



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 336 OF 2010

PENMAIN COMPANY LIMITEDPLAINTIFF

VERSUS

LIKONI COMMUNITY DEVELOPMENT & 6 OTHERS.....DEFENDANTS

JUDGMENT

(Plaintiff filing suit for a declaration of ownership of the suit land and for a permanent injunction to restrain the defendants from it; plaintiff claiming that the defendants wish to forcefully enter the suit property in order to access the beach; plaintiff producing a map to demonstrate that there is no access road; defendants not filing any defence; plaintiff's suit undefended; plaintiff demonstrating ownership of the suit land and further demonstrating that there is no access road through the land; judgment entered for the plaintiff

1. This suit was commenced by way of a plaint filed on 20 September 2010. The 1st -3rd defendants are described as community organizations, and the 4th defendant is claimed to be an official/agent of the 1st defendant. It is further claimed that the 5th defendant is an official/agent of the 2nd defendant; the 6th defendant an official/agent of the 3rd defendant, and the 7th defendant an adult of sound mind residing and working for gain in the republic of Kenya. The plaintiff pleads that it is the registered owner of the plot title Mombasa/M.S/Block V/49 (the suit land), and that sometime in the month of April 2010 the defendants entered into the suit land and started interfering with the same by destroying and demolishing the plaintiff's wall. This intrusion, it is said, has happened on several occasions with the plaintiff making reports to the police. The plaintiff has pleaded that this trespass has resulted in great loss as the plaintiff had invested heavily on the suit land. In this case, the plaintiff has asked for the following orders (slightly paraphrased) :-

- a) *A permanent injunction restraining the defendants from interfering with the suit land.*
- b) *A declaration that the plaintiff is the rightful and registered owner of the suit land.*
- c) *Costs and interest.*

2. The defendants entered appearance and appointed counsel but did not file any defence. They also did not appear at the hearing of the suit despite being duly served.

3. The matter came up for hearing on 18 May 2021. The plaintiff called as PW-1 one George Ngatia Wachira, the general manager of the plaintiff. He produced some exhibits including the certificate of incorporation of the plaintiff, the original map sheet, transfer of land instrument, the official search of the suit land, receipt No. 0193059 for the architectural & structure fee for the suit land, the Municipal Council of Mombasa approval notice, and photographs and newspaper cuttings showing the damage to the wall. He testified that the defendants insisted that the plaintiff give them way through the suit land to the beach. He testified that as per the map sheet, there is no access way passing through the suit land. He testified that the defendants should be permanently restrained from interfering with the suit land and further pay for the costs of the suit.

4. The plaintiff closed its case and counsel filed written submissions. I have taken note of these submissions alongside the authorities referred therein.

5. It will be observed that among the documents produced by the plaintiff was a copy of the title deed to the suit land. It shows that the plaintiff is the registered proprietor. Section 24 of the Land Registration Act, 2012 provides as follows:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

6. Section 25 (1) of the said Act further provides that:-

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

7. Additionally, Section 26 of the same Act provides 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 indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

8. It will be seen from Section 26 above, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights comprised in the subject land. The defendants have not come to court to contest the title of the plaintiff. It is therefore my finding that as against the defendants, the plaintiff is the absolute proprietor of the suit land.

9. The plaintiff in the suit claimed that the defendants insist that they want to access the beach through the plaintiff's land. The plaintiff has produced a map sheet of the area to demonstrate that there is no road through its land. I have looked at the map and it is true that there is no access road passing through the plaintiff's land. From the map sheet produced by the plaintiff, the road/path leading to the beach is on the left side after Plot Title Mombasa/M.S/Block V/50 which is adjacent to the suit land.

10. The plaintiff attached a newspaper excerpt from the Sunday Nation dated 24 July 2010 showing some people demolishing the perimeter wall of the plaintiff. The plaintiff claims that all the defendants took part in the demolition. The defendants have not come to court to refute this and I have no reason to doubt the plaintiff. I am of the view that the plaintiff has proved his case against the defendants on a balance of probabilities.

11. I have no reason to deny the plaintiff the order to permanently restrain the defendants from the suit property. I also have no reason not to make the declaration that as between the plaintiff and defendants, it is the plaintiff who is the rightful owner of the suit property and who is entitled to proprietary rights over the same.

12. The plaintiff will also have the costs of this suit.

13. Judgment accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2020.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA.