



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)**

**CIVIL APPEAL NO. 50 OF 2014**

**BETWEEN**

**MIYORO PETERSON.....APPELLANT**

**AND**

**JAFFA RAMADHAN.....RESPONDENT**

***(An Appeal from the Judgment of the High Court of Kenya at Kisii, (Okong'o, J.) dated 28<sup>th</sup> March, 2014***

**in**

**H.C.C.C. NO. 305 OF 2010)**

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**JUDGMENT OF THE COURT**

1. This is an appeal against the judgment of Okong'o, J. delivered on 28<sup>th</sup> March 2014 in Kisii HCCC No. 305 of 2010. In that judgment, the learned Judge granted the respondent a perpetual injunction restraining the appellant from further damaging the respondent's building on Plot No. 29. The facts of the case are fairly straightforward and not in dispute.

2. The appellant is the owner of the piece of land situate in Kisii Municipality and known as Plot No. 28 Nyanchwa Phase I Site and Service Scheme (Plot No. 28). On the other hand the respondent is the owner of the piece of land situate in Kisii Municipality and known as Plot No. 29 Nyanchwa Phase I Site and Service Scheme (Plot No. 29). The two pieces of land are contiguous and equal in size. Each measures 23.5 metres in length by 8.33 metres in width. They were separately allocated to the parties by the Kisii Municipal Council (the Council). At the time of allocating it to the respondent, Plot No. 29 had a building that had been put up by the National Housing Corporation (the NHC). The Council, however, allocated it as an empty piece of land and advised the respondent to purchase the building from the NHC, which the respondent claimed he did.

3. In 2010, after obtaining the approval of the Council, the appellant commenced construction on his piece of land, Plot No. 28. In the course of that construction, he damaged a portion of the roof to the

respondent's building. The respondent reported the matter to police, who arrested the appellant's workers. Later the respondent filed the said suit in which he claimed that the Council had unlawfully subdivided his Plot No. 29 and allocated a portion thereof to the appellant; that without any colour of right, the appellant had trespassed onto his Plot No. 29 and commenced construction thereon; and that the appellant's building under construction had blocked the light to the respondent's building. He therefore sought, inter alia, a permanent injunction to restrain the appellant from continuing with his construction, which, according to him, was on his Plot No. 29, or in any way interfering with his quiet use and occupation of his building; an order directing the appellant to remove his building under construction and vacate the respondent's plot; and general damages for the damage the appellant had caused to his building.

4. In his defence, the appellant denied the respondent's claim that Plot No. 28 was a subdivision of the respondent's Plot No. 29. He therefore denied trespassing on the respondent's piece of land and averred that he was lawfully constructing on his Plot No. 28.

5. After hearing the case, as stated, Okong'o, J. granted the respondent a permanent injunction restraining the appellant from further damaging the respondent's building. What that meant is that the appellant could not continue with his construction. The appellant was aggrieved by that decision, hence this appeal.

6. The appellant's appeal is that having found that the respondent's building encroached onto the appellant's piece of land, the learned Judge had no basis of restraining the appellant from removing the encroachment. The respondent's contention on the other hand is that the appellant having not counterclaimed, he has no right to damage the respondent's building.

7. We have considered these submissions and carefully read the record of this appeal.

8. In the suit before the High Court, the Council was the 1<sup>st</sup> defendant. It only entered appearance but did not file any defence. During the hearing, it called its surveyor, one Prescott Mokaya, who testified as DW1. The gravamen of that witness' testimony was that neither of the two pieces of land is a subdivision of the other. They were apparently surveyed and allocated at the same time and, as stated, they are equal in size. When the dispute between the parties arose, the witness went to the locus quo and after survey, he found out that the appellant's building under construction is squarely on his Plot No. 28. It is the respondent's building on Plot No. 29 that encroaches onto the appellant's Plot No. 28 by a margin of 8.5 by 2.33 metres. He further stated that the Council's Physical Planner had recommended that the respondent's encroachment onto the appellant's Plot No. 28 be removed.

9. The respondent never counteracted DW1's testimony. On that evidence, the learned Judge found as a fact that the appellant's building under construction is squarely on his Plot No. 28 and that it is the respondent's building on Plot No. 29 that encroaches onto the appellant's Plot No. 28 by a margin of 8.5 by 2.33 metres. In other words, the learned Judge found that it is the respondent who had trespassed onto the appellant's piece of land.

10. With that finding against which there is no cross appeal, we agree with the appellant that there was no basis for the learned Judge's order of perpetual injunction restraining the appellant from removing the portion of the respondent's building that encroached onto his land.

11. We have seen the agreement the parties reached on 9<sup>th</sup> October 2010. The appellant's son testified that the purpose of that agreement was to secure the release of the appellant's workers whose arrest the respondent had obtained on allegations of malicious damage to his said building. However, the learned Judge did not base his decision on that agreement, and rightly so. There was no consideration given for it. The appellant did not damage the respondent's building. All that he did was to chop off the portion of the respondent's building which had encroached onto his plot. He had a right to do so. At common law, where a trespasser peaceably enters or is on land, the proprietor of such piece of land has a right to self-redress "using no more force than is reasonably necessary"—**Volume 45 Halsbury's Laws of England, 4<sup>th</sup> edition, paragraph 1400**. He does not need the trespasser's consent to evict him. Although, to avoid a breach of peace, it is civil to first obtain a court order to do that, the appellant cannot be faulted for

chopping off the encroachment in the course of building on his land.

12. For these reasons, we allow this appeal, set aside the learned Judge's decision and substitute it with an order dismissing the respondent's case with costs. The appellant is at liberty to continue with his construction as long as it does not trespass onto the respondent's piece of land. The appellant shall also have the costs of this appeal.

**DATED and delivered at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

I certify that this is the

true copy of original.

**DEPUTY REGISTRAR**