



**Shah & 2 others v Menkar Limited (Environment & Land Case
179 of 2017) [2023] KEELC 273 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 179 OF 2017**

**NA MATHEKA, J
JANUARY 26, 2023**

BETWEEN

RATILAL GHELA SAMAT SHAH 1ST PLAINTIFF

DI NUMATI RATILAL GHELA SHAH 2ND PLAINTIFF

BHIKHU RATILAL GHELA SHAH 3RD PLAINTIFF

AND

MENKAR LIMITED DEFENDANT

JUDGMENT

- 1 The Plaintiffs aver that they are the joint registered owners of the leasehold interest in the property Mombasa/Block 1/408 (herein the suit property) situate in Shimanzi within Mombasa. On or around 2009, the Plaintiffs realized that part of a construction on the adjoining property, Mombasa/Block 1/409 belonging to one Roshanali Sherali Esmail, encroached onto the suit property. The Plaintiffs aver that surveys commissioned by themselves and by the said Roshanali Sherali Esmail established that the construction on Mombasa/Bock 1/409 encroached the suit property by about 11 x 10 x 17 metres and also that the 6th beacon K36 could not be accessed because the wall to the said Mombasa/Block 1/409 was built on it. The Plaintiffs aver that they reported the encroachment to the then Municipal Council of Mombasa who issued notice to the owner to demolish the encroaching parts of the building to ground level, remove debris and to return the plot to its original condition.
- 2 The Plaintiffs aver that the said owner did not comply with the notice leading to him being charged in Criminal Case Number 650 of 2012 wherein he was found guilty and convicted of the offence of failing to identify plot boundary and encroaching on the neighbouring plot contrary to bylaw 42 (1) of the Building Code of the Local Government (Adoptive) Bylaws 1968. The Plaintiffs aver that despite being ordered to demolish the encroachment the owner did not comply but instead sold the suit property to the Defendant herein and was therefore discharged as he was no longer liable as an



owner. Thereafter, the Defendant herein as the new owner was issued with fresh notice to demolish the encroachment on the Plaintiffs' property but failed to comply and was thus charged in Criminal Case Number 1968 of 2015. The County Government has been unable to conclude the prosecution of the charges since the directors of the Defendant are ostensibly untraceable. The Plaintiffs aver that the Defendant as the owners has failed and or refused to demolish the encroaching portion of its building despite notice and the criminal case against it in court to the great loss and prejudice to the Plaintiffs. The Plaintiffs aver that the Defendant does not have any right or interest in the suit property and particularly the portion of the suit property constructed on as the entire property belongs to the Plaintiffs.

3 The Plaintiffs assert that the Defendant's action is an act of trespass, illegal acquisition/grabbing of private property, unlawful occupation and a clear breach and interference with their constitutionally guaranteed property rights. The Plaintiffs aver that as a result of construction on their part of the suit property, they have been unable to utilize the said portion to their loss and damage and therefore seek damages and or mesne profits for the trespass and unlawful occupation and use of the suit property since November 2009 at a rate of Kshs 300, 000/ = per month with interests until the Defendant vacates and or is evicted.

4 The Plaintiffs pray for judgment against the Defendant for: -

1. A permanent injunction to restrain the Defendant, by itself, representatives, agents, employees, servants, or whosoever is acting on its behalf from entering, trespassing onto, erecting, constructing, building or in any manner whatsoever interfering with the property Mombasa/Block 1/408.
2. An order to evict and remove the Defendant, by itself, representatives, agents, employees, servants, or whosoever is acting on its behalf from the property Mombasa/Block 1/408.
3. An order for the demolition to the ground level and removal of all and any of the portion of the building encroaching onto the property Mombasa/Block 1/408 and restoration of the suit property to its original status at the Defendant's costs.
4. An order directing the relevant Officer Commanding Station (OCS) with jurisdiction over Shimanzi area to provide security, supervise and enforce the court orders granted herein.
5. Mesne profits and or general damages calculated at Kshs 300,000/ = per month from November 2009 till the cessation of the trespass, unlawful occupation and use of the suit property.
6. The costs of this suit.
7. Interest on 5 and 6 above.
8. Any other order as the court may deem fit and appropriate.

