The case of the Plaintiff is that the defendant has trespassed on his land and is discharging waste from

his land onto the plaintiff's septic tank. The defendant on his part claims that there is an existing agreement stipulating how the septic tank should be shared. On the boundary dispute, the defendant contends that the same has been a subject of previous dispute that was resolved by various government agencies.

7. I have looked at the material before me. I have seen the copy of agreement exhibited by the defendant. The same stipulates that both parties should use the septic tank jointly, and when it is filled, both parties should share the cost of emptying it. I have also seen the other documents showing that the beacon identification in respect of the two plots were found in place and checked to be correct. Given that position, and given that the applicant has not challenged the averments made by the defendant, I find that the plaintiff has not established a prima facie case with a probability of success. The plaintiff can adequately be compensated in damages if at the end of the trial it is found that the defendant was on the wrong. Even if I was to consider the balance of convenience, the same tilts towards maintaining the status quo currently prevailing until this suit is heard and determined.

8. The upshot is that the Notice of Motion dated 14<sup>th</sup> May 2019 is dismissed with costs.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 21<sup>st</sup> day of September 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**