



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 177 OF 2013

FERMOOD MEHMOOD JAGANI.....1ST PLAINTIFF

MEHMOOD SHAUKATALI H. JAGANI.....2ND PLAINTIFF

VERSUS

LICINUS INVESTMENTS LIMITED.....1ST DEFENDANT

PIERRO CANOBBIO.....2ND DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated 10th August, 2011. In the Plaint, the Plaintiffs averred that they are the registered proprietors of land known as Kilifi/Block 4/194 (*the suit land*) which they purchased from the 1st Defendant; that there existed a public access road between parcels number Kilifi/Block 4/193 and 194 leading to the neighbouring suit properties and that the Defendants unlawfully constructed a gate blocking the said public access road.

2. The Plaintiffs sought for a declaration that there exists a public access road between plot numbers Kilifi/Block 4/193 and 194; and an order of injunction restraining the Defendants or their agents from interfering with the Plaintiffs' quiet possession of parcel number Kilifi/Block 4/194 and a mandatory injunction compelling the Defendants to rebuild the boundary wall of Kilifi/Block 4/194 which was allegedly demolished by the Defendants.

3. In their Defence and Counter-claim, the Defendants denied the averments raised in the Plaint. In the Counter-claim, the Defendants averred that on 24th August, 2011, the Plaintiffs demolished the perimeter wall of parcel number Kilifi/Block 4/193 belonging to the 1st Defendant. The Defendant has prayed for a declaration that the portion of land where there stood a perimeter wall demolished by the Plaintiffs belongs to the 1st Defendant; damages to the 1st Defendant for the demolished perimeter wall and an order directed to the Plaintiffs to demolish the septic tanks and the perimeter wall on the 1st Defendant's portion of land and to construct the wall in the original place where it was before demolition.

4. When the matter came up for hearing, neither the Plaintiffs nor their advocate was in court to prosecute the suit. The suit was dismissed for want of prosecution and non-attendance. The Defendants prosecuted their Counter-claim.

5. The 1st Defendant, DW1, informed the court that he built a perimeter wall around parcel number 193 in 1998; that when he sold parcel number 194, he showed the Plaintiffs all the beacons and that one of the beacons was inside a garage that was on a different parcel of land.

6. DW1 informed the court that the Plaintiffs built a wall on his plot and in the process demolished his original perimeter wall. In the process of demolishing his wall, DW1 stated that the Plaintiffs also damaged his water pipes.

7. The Defendants' advocate submitted that the Surveyor's report shows the position of the beacons on Kilifi/Block IV/193 and 194; that the Defendants produced photographs showing the extent of the damages caused by the Plaintiffs when they demolished the original wall constructed by the 1st Defendant and that the Defendants have proved their case on a balance of probabilities.

8. The 1st Defendant's case is that he sold to the Plaintiffs parcel number Kilifi/Block IV/194, with him retaining parcel number 193. According to the 1st Defendant, while the Plaintiffs were putting up a new perimeter wall around parcel number 194, they demolished his old wall.

9. To support his case for damages and reconstruction of the perimeter wall that was purportedly demolished by the Plaintiffs, DW1 produced in evidence the Surveyor's report dated 15th October, 2012.

10. The report by the Surveyor, and the typographical plan shows that there exists a "road reserve between parcel number 193 and 194". Both parcels of land have a perimeter wall. In the report of the Surveyor, the Surveyor stated as follows:

"The wall defining the western boundary of parcel 194 is therefore wholly inside the road reserve."

11. The findings by the Surveyor that the wall that the Plaintiffs had put up along parcel number 194 was 1.33 meters inside the road reserve was not challenged by the Plaintiffs. That being the case, I find that the Defendants have proved that indeed the Plaintiffs' wall has encroached on an access road and should be removed.

12. The Defendants did not however prove that it is the Plaintiffs who demolished the old existing wall. The Defendants did not also prove the payable damages in respect to the demolished wall, if at all. In the circumstances, and having already dismissed the Plaintiffs' suit, I find that the Defendants' Counter-claim partially succeeds in the following terms:

a. A permanent injunction be and is hereby issued restraining the Plaintiffs or their agents from interfering with the road of access between parcel numbers Kilifi/ Block 4/193 and 194 and on parcel number Kilifi/Block 4/ 193.

b. An order be and is hereby issued directing the Plaintiffs to remove the wall encroaching on the road reserve and to abide by the report of Hime and Zimmerlin dated 11th October, 2012 within sixty (60) days of this Judgment.

c. The Plaintiffs to pay the costs of the Plaintiff and the Counter-claim to the Defendants.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 26TH DAY OF JUNE, 2019.

J.O. OLOLA

JUDGE