



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 189 OF 2009

MOHAMED MAHMOOD AWADH.....PLAINTIFF

VERSUS

ABDULWAHAB ABDULRAHMAN & 3 OTHERS.....DEFENDANTS

JUDGMENT

1. By a plaint dated 9th June 2009, the plaintiffs sued the 4 defendants accusing them of trespassing on to his land Ref. No. MOMBASA/BLOCK XVI/617 by constructing a perimeter wall and a building on part of the suit property. The plaintiffs gave the particulars of encroachment as follows;

(a) building encroaches by 26.42m².

(b) wall encroaches by 41.24m².

2. The plaintiff pleaded further that he wrote to the defendants on 20th August 2008 notifying them that they had illegally put up a building on the suit property but they disregarded and the defendants have failed to vacate the suit property and or hand over vacant possession.

3. The plaintiff has thus brought this suit seeking judgment against the defendants jointly and severally for;

(a) A declaration that the defendants have encroached and/or trespassed on the suit property.

(b) An order by way of a mandatory to compel and direct the defendants to immediately demolish the illegal building and wall constructed by the defendants outside their own boundary and which encroach and/or trespass on the suit property and to clear the debris.

(c) A permanent injunction restraining the defendant, its servants, employees and/or agents from in any way interfering with the suit property and/or entering into or carrying on any construction or development on the suit property or causing any hindrance or interference with the quiet and/or peaceful enjoyment of the suit property or any portion or part thereof.

(d) Removal of the part of the defendant's property that has encroached upon the suit property.

4. The suit is opposed via the joint statement of defence that was filed on 24th July 2009. The defendants pleaded that the plaintiff is not well versed with the boundaries of his plot thus he cannot claim encroachment. The defendants denied encroaching on the plaintiff's plot and put him to strict proof.

5. The defendants averred that the plaintiff's plot was curved out of a road reserve hence the measurement was done without including the portion on the road reserve. That the Mombasa Land Registrar has never carried out a comprehensive survey on the defendant's land position and size as per their title deed. The defendants prayed that the plaintiff's suit be dismissed with costs.

6. At the close of pleadings, parties called oral evidence. The plaintiff testified on 6th March 2012 before Tuiyot J. The plaintiff testifying as PW1 said he lives in Majengo and is the registered owner of Plot No. Block XVI/617. He produced the copy of title deed as P ex 1. PW1 said the defendants Plot No. Block XVII/937 neighbours his plot. PW1 continued that the defendants started a building in 2008 which he realized was falling on a portion of his plot. That he tried to stop them but the defendants insisted their construction was within their plot.

7. PW1 said the defendants completed constructing the building and people reside therein. That he knew the defendants had encroached on the advise of his surveyors. PW1 gave evidence that he requested Hime and Zimmerhin Surveyors to establish the boundaries which they did and prepared two reports dated 14th August 2008 (DMF I2) and 9th September 2010 (DMF I3). That the Mombasa District Survey Officer also confirmed the encroachment vide his letter dated 7th October 2008 (DMF I4). On receipt of these reports, PW1 avers that he visited the Lands Office. The District Land Registrar visited the suit premises and gave a ruling on 30th January 2009 in his favour. PW1 produced the District Land Registrar's ruling as P ex 5. That even after this ruling, the defendants have failed to remove the offending structures. Consequently, he is seeking prayers as per the plaint.

8. In cross-examination, PW1 said he purchased the suit plot on 19th July 1995 from Swaleh Nguru. That when he bought his plot there was a house built with iron sheets on the defendants' plot. That he fenced his plot in 1995 after buying it. That the defendants' plot also previously belonged to Swaleh Nguru. He agreed that the Surveyors re-established the beacons with some of the beacons falling inside the defendants building.

9. He continued that when the surveyors visited the site, the defendants building was on the 5th floor. That the survey report say no beacons were found. PW1 admitted that he did not report to the police that the defendants had uprooted the beacons. Shown minute extracts no 47/58 of the council (DMF I6) PW1 said he was not aware of it. That the council demolished his fence in 2007 because some criminals were said to be residing on his plot. PW1 was also shown approved plans dated 4th December 2003 in favour of the 1st defendant. Shown the ruling of the Registrar, PW1 agreed the Registrar never gave a ruling on the issue of boundary.

10. In re-examination, PW1 said the existing building on the defendants plot then did not encroach on his land. That the building plans showed to him by the defence is in respect of a proposed boundary wall and on the plan, his plot is shown. He denied that his fence was demolished because it was on a road reserve.

