



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE 1220 OF 2013

AMRITLAL VELJI CHAVDA & ANOTHER.....PLAINTIFFS

=VERSUS=

GEOFREY N. GITHUNGURI.....DEFENDANT

JUDGEMENT

1. The plaintiffs brought this suit against the defendant claiming the following reliefs:-

a) General damages on account of trespass

b) A mandatory injunction requiring the defendant forthwith to remove such part of his wall as encroaches upon the plaintiff's property or in the alternative the plaintiffs do remove the wall at the defendant's expense.

c) Costs of this suit.

d) Interest on (a) and (C) above at court rates.

2. The plaintiffs and the defendant are neighbours. The plaintiffs jointly own LR No.330/703 whereas the defendant owns LR No.330/702. Sometimes in the year 2000, the defendant erected a boundary wall separating his property from that of the plaintiffs. The plaintiffs engaged the services of a private surveyor who found out that the defendant had encroached on to the plaintiffs' property by about 1.056 metres. When the plaintiffs brought this fact to the attention of the defendant, the defendant rejected the report and insisted on a Government surveyor being engaged.

3. The plaintiffs engaged a Government Surveyor who also found out that the defendant's wall had encroached on to the plaintiffs' property by about 1.2 metres. The plaintiffs asked the defendant to remove the boundary but the defendant refused prompting the plaintiff to file this suit.

4. In his defence the defendant denied that he had encroached on to the plaintiffs' property. He stated that he purchased his land in the 1980's and later had it subdivided into two portions. He occupies one portion of the property and has put up apartments on the other portion which he has sold out to third parties. He stated that if the wall was to be moved, it will affect the windows of the apartments.

5. I have considered the evidence adduced by the plaintiffs and the evidence of the defendant. The issues which emerge for determination are firstly whether there is encroachment on to the plaintiffs' property. Secondly, whether the encroachment amounts to trespass for which the plaintiff can claim damages. Thirdly which order should be made on costs.

6. The plaintiffs engaged the services of a private surveyor called Job Kaguongo. At the initial survey exercise, this surveyor engaged another surveyor who had been picked by the defendant. This surveyor identified as Mwikiria later did not co-operate. The plaintiffs' surveyor went ahead to conduct a survey. He prepared a report dated 29th December 2010. This surveyor came and testified as PW2. He found out that the defendant's wall had encroached on to the plaintiffs' property by 1.056 metres.

7. The second surveyor who was engaged compiled his report dated 27th July 2012. This surveyor called Bernard Gitonga testified as PW3. He produced his report which found that the defendant had encroached onto the plaintiff's property by 1.2 metres. This surveyor found out that beacon No.Y2 was inside the defendant's property when it was supposed to be at the boundary.

8. Whereas the defendant had denied any encroachment, he claims the encroached portion by way of adverse possession in his submissions. He has also for the first time claimed in his submissions that the plaintiffs' claim is statute barred and that the court cannot rely on biased

survey reports in which he was not involved. The defendant did not raise a claim of adverse possession in his defence. He also did not raise a defence of limitation. He cannot therefore seek the encroached portion by way of adverse possession or claim that the plaintiff's suit is statute barred.

9. There are correspondences in evidence that the surveyors invited him to be present when the survey was being carried out if he chose to be absent, he cannot claim that he was not involved. I therefore find that there is encroachment on to the plaintiff's property by about 1.2 metres.

10. The defendant erected the fence in the year 2000. This is not disputed. The plaintiffs have been denied the use of the portions measuring about 1.2 metres. When it comes to assessment of damages, the factors which are taken into account is the size of the land and the lengthy of time the trespass has existed. There is a sketch map of the encroachment which was drawn by the government surveyor. It shows that the encroachment is a small strip measuring about 1.2 metres. The trespass has been there since the year 2000. The plaintiffs are asking for KShs.4,500,000/= general damages . Considering the size of the land encroached on and the years, I find that the amount being claimed by the plaintiff is on the higher side. I will award nominal damages of Kshs.1,000,000/= .

11. I find that the plaintiffs have proved their case on a balance of probabilities. I enter judgement in their favour against the defendant as follows:-

a. General damages of Kshs.1,000,000/= (One Million).

b. A mandatory injunction requiring the defendant to forthwith remove such part of his wall that has encroached on the plaintiffs' property failing which the plaintiffs to remove it at the cost of the defendant.

c. The defendant shall bear costs of this suit.

d. Interest on (a), and (c) at court rates.

Dated, Signed and delivered at Nairobi on this 21st day of March 2019.

E.O.OBAGA

JUDGE

In the presence of;-

Defendant in person though represented by a lawyer.

Court Assistant: Hilda

E.O.OBAGA

JUDGE