5 The Defendant avers that they only acquired its Title No Mombasa/Block 1/409 in 2012 and was never made a party to any court proceedings between the Plaintiffs herein and the Defendant's predecessor in title. The Defendant particularly denies ever being served with any notice by the County Government of Mombasa which, in any event, has no jurisdiction to determine or fix boundaries of registered land. The Defendant denies encroaching onto the Plaintiffs' land, denies being a trespasser, denies that the Plaintiffs have suffered any loss or damage or are entitled to mesne profits at all, or to any of the orders sought in the Plaint. In the alternative and without prejudice to the contents of the Defence, the Defendant pleads that the Plaintiffs claim is not maintainable in equity as the Plaintiffs are guilty of laches and indolence. That the building constructed on the Defendant's property Title No Mombasa/



Block 1/409 was completed between 2007 and 2009. That the survey plans relied on by the Plaintiffs in support of their claim have always been available to them yet the Plaintiffs, who have been the owners of Mombasa/Block 1/408 at all material times, sat back and watched the building being constructed to completion but took no action to assert their rights. The Plaintiffs slept on their lawful rights and only woke up in 2017 to file this suit way after the Defendant had purchased and taken possession of the Title No Mombasa/Block 1/409 and fully utilized the same. Equity favours the vigilant and will not come to the aid of the indolent such as the Plaintiffs herein. That on or about January 25, 2012, the Plaintiff by counter claim discovered that the boundaries of the Defendants by Counter-claim's property known as Title No Mombasa/Block 1/408 have encroached onto the Plaintiff's known as Title No Mombasa/Block 1/409.

- 6 The Plaintiff by Counter-claim purchased Mombasa Block I/409 in 2012 and at the time of purchase there were erected thereon a building which had been constructed and completed in 2007. The Plaintiff by Counter-claim has no reason to suspect any boundary issue as the boundaries of Mombasa Block I/410 vis a-vis Mombasa Block I/409 just like those of Mombasa/Block I/408 run horizontally and parallel to one another. The Defendants by Counter-claim then made a claim for encroachment of the boundaries of Mombasa/Block 1/409 onto Mombasa/Block 1/408 in 2017 and by way of a court order issued on or about June 2019, the Coast Regional Surveyor visited the two subject properties in or around November 2020 and a report was filed in court on or about January 25, 2021. The Coast Regional Surveyor's report dated January 21, 2021 indicated that whilst there was encroachment of the boundaries of the Plaintiff by Counter-claim's land Mombasa/Block 1/409 onto the Defendants' by Counter-claim land Mombasa/Block 1/408, on account of the plot boundaries being diagonal (as opposed to running vertically and parallel)t there was cross-encroachment of both properties and that the boundaries of Mombasa/Block 1/408 had also encroached onto the boundaries of Mombasa/Block 1/409.
- 7 Though the sizes of the cross-encroaching portions are yet to be established, the discovery gave rise to a cause of action by the Plaintiff by Counter-claim for trespass by the Defendants by Counter-claim onto the boundaries of Mombasa/Block 1/409. By virtue of the hitherto undiscovered trespass of the Defendants by Counterclaim, the Plaintiff by Counter-claim has been denied the use of the portion of Mombasa/Block 1/409 which has been encroached onto by the boundaries of Mombasa/Block 1/408 from 2012 to the date hereof. The Plaintiff by Counter-claim's claim is for a declaration that the Defendants by counter-claim have trespassed onto the Plaintiff by Counter-claim's property Mombasa/Block 1/409, for an order of restitution and/or re-alignment of boundaries and for general damages for trespass from 2012 until the cessation thereof.
- 8 The Defendant counterclaims the for the following orders;
 - a. A declaration that the defendants by Counter-claim's boundaries of Mombasa/Block I/408 have encroached onto the Plaintiff by Counter-claim's property Mombasa/Block I/409.
 - b. General damages for trespass.
 - c. An order directing the Defendants by Counter-claim to demolish and cart away the debris arising from such demolition, any developments which are located within the boundaries of Mombasa/Block I/409 within 30 days of this order, failing which the Plaintiff by Counter-claim be set at liberty to cause such developments to be so demolished and debris carted away at the Plaintiff by Counter-claim's cost.
 - d. Costs of this suit.
 - e. Interest on b) and d) at court rates.



