



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT

ELC.NO.173 OF 2012

AQUILA PROPERTIES LIMITED.....PLAINTIFF

VERSUS

BHUPENDRA PATELDEFENDANT

JUDGEMENT

The plaintiff herein Aquila Properties Limited brought this claim against the defendants through a Plaint dated **30th March 2012**.The plaintiff has sought for these orders against the Defendant;-

- a. A mandatory injunction requiring the Defendant to remove with immediate effect that part of the perimeter wall that lies on the plaintiff's property and on the access road.***
- b. General damages for trespass.***
- c. Costs of the suit together with interest thereon at the courts rates.***
- d. Such other or further relief as this Honourable court may deem fit and just to grant.***

The plaintiff has alleged that it is the registered owner of **LR.NO.209/18650 (Original LR.NO. 209/346/470)** situated at Riverside in Nairobi which adjoins **LR.NO.209/346/46** belonging to the Defendant. That sometimes in 2011 the plaintiff's officers whilst comparing the deed plan for the property noticed that part of the Defendant's wall had encroached on the plaintiff's property at varying degrees.

The plaintiff further claims that in 2011 through ***Online Survey Services*** which issued a beacon certificate and a map which concluded that the Defendant's North Easterly wall encroached into Plaintiff's property and its access roads by varying degrees at various points.

The Plaintiff further alleged that through Arch Surveys, the same was confirmed that the Defendant had encroached on the plaintiff's property and further that the said encroachment amounts to continuing trespass.

The Plaintiff further stated that it requested the Defendant both in writing and orally to remove that part of wall but the Defendant instead resorted to making wild allegations at Kileleshwa Police Station and that the Defendant threatens and intends to continue trespassing on its property unless restrained by this Honourable court.

The Defendant **BHUPENDRA PATEL** urged the court to struck out the Plaintiff's Plaint on the ground that it has not complied with **Order 4 Rule 1(4) of the Civil Procedure Rules** which requires it (the Company) to acknowledge authority of filing any pleadings in court under the name of the company.

The Defendant denies each and every allegation contained in the Plaintiff's Plaint and averred that in or about **1973** when he first occupied **LR.NO. 209/364/46** there was well established bougainvillea hedge and bamboo fence between **LR.NO.209/346/46**, and adjoining and adjacent **LR.NO.209/346/47**, then owned and occupied by Mr. & Mrs. Greene who also owned **LR. No. 209/346/48** on eastern side such that the (3) properties had single dwellings erected thereon respectively. That there was private access road common to the (3) properties ('private access road') and in the year **1988** an informal arrangement was made between the Defendant and Mr. & Mrs. Greene with a view to enhance security and privacy of both parties as result of which Defendant undertook to construct a wall at his own expense with the permission of Mr. & Mrs. Greene.

The Defendant admits that in **LR.no.209/346/47**, there was some encroachment but the defendant conceded a portion of its property **LR.NO.209/346/46**, for the benefit of **LR.NO.209/346/47**, belonging to the predecessors in title to the Plaintiff. The Defendant alleges that when the Plaintiff acquired **LR.NO.18650 (original LR.NO.209/346/47)** by transfer

registered on **21st February 2011**, first he raised the issue of encroachment.

The Defendant in his Counter -Claim prayed for the following orders;-

- a. Both parties to this suit should grant cross easement over their respective properties to each other;**
- b. That an injunction be issued restraining the Plaintiff and its agents and employees from removing any part of the existing wall erected on LR. No. 209/346/47 or the barrier on the private access road.**

The Defendant urged the court to dismiss with costs or alternative such order be made on the Counter-Claim as the honourable court considers just and equitable but the plaintiff should bear the costs of this suit in any event.

In response to reply to Defence and Defence to Counter- Claim the Plaintiff denies and reiterated his averment in the Plaintiff's Plaint and did put the Defendant to strict proof thereof and averred that the Defendant had admitted encroaching on its property and that any alleged consent or acquiescence by previous owners of the suit premises was effectively terminated when the Defendant was notified of the encroachment.

The matter commenced for hearing on **28th October 2015**, and Plaintiff called no witnesses.

PW1 testified that they did a survey and realized that Mr. Patel had encroached on the **LR. No. 209/346/47**. **P.W.2** testified that the owner of **plot No.46** has encroached on the **Plot No.47** on section A which is **32 meters**, and the length of encroachment is about **44.8metres** and which he produced a report of the same in court.