11. Maurice Mudaho Odero testified as PW2. He resides in Bamburi and is a practicing surveyor who works for Hime & Zimmerline Surveyors. PW2 confirmed that the plaintiff instructed the firm to locate the beacons for Plot 617 and see if there was encroachment. PW2 continued that he visited the plot and recorded his findings which included the following;

- (i) No beacons for Plot 617 were found so he used plots further north and south to locate its boundaries and re-establish the missing beacons.
- (ii) That the wall and the building on Plot 617 which began on Plot 937 had encroached by 3.31 metres and 1 1/2 metres respectively.

12. PW2 stated that he prepared his report dated 14th August 2008 which he produced in evidence as P ex 2 and also drew a survey plan which he submitted to the Director of Surveyors for authentication. PW2 averred that the Plot No. 617 is not a road. In cross-examination, PW2 said he has done a number of survey jobs in Majengo and he is familiar with the area. That when he visited the plot, beacon K 122 could not be placed as it fell inside the defendants' building. He located beacon K 110 but re-established beacon K 109 and K 121. He relied on the plan. That a contrary result can be reached depending on where the survey begins.

13. Christian Wakesho testified as PW3. He is a Land Surveyor working with the District Office Mombasa since 2006. PW3 said that the plaintiff requested the survey office to carry out some work. That work was done on 18th September 2008 by his colleague Mr Athman. PW3 produced the report done by Mr Athman on 7th October 2008. That the report concluded there was encroachment i.e wall by 3.33m and building by 2.14m and 2.15m. The report is produced as P ex 4.

14. In cross-examination, PW3 started that from the report, no beacons were found. That Mr. Athman established the beacons from the control points. Shown P ex 2, PW3 stated that if there were any beacons established, Mr Athman did not find them neither did Athman place any new beacons. That one can establish the area encroached without necessary planting a beacon. Shown DMF I 3(a), PW3 said the two reports differed because Mr Munyasia used an old plan.

15. Mr. Athman Amani testified as PW4. He said that he visited the suit property severally and on one occasion he identified one beacon which was newly established. That beacon K 122 did not demarcate parcel No. 617 as it was within an existing structure. He stated that the correct beacon for parcel No 617 are K 109, 122, K 110 & K 181 PW4 denied that Plot No. 617 is on road. PW4 said he had the Registry Index Map for the area block 16 which shows that the suit parcel is not a road. He continued that he has another plan showing the survey of parcel No 937. He produced the plan folio No. 227/35 depicting Plot No. 617 has been in existence since 1992 and is not a road (P ex 7).

16. In cross-examination, PW4 stated that the plaintiff went to their office and engaged an officer. That the District Surveyor is the one who instructed PW4 to do the work. That he did not try to locate beacons of Plot No 937 is neighbouring Plot 617. That the beacons defining the boundaries of 937 and 617 could not be established because there was a structure. That P ex 7 was prepared earlier than P ex 8. That Rim was annexed on 7th July 1992 to introduce subdivision of Plot 10 to parcels 610-619. That from the map, it is not possible to know who requested the amendment.

17. The witness did not know the distance between beacons K 181 to K 122. That he did not measure because of the existing structure that concern beacon K 109 and K 122. That he did not contact the owner of Plot 618 because it was not necessary. That owner of Plot 937 was contacted and he believed they were present during the site visit. That survey for Block 16/6, 7, 10, 13 was done in 1927. After that, owners of the sub plots could carry out further subdivisions. He was not aware Plots 610 – 619 were on the road as the original subdivision of Plot 10 shows no road. That the road surrounds the parcels. This marked the close of plaintiff's case.

18. The defence opened their case on 23rd October 2012 with the evidence of Idris Salmin Said a resident of Majengo, DW1 stated that he knew both the plaintiff and the defendants. The defendants are his neighbours and have a 4 storey building on their plot. DW1 said he has

heard of the dispute. According to him the Plot the plaintiff is claiming is a road. That where the current house of the defendants are they had previously had a Swahili house. He did not see any surveyor coming to survey the disputed area.

19. In cross-examination, DW1 said he would not know about boundaries since he is not a surveyor. DW1 knew Swaleh Nguru sold the plots to various people. That the plaintiff was stopped from building of his plot by the community and the council because he was building on a road. DW1 in re-examination said his Plot was also sold to him by Swaleh Nguru. That there is a road because even CDF has put cabo on it.

