



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 636 OF 2011

OMAR ABDALLA OMAR.....PLAINTIFF

VERSUS

REHEMA MOHAMED ATHUMAN.....DEFENDANT

J U D G M E N T

1. By the plaint dated 13th December, 2011 and an Amended Plaint dated 20th April 2017, the Plaintiff seeks against the Defendant;
 - a) **A declaration that the said offending balcony and aforementioned canopy are a nuisance on the Plaintiff's Plot and a violation of the Plaintiff's proprietary interest.**
 - b) **An order of compelling the Defendant to forthwith pull down and/or remove at her expenses the said offending balcony and the aforementioned canopy on the Defendant's building under construction on Plot Number Mombasa/Block XXXVII/27 and to seal by refiling the borehole dug on the Plaintiff's Plot Number Mombasa/Block XXXVII/29.**
 - c) **Special damages of Kshs17,500/=.**
 - d) **Any or further relief this Honourable Court may deem fit and just to grant.**
 - e) **Costs of the suit.**
2. By a statement of defence dated 23rd January, 2012, the Defendant denies all the allegations in the plaint. She prays that the Plaintiff's suit be dismissed with costs.
3. When the matter came up for hearing on 7th December, 2017 the Defendant and her Advocate were absent. The hearing date had been taken by consent on the 24th October, 2017. The court directed that the matter proceeds exparte.
4. The Plaintiff, Mohammed Abdalla is the son of the late Omar Abdalla Omar. He is the legal representative and Administrator of the Estate of the late Omar Abdalla Omar who had initially filed this suit against the Defendant. He produced the grant of letters of administration as exhibit. He was substituted in this suit vide an application dated 22nd September, 2015 which was allowed on 6th April, 2017.
5. The Plaintiff told the court that the Defendant is a neighbour. The Defendant has constructed her house in a manner that the balcony encroaches on the Plaintiff's Plot.

The Plaintiff and the Defendant share a boundary. A report was made to the County Surveyor who confirmed the encroachment. The balcony and the canopy have encroached on the Plaintiff's plot.

6. The Plaintiff produced the following documents as exhibits;

- a) **A certificate of Title for Land Parcel Number Mombasa/Block XXXVII/29/MN as exhibit P1.**
- b) **A report by the Chief Building Inspector vide a letter dated 15th July, 2011 as exhibit P2.**
- c) **A report by the surveyor dated 13th October, 2011 as exhibit P3.**
- d) **A receipt for the survey report No. 8150710 dated 7th October, 2011 for Kshs10,000/= as exhibit P4.**
- e) **A report by Architect Fuad A. Taib exhibit P5.**
- f) **A receipt No. 021 for Kshs7500 dated 5th November, 2011 as exhibit P6.**
- g) **A demand notice to the Defendant dated 29th September, 2011 as exhibit P7.**
- h) **Photographs of the said house as exhibit P8.**
- i) **Grant of letters of Administration as exhibit P9.**

7. I have considered the Plaintiff's case and the written submissions. The same has not been controverted. The issue for determination is whether the Plaintiff has established a good case against the Defendant.

8. I have gone through the Defendant's statements of defence and the same amounts to mere denials. In paragraph 4 of the statement of defence, the Defendant admits she is putting up a storey building but denies that the balcony and the canopy are encroaching.

9. The survey report produced by the Plaintiff as exhibit P3 confirms the balcony and the canopy are encroaching. It is the plaintiff's case that the Defendant's action of constructing a building with a balcony overlying on his land failed to leave a space of two (2) metres between the building and the actual boundary.

10. The Plaintiff has been deprived of proper use of his land by making it difficult for him to construct a storey building. It has lessened the value of his land and is a violation of the Plaintiff's proprietary interest.

The construction was done without regard and/or compliance with the physical planning requirement that every residential house must leave a minimum of two (2) metres space between the building and the actual boundary.

11. As stated earlier the Plaintiff's suit is uncontroverted. I find that he has made out a case against the Defendant on a balance of probabilities.

I enter judgment in his favour as against the Defendant as follows;

- a) **A declaration be and is hereby issued that the said offending balcony and canopy are a nuisance on the Plaintiff's Plot and a violation of the Plaintiff's proprietary interest.**
- b) **An order is hereby issued compelling the Defendant to forthwith pull down and/or remove at her expense the said offending balcony and the canopy on the Defendant's building under construction on Plot Number Mombasa/Block XXXVII/27/MI.**
- c) **Special damages of Kshs.17,500/=.**

d) Costs of the suit.

It is so ordered.

DATED, and SIGNED at *Mombasa* on the 13th day of *June*, 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at *Mombasa* on the 13th day of *June*, 2018.

A. OMOLLO

JUDGE