The Defendant testified that the wall was structurally approved by the City Council of Nairobi and that his neighbor then and the owner of plot no.47 one Mr. and Mrs. Greene did not have a problem with him putting up the wall, since they had consented on the same.

After the Viva Voce evidence the parties filed their written submissions. The plaintiff's Advocates, **Wanjiku Muriu & Company Advocates** filed their written submissions on **the 1st of March 2016**.

The Defendants Advocates, **Daly & Inamdar Advocates** filed their written submissions on the **27th May 2016**. This court has now carefully considered the pleadings in general, the annexures thereto, the

available evidence and the exhibits produced in court. The court has now also considered the written submissions, the cited provisions of law and the attached authorities and the court renders itself as follows;

There is no doubt that the Plaintiff herein *Aquila Properties Ltd*, is the registered proprietor of **LR.NO.209/18650 original NO.209/346/47**, having purchased the same from *Urban Splash Ltd*, in the year **2011**. The suit property was transferred to the Plaintiff on **25th February 2011** as is evident from the certificate of registration produced in court as exhibit by the Plaintiff. There is also no doubt that the Defendant herein *Bhupendra Patel*, is the registered owner of **LR.NO.209/346/46**, which is adjacent or neighbouring Plot No.**209/346/47**, which is owned by the Plaintiff herein.

There is also no doubt that the Defendant herein has constructed a boundary wall between the two plots **209/346/46** and **209/346/47** and which boundary wall was constructed in year **1989**. It is not in doubt that **LR.NO.209/346/47** was occupied by Mr. and Mrs. Greene and there is no evidence that they ever raised any objection to the construction of the said boundary wall. It is also evident that after *Aquila Properties Ltd*, acquired **LR.NO.209/18650** in year **2011**, they subsequently raised the issue of encroachment on road reserve by the Defendant. However, there is no evidence on whether the Plaintiff raised this issue of the alleged encroachment of the road reserve and its property by the Defendant at the time of purchase of the suit property.

There is evidence that the Plaintiff and the Defendant had tried to mutually resolve the issue in the year **2012**. However the same was never resolved and this suit was filed in court on **2nd April 2012**.

The Plaintiff has sought for various prayers against the Defendant.

The Defendant on his part has denied the Plaintiff's claim and has raised a Counter-Claim that the court do order that both parties should grant cross easements over their respective properties to each other.

From the available exhibits, it is evident that the Defendant was granted approval to construct the boundary wall by the City Council of Nairobi vide the approved structural drawing dated **11th July 1989**. Further vide a letter dated **19th June 2008**, the City Council of Nairobi granted the Defendant permission to construct access way and erect a barrier to serve **LR.NO 209/346/46**.

Further it is evident that after the Plaintiff and the Defendant exchanged correspondences over the encroachment of Access Road and erection of the boundary wall, the City Council of Nairobi served the Defendant with enforcement Notice alleging that the Defendant had erected the boundary wall illegally and without approval which enforcement Notice was dated **3rd May 2012**.

However it is evident that on **11th July 1989**, the City Council of Nairobi approved structural drawing in respect of the boundary wall. The Plaintiff also produced exhibits and particulars of the beacon certificate and various photographs allegedly showing the encroachment on plot no **209/346/46**. The Plaintiff also produced *Boundary Access Survey Report from Geomatics Technics Ltd*, and the map of the property drawn by Geomatics Technics Ltd. The survey report confirmed an alleged encroachment on the access route showing credence to Plaintiff's evidence.

Therefore the evidence tendered by the Plaintiff was to the effect that the Defendant has encroached on the Plaintiff's plot and the access road. The Defendant on his defence alleged that the erection of the boundary wall in dispute was with the consent and permission of the previous owners of **LR.NO.209/346/47**, Mr. and Mrs. Greene and that the court should direct that the same should remain as it is and order that there should be cross easements between the parties herein.

That being the evidence before the court, the issues for determination are;

- 1. Has the Defendant trespassed onto the Plaintiff's property and the common access road?**

2. Is the Plaintiff bound by the actions of the previous owners of LR.No.209/346/47?

3. Is the suit barred under the Limitation of Actions Act, Cap 22 Laws of Kenya?

4. Has the failure to have the requisite authorization of the Company affected the Plaintiffs suit?

5. Is the Plaintiff entitled to the prayers sought and alternatively is the Defendant entitled to the prayers in the Counter-Claim?