- f. In the alternative an order be issued to the Coast Regional Surveyor to conduct a re-alignment of the boundaries of Mombasa/Block 1/409 with those of Mombasa/Block 1/408 so as to reflect the current physical demarcations and developments on the properties and to file before this Honourable Court within 60 days, a report on the changes in acreage of the two properties as a result of said re-alignment indicating whether any party has as a result of the said re-alignment, ended up with more land (Net Land) and if so, which party.
- g. Further to the alternative order (f) above, the parties be directed to value the Net Land at market rates as at the date of the Regional Surveyor's re or within 30 days of its filing and upon such valuation. the party ending up with more land to pay to the other party the market value of the Net Land with 14 days of the valuation.
- 9 The law clearly states that a certificate of title is the conclusive evidence of proprietorship. Section 26 of the [Land Registration Act](#) states that:-
- ' The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate.'
- 10 PW1 testified that the Plaintiffs are the joint registered owners of the leasehold interest in the property Mombasa/Block 1/408 (herein the suit property) situate in Shimanzi within Mombasa. On or around 2009, the Plaintiffs realized that part of a construction on the adjoining property, Mombasa/Block 1/409 belonging to one Roshanali Sherali Esmail, encroached onto the suit property. PW2 the Land Registrar confirmed the same. PW3 the Land Surveyor testified that there was cross-encroachment of both properties and that the boundaries of Mombasa/Block 1/408 had also encroached onto the boundaries of Mombasa/Block 1/409. He proposed that the area be resurveyed and the boundary be rectified to reflect what is on the ground.
- 11 DW1 a Director with the Defendant Company states that he bought his property with the buildings on it. That the building had been there since 1995. The drawings were approved before the buildings were put up. DW2 another Land Surveyor confirms that there was cross-encroachment of both properties and that the boundaries of Mombasa/Block 1/408 had also encroached onto the boundaries of Mombasa/Block 1/409.
- 12 The issue then for determination is whether or not the Defendants have trespassed on the Plaintiffs land. [Clerk & Lindsell on Torts 18th Edition](#) at paragraph 18-01 defines trespass as follows;
- ' Any unjustifiable intrusion by one person upon land in possession of another.' .Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession'
- 13 In Black's Law Dictionary 8th Edition, a continuing trespass is defined as;
- ' A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property'.



Section 3 (1) of the Trespass Act, Cap 294 provides that:

' Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.'

14 Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. In the case of *Duncan Nderitu Ndegwa vs KP&C LC Limited & Another (2013) eKLR* where P Nyamweya J held that;

' Once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass'

15 In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows;

- ' (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
- (d) --
- (e) -'

16 On the issue of general damages for trespass, the issue that arises is the amount to be awarded. This question was answered in the case of *Philip Ayaya Aluchio vs Crispinus Ngayo (2014) eKLR* where it was held as follows:

' The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See *Hostler – vs – Green Park Development Co 986 S W 2d 500 (No App 1999)*.'

17 From the evidence on record, the Plaintiff has proved trespass but there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the Plaintiffs suffered for them to be compensated for the loss. Be that as it may, it is not disputed that there is cross-encroachment of both properties and that the boundaries of Mombasa/Block 1/408 had also encroached onto the boundaries of Mombasa/Block 1/409 and hence this court finds that both parties trespassed on each other's property and the award of damages will not be granted as the damage suffered was by both parties. On the issue of demolition and eviction both Surveyors PW3 and DW2 agree that the two plots have encroached on each other and PW3 suggests a realignment of the boundaries to reflect what is on the ground. I agree. PW1 testified that it was on or around 2009, that the Plaintiffs realized that part of a construction on the adjoining property, Mombasa/Block



1/409 had encroached onto the suit property. DW1 confirms that the said building had been there since 1995 and in turn the Plaintiffs had also encroached on his land. I find that the correct remedy in these circumstances is to realign the boundary and not to demolish the encroaching properties on either side. This matter is unique in that both parties are right on the issue of trespass and encroachment and in the interest of justice I grant the following orders;

1. The Coast Regional Surveyor to conduct a re-alignment of the boundaries of Mombasa/Block 1/409 with those of Mombasa/Block 1/408 so as to reflect the current physical demarcations and developments on the properties and to file before this Honourable Court within 90 days, a report on the changes in acreage of the two properties as a result of said re-alignment indicating whether any party has as a result of the said re-alignment, ended up with more land (Net Land) and if so, which party.
2. The parties are directed to value the Net Land at market rates as at the date of the Regional Surveyor's report or within 30 days of its filing and upon such valuation. the party ending up with more land to pay to the other party the market value of the Net Land within 30 days of the valuation.
3. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE

TABLE

ELC CASE NO. 179 OF 2017 Page 2 of 2

