



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. CASE NO. 20 OF 2016

HARSHKUMAR JITENDRA TARACHAND SHAH

JITENDRA TARACHAND SHAHPLAINTIFFS

VERSUS

GREEN ENERGY LIMITED DEFENDANT

JUDGMENT

1. The Plaintiffs have filed this suit against the Defendant seeking;

i. A declaration that the portion of the Defendant's perimeter wall around its plot Number Mgumopatsa/Mazeras/856 encroaching and/or overlapping into the Plaintiffs Plot Number Mgumopatsa/Mazeras/858 and completely blocking the only access road to the said property is illegal, unlawful and affront to the sanctity of title.

ii. A mandatory injunction compelling the Defendant to forthwith pull down the portion of the aforesaid offending perimeter wall encroaching and/or overlapping into the Plaintiff's plot Number Mgumopatsa/Mazeras/858 and blocking the only access road to the said property and restore the ground to its original state as it was before the construction of the said illegal portion of the subject perimeter wall.

Alternatively, the Plaintiff be granted leave by the Honourable Court to pull down the said offending portion of the subject perimeter wall and restore the affected ground to its original state as it was before the construction of the said wall at a cost to be recovered from the Defendant.

iii. An interlocutory mandatory injunction compelling the Defendant to pull down the portion of the wall blocking the said access road to allow free access of the Plaintiff's Plot Number Mgumopatsa/Mazeras/858 pending the hearing and final determination of the suit.

iv. Such other or for the orders as the Honourable Court may deem fit and just or grant.

v. Costs of the suit.

2. By a statement of defence dated 29/3/2016, the Defendant denied each and every allegation in the plaint. They pray that the Plaintiff's suit be dismissed with costs.

3. P.W.1, Jitendra Tarachand Shah, the 2nd Plaintiff told the court that he owns three adjacent pieces of land, Mgumopatsa/Mazeras/858, 866 and 867 respectively. That the said plot neighbour Plot Numbers 856, 1174, 863 and 855.

He told the court that in March 2015 the owner of Plot Number 856 put up a perimeter wall thereby blocking his access to his three plots.

4. The perimeter wall put upon Plot Number 856 overlapped on parcel number 858. Subsequently blocking access to Plot Number 858. He further told the court that when the construction of the wall started, he notified the Defendant. The Defendants construction stopped temporarily but later went on to completion.

He instructed his advocates to write a letter to the Defendant. He also informed the County Surveyor and the District Land Adjudication and Settlement Officer Kilifi to confirm the boundaries and the existence of the said road reserve. The reports were given.

5. P.W.1 produced the title deeds for the three parcels of land together with the searches as exhibit P1. He also produced the area map as exhibit P2.

A letter from M/s Marende, Birir Shimaka and Company advocates dated 10/4/2015 as exhibit P3.

A report by the District Surveyor Kilifi County as exhibit P4.

A report by the District Land Adjudication and Settlement Kilifi as exhibit P5.

Ground report by M/s Edward Kiguru Land Surveyors as exhibit P6.

6. D.W.1, Tarig Amer Yislam told the court that he is the Director of the Defendant. He told the court the Land Parcel number Mgumopatsa/Mazeras/858 was acquired from Hamza Omar Abdul Aziz in 2011. He told the court that what was in the title was 0.49 hectares while on the ground it was 1.05 hectares. That the vendor approached Kilifi Land Registry who did a resurvey and new beacons were placed on the property. He told the court that this was done in 2012. He produced the first title deed as exhibit D1 and the second title deed as exhibit D2. The one in the Defendant's name was produced as exhibit D3. He also produced the deed plan from Kilifi Lands Office as exhibit D4.

7. I have considered the pleadings, the evidence on record and the submissions of both counsels. The issue for determination is whether the perimeter wall put up by the Defendant around Plot Number 856 has encroached and/or overlapped into Plaintiff's Plot Number 858 and blocked access to the said plot.

8. P.W.1 produced her registered index map as exhibit P2, a report by the District Surveyor Kilifi exhibit P4, A report by District and Adjudication and Settlement officer Kilifi exhibit P5. They all confirm that the perimeter wall has encroached and blocked access to Plot Number 858. Another report by M/s Edward Kiguru Land Surveyors dated 27/10/2015 (Exhibit P6) confirms the position.

9. The Defendant on his part relied on a surveyor's sketch of Plot Number 856. D.W.2 claimed that the Registrar of Land Kilifi visited the area to determine the boundary of Plot No 856 and issued a new title deed.

10. He did not produce any proceedings before the Land Registrar to show that the new boundary had taken away a public access road. It appears the rectification of the acreage and the subsequent issuance of the new title deed in respect of Plot Number 856 was done without following the proper procedure.

It appears the Defendant was misled on the actual acreage of Plot Number 856.

11. All in all I find that the Plaintiffs have proved their case on the balance of probability as against the Defendant.

I hereby enter Judgment on their behalf as follows:

i. A declaration be and is hereby issued that the portion of the Defendant's perimeter wall around its Plot Number Mgumopatsa/Mazeras/856 encroaching and/or overlapping into the Plaintiff's Plot Number Mgumopatsa/Mazeras/858 completely blocking the only access road to the said property is illegal, unlawful and affront to the sanctity of title.

ii. A mandatory injunction be and is hereby issued compelling the Defendant to forthwith pull down, the portion of the aforesaid offending perimeter wall encroaching and/or overlapping into the Plaintiff's Plot Number Mgumopatsa/Mazeras/858 and blocking the only access road to the said property and restore the ground to its original state as it was before the construction of the said illegal portion of the subject perimeter wall.

ALTERNATIVELY, the Plaintiff is hereby granted leave to pull down the said offending portion of the subject perimeter wall and restore the affected ground to its original state as it was before the construction of the said wall at a cost to be recovered from the Defendant.

iii. Costs of the suit and interest.

It is so ordered.

Dated, signed and delivered at Mombasa on the 7th day of February 2018.

L. KOMINGOI

JUDGE

7/2/2018

Mr. Said : We seek thirty (30) days of stay of execution.

Mr. Odongo : No objection.

Court : Stay of execution is granted for thirty (30) days.

L. KOMINGOI

7/2/2018