6. Who is to bear the costs of the suit?

On the first issue, the question for determination is whether the Defendant has trespassed on the Plaintiff's property and the common access Road.

There is no doubt that the Plaintiff is now the registered owner of **LR. No. 209/346/47** having purchased it from the previous owners who according to the Defendant were Mr. and Mrs. Greene As I had stated earlier the Defendant is the owner of the adjacent property **LR. No. 209/346/46** and there is a boundary wall constructed by the Defendant between the two plots in the year **1989**. By the time the Plaintiff acquired the suit property, this boundary wall was still in place. However there is no evidence that the Plaintiff ever raised any issue of the boundary wall before the purchase of the suit property.

The Black's Law Dictionary 6th Edition describe *trespass* as;

“An unlawful interference with one's person property or right.

At common law trespass was a form of action brought to recover damages for any injury to one's person on property or relationship with another.....

Any unauthorized intrusion or invasion of private premises on land of another”

The Plaintiff herein has to satisfy this court that the Defendant herein had unauthorized intrusion or invasion of its private premises or land.

It is evident that the Defendant did purchase and acquire the suit property in the year **2011**.By the time of its acquisition, the Defendant had already put up the boundary wall. The Plaintiff did not request for removal of the boundary wall before it acquired the same from the previous owners. The Defendant testified that he constructed the boundary wall with the consent of the previous property owners of **LR.No.209/346/47** and therefore the said agreement gave the Defendant the right to utilize the land owned by the Plaintiff thus creating an easement. The Defendant said the said agreement was oral and therefore the existing easement was an equitable easement. *Black's Law Dictionary* describes easement as;

“An interest in land owned by another person consisting in the right to use and control the land or on area above and below it for a specific limited purpose”

The Defendant testified that the agreement between him and the owners of **LR.No.209/346/47** to construct the wall was informal. In the case of **Kamau versus Kamau KLR EA 105**, the Court held that;

“How are easements created? At common law only by Deed and Will.....

At equity however if there is an agreement whether under seal or not to grant an easement, for valuable consideration, equity considers it as granted between the parties and persons taking with notice and will either decree a legal grant to restrain a disturbance by injunction”

Further **Section 32** of the **Limitation of Actions Act** creates an indefeasible right to an easement where a person enjoys the easement peacefully and openly as of right without interruption for twenty years.

The said **Section 32 of Limitation of Actions Act Cap 22** provides as follows;

1) Where

a)

b)

c)-any other easement has been enjoyed;

peaceably and openly as of right and without interruption, for twenty years the right to such access and use of light or air, to such way on water course, or use of water, or to such other easement ,is absolute and indefeasible.

It is evident that the Defendant and the previous owner of **LR.No.209/346/47** entered into an informal agreement at the year **1988** and the wall was constructed in the year **1989**. The Defendant has been enjoying the accrued rights from the year **1989** and the said right was continuous for **20** years. The Defendant was therefore not a trespasser and he could certainly not have trespassed on the Plaintiff's property as the Plaintiff purchased the suit land when the boundary wall was still in place. The court finds that as provided by **Section 32** of the **Limitation of Actions Act**, an easement was created and therefore the Defendant has not trespassed on the Plaintiffs property.

The next issue for determination is whether the Plaintiff is bound by the actions of the previous owner of **LR.No.209/346/47**.

It is evident that the easement herein was created in the year **1989**. The Plaintiff acquired the land in the year **2011** and it is trite that an easement is an overriding interest which attaches to the property. It is also evident that an easement is a right **in rem** which survives the change of ownership.

As was held in the case of **Ruth Wamuchi Kamau versus Monica Mirae Kamau [1984] eKLR** as follows;

“once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come.”