20. Antony Kilonzi Munyasia testified as DW2. He is the Provincial Surveyor Mombasa. That the 1st defendant went to their office seeking beacon identification for parcel No. 937. He visited the Plot on 26th October 2011 and found some reference beacons. After the survey, he prepared the report dated 28th October 2011 which he produced as D ex 1. DW2 stated that in 2008 he was not working in the Coast Province so he did not give PW4 any instructions to measure the suit Plot. That in his finding, what encroached was the wall. That it was difficult to establish whether Plot 617 existed. That the plaintiff was absent during his visit.

21. In cross-examination, DW2 stated that the wall had encroached. That the data he used was plan for plot 937 which he obtained from the offices of Swaleh Nguru. He did not know how these parties acquired their plots. That his report and Athman's report differ on the extent of encroachment. In re-examination, DW2 said he did not have a survey plan for Plot 617.

22. DW3 is Chrisantus Mwadime an employee of the County Government. He was instructed by his boss who is the Chief Officer Planning to show minutes before court as true. That minute 47/98 is an extract of Town planning committee discussing building plans. That the minutes stated that no approval should be given for building on the mentioned plots. He produced the minutes as D ex 2.

23. DW3 in cross-examination said Plot No. 937 is not in the list of plots mentioned in the minutes. That approval was not given probably because the building exceeded the size of the plot. The plots mentioned could be having owners but DW3 could not confirm whether refusing to approve building amounts to cancellation of ownership. In re-examination, DW3 stated that plans Plot 617 was mentioned in the minutes. That the town clerk recommended repossession or cancelling of the titles created from the open spaces and access roads as per minute 297/95.

24. The 1st defendant testified as DW4. He works with the County Government of Mombasa as Chief Officer in charge of trade. The 2nd, 3rd and 4th defendants area his sisters. DW4 stated that his sisters area currently living in Dubai. That they own Plot No. 937. He did not know the plaintiff before this suit. He denied encroaching on the plaintiff's plot. He produced copy of his title as D ex 3 and transfer as D ex 4.

25. DW4 said he built the house after getting approvals to his drawings D ex 5. That the plaintiff's Plot is marked as a road in the council minutes. That the map he bought in October 2003 does not show Plot No. 617. That he constructed a wall around their house after getting approval from the Municipal Council. This plan was produced as DMFI 6. He had not seen the map produced as P ex 9 before. That he only saw the plaintiff's title in 2007 but before there was a Kibanda for selling charcoal on the road reserve. Later the Kibanda was demolished by the County Council. He urged the court to dismiss the plaintiff's suit to allow them enjoy the road reserve.

26. In cross-examination, DW4 said the receipts do not indicate the existence of a road reserve. That they received a plan before constructing their house. That the road reserve in the area was done in 2013. In re-examination, DW4 said he is not in charge of roads neither does he participate in their construction.

27. Philip Angove testifying as DW5 said he is the one who drew the building plans dated 22nd March 2003 for the defendants. He produced the architectural plans for the building as D ex 5 and for the wall dated 4th December 2003 as D ex 7. This marked the close of the defence case on 12th June 2018.

28. Parties advocates were to exchange written submissions by 4th December 2018. The defendants submissions were filed on 29th January 2019. I have read the submissions of both parties. Each has given a summary of the evidence adduced. The dispute for this court to determine comprises two questions.

(a) Whether or not the plaintiff's Plot Block XVI/617 is a road reserve.

(b) If the answer to (a) is negative, has the defendants Plot No. 937 encroached on Plot No. 617 and by what margin.

29. The plaintiff presented a title deed for his Plot No. 617 issued to him on 18th January 2007. The title deed shows the plot measured 0.0128ha. The defendant's case is that this title was curved out of a road reserve therefore the title deed for Plot No. 617 should not stand. DW1 stated that he knew both the plaintiff and the defendant. As far as he is concerned, the plot the plaintiff is claiming is part of the access road; hence the reason the community and the Municipal Council refused the plaintiff to build.

30. This line of evidence was supported by the evidence of Munyasia (DW2) and Mr. Mwadime (DW3). DW3 produced minutes from the Municipal Council dated 24th March 1997 which passed a resolution that building approvals on Plot Nos. 606-619 (inclusive) should not be processed. This resolution was pursuant to minute No. 197/95 of 24th July 1995 which stated thus;

“(i) that the council having considered the issue of road reserve, access road and open space in Majengo which were previously approved by the council but which are found to be inconsistent with the Town Planning Act the Council recommends that the Commissioner of Lands be requested to consider to revoke the title deeds issued for the road reserves and access roads.”