The Plaintiff submitted that it owns the property and its right accrued upon registration as at **25th February 2011**. However, the court found that an easement was created by virtue of **Section 32 of Limitation of Actions Act** and irrespective of whether the Plaintiff was made aware of it, or not, the said easement survived the change of ownership. Therefore the Plaintiff is bound by the actions of the previous owners. See the case of **Kepha Maebe & 365 Others versus Benson. I. Mwangi & another (2015)eKLR** which quoted with approval the case of **Wheeldon versus Burrows(1879)12 ch D 31** where it was held that.....”**the first of these rules is that, on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed, then it will pass to the grantee all those continuous and apparent easements or in other words all those easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted”**

From the above findings of the court, it is evident that the subsequent owner of a property is bound by pre-existing easement. The court finds that equally in this suit, the Plaintiff is bound by the actions of the previous owners of **LR.No.209/346/47**.

The third issue is whether the suit is barred under the **Limitations of Actions Act Cap 22 Laws of**

Kenya.

It is evident that the Plaintiff's claim is on the encroachment of the property

which is a claim on trespass. It is evident that trespass is a *tort* and under **Section 4(2) of the Limitation of Actions Act**, this claim cannot stand. The boundary wall in issue was constructed in the year **1989**. During the construction of this boundary wall Mr. and Mrs. Greene the owners of **LR.NO 209/346/47**, then did not complain of trespass at that time. **Section 4(2) of Cap 22** reads as follows;

“An action founded on tort may not be brought after the end of 3years from the date on which the cause of action accrued”

Further **Section 7** of the said Act provides that;

“An action may not be brought by any person to recover land after the end of 12years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person”

The boundary wall in question was constructed in the year **1989**. That is when the alleged trespass accrued. The Plaintiff brought the suit after more than **20** years. The suit here is therefore caught by **Limitation of Action Act**.

The Plaintiff submitted that its right on the suit property attached as from **25th February 2011** and that is when the Defendant's trespass upon the plaintiff's began. However the plaintiff found the defendant having been granted an easement by the previous owners. The Defendant has therefore not trespassed on the Plaintiff's property or the access road.

However if the previous owner was to bring a suit for trespass, then the cause of action arose in the year **1989** and that is more than **20years** from the time the cause of action arose. The suit is therefore barred by **Limitations of Actions Act**.

The fourth issue is whether failure to have the requisite authorization of the Company has affected the Plaintiff's suit. It is trite law that when Directors of the Company file a suit on behalf of such a Company, the said Directors must specifically be authorized to act on behalf of the said Company by the resolution either by the Shareholders or Directors. Failure to have such authority means that the actions of such Directors is not binding on the Company at all. In the case of **Bugerere Coffee Growers Ltd versus Sebaduka & others(1970) EA 147**, the court held that;

“when companies authorizes the commencement of legal proceedings, a resolution or resolutions have to be passed either at a Company or a Board of Directors meeting and recorded in the minutes whereas in the present case I find no Company or Board meetings were held on or about 18th November 1968.....clearly messrs. Parekhji & Co. had no authority to act on the company's behalf or bring these present proceedings in the name of the company”

In the present suit the court has perused the plaintiff's exhibits and there is no authority granted to the Director of the plaintiff to bring this suit either through the resolution of the shareholders or Directors. The suit is therefore not authorized by the Company. The court finds that there was no authority to file this suit and therefore the suit is not authorized by the company and it is therefore incompetent and a nullity.

On the **5th** issue on whether the Plaintiff is entitled to the prayers sought, the court finds that having found that the suit was filed without authority by the Company and therefore it is incompetent and a nullity and having found that the defendant has an easement on **LR.No.209/346/47**, then the court finds that the Plaintiff is not entitled to any of the prayers sought in the Plaintiff. However it is evident that the Defendant had proved that there exists an easement in equity. For the above reasons, the court finds that the

defendant is entitled to his prayers as contained in the Counter-Claim.

On the last issue of who is entitled to costs, the court finds that costs normally follow the event. The court finds that the Defendant is the successful litigant herein and is therefore entitled to costs of the suit.

Having now carefully considered the available evidence, the court finds that the Plaintiff has not proved its case on a balance of probabilities.

Consequently the Plaintiff suit is not merited and is dismissed entirely with cost to the Defendant. On the other hand, the Defendant has established that there exist an easement in equity and consequently the court allows the Defendant's Counter-Claim entirely with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered this 7th day of April 2017.

L.GACHERU

JUDGE

7/4/2017

In the presence of

M/S Muriu for Plaintiff

Mr. Ogado for Defendant

Halima - Court Clerk