31. Other than this minute, nothing was shown to the court that such a request was ever presented to the Commissioner of Lands for cancellation of the alleged titles. Neither was there evidence that any letter was written by the Municipal Council-now County Government to the owners of the offending title deeds expressing the intention to cancel their deeds. Further although DW3 stated that minute 173/97 was related to minute 297/95, the two documents produced in court showed no such nexus.

32. Consequently, if there was an intention to cancel the plaintiff's title for being part of a road reserve, the said intention was never implemented by the concerned authorities. Similarly the statement of defence filed by the defendants on 24th July 2009 other than pleading in paragraph 10 of their defence did not pray for cancellation of the plaintiff's title. It is a rule of law that a court cannot grant what is not prayed for. On this account, I answer my first question in the negative because no hearing has been done or due process followed to reach a determination that the plaintiff's Plot constitutes part of a road reserve.

33. The second and most important question is whether the plaintiff has proved his case by establishing that the defendants structures are encroaching on his suit title Plot No. 617. In an effort to do so, he provided two survey reports i.e by Hime & Zimmerline and report of Mr Athmani who was working with the Ministry of Lands at the time. Both reports produced by the plaintiffs stated that the defendants wall and part of the building encroached on the plaintiffs plot. They gave the extents of the said encroachments.

34. The report of Mr Munyasia DW3 dated 28th October 2011 stated that the house was built within the boundaries of Plot No. 937. He admitted that the perimeter wall around the house encroached i.e it was constructed outside the boundaries of Plot 937. According to DW3, the encroachment was on a road reserve. In cross-examination, DW3 admitted that they did not know how the plaintiff and the defendants acquired the defendants their plots.

35. This court made a site visit of the area. On the ground Plot Nos. 616 and 617 appears eaten by an existing road. Plot Nos. 618 and 619 is built. The plaintiff accused the 1st defendant of influencing the building of the road because he works with the County Government as a Chief Officer. The 1st defendant has vehemently denied that acusatin. There was no evidence led by the plaintiff to verify that indeed the 1st defendant influenced the building of this road. Secondly the County Government was not joined in this case. I will therefore not delve into the legality or otherwise of the existing road as the same is not pleaded. Similarly whether the owners of Plot Nos. 618 and 619 have been served with demolition notices only came up during the site visit. The court has not been shown those notices. Neither are the owners of Plots 618 and 619 parties to these proceedings. I shall say no more about the two plots as doing so would amount to rights of partes to not to be condemned unheard.

36. In light of the consensus of the three survey reports as regards the position of the defendants' wall *visa vis vi* the boundaries of their plot, I safely come to the conclusion that the defendant's perimeter wall encroaches on the plaintiff's Plot No. 617. Whether Plot No 617 is a road reserve or not is yet to be resolved. The defendants had no right to build a wall outside the boundaries of their plot and to the extent that the plaintiff is claiming this portion as comprising part of his land, I find that the plaintiff has proved his case on this limb of encroachment.

37. On whether a part of the defendants building/house is encroaching on the plaintiff's plot, I find this was not satisfactorily proved. The two surveyors (PW2 & PW4) engaged by the plaintiff only considered the boundaries of Plot 617. They admitted in their evidence that they did not take measurements of Plot No. 937 owned by the defendants. Similarly DW2 only established the boundaries of Plot 937 but did not take measurements of Plot 617. In my opinion since the two neighbours were embroiled in a dispute, the surveyors ought to have established the sizes and beacons of both plots on the ground to conclusively determine the matter, an exercise they failed to do. In the circumstances, this court cannot take the role of a surveyor to establish the extent of encroachment if at all as it lacks the capacity to do so.

38. Since the burden was on the plaintiff to discharge, I find that the evidence presented does not meet the standard of balance of probability by virtue of failing to report on boundaries of both plot nos. 617 and 937. Consequently, I do find that no proof has been made that part of the house has encroached on Plot No. 617.

39. In conclusion, I enter judgment for the plaintiff;

1. That the defendants' perimeter wall has encroached on the plaintiffs Plot No. 617.
2. The defendants are hereby directed to demolish the offending wall constructed outside their plot boundary and clear the debris within 30 days of delivery of this judgment.
3. A permanent injunction restraining the defendants, their servants, employees and/or agents from in any way interfering with the suit property and/or entering into or carrying on any construction or development on the suit property or causing any hindrance or interference with the quiet and/or peaceful enjoyment of the suit property MOMBASA BLOCK XVI/617 neighbouring their building or any portion or part thereof.
4. Costs of the suit and incidentals thereto.
5. Liberty to negotiate for a buy off.

Judgment DATED, SIGNED & DELIVERED at Mombasa this 30th day of April, 2019.

A .OMOLLO

JUDGE.