



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 215 (B) OF 2018

(FORMERLY 622 OF 2011)

NAINESH KANTILAL SHAH.....PLAINTIFF

-VERSUS-

BIDAN MBUGUA & 32 OTHERS.....DEFENDANTS

JUDGEMENT

1. Mr Nainesh Kantilal Shah sued the 33 defendants vide his plaint dated 24th November 2011 seeking the following reliefs:

a. An order directing the defendants to vacate and demolish any structures erected thereon by the defendants on all those pieces or parcels of land known and described as LR No. 12638/1; LR No. 12638/2; LR NO. 12638/3; LR No. 12638/4; LR No. 12638/5; LR No. 12638/6; LR No. 12638/7; LR No. 12638/8; LR No. 12638/10; LR No. 12638/11 and give the plaintiff vacant possession forthwith. In default, the defendants be forcibly evicted.

b. Damages for trespass.

c. Costs.

d. Interest on (b) and (c) from the date of judgment, until payment in full.

e. Any other or further relief that this honourable Court may deem fit, just and expedient to grant.

2. Together with his plaint, he filed a list containing 22 documents and also witnesses' statements.

3. The defendants were served with summons to enter appearance on 13th, 14th and 16th January 2012 by a Mr Michael Otieno who swore an affidavit of service dated 14th February 2012. The process server deposed that he served the defendants through the assistance of the Chief and two village elders on 3 separate days as described in his affidavit. The defendants entered appearance through Gikandi & Co advocates on 28th February 2012 filed in Court on 1st March 2012 but never filed a defence.

4. The matter was listed for mention on 27th July 2018 in the presence of Ms Kiptum holding brief for Gikandi & Co Advocates for defendants and Mr Njoroge advocate appearing for the plaintiff. By consent of the two advocates, a hearing date was set for 17th October 2018. On 17th October 2018, no appearance was made for the defence. The matter therefore proceeded exparte.

5. The plaintiff called two witnesses. Mr Nainesh K. Shah who adopted his witness statement made on 1.12.2011 as his evidence and Mr Michael Otieno the process server who testified that he had previously served the defendants with demand letters issued by the plaintiff.

6. The plaintiff (PW 1) also told the Court that he had the original title deeds in his possession before producing the copies contained in his list filed in Court. All the copies of the 11 title deeds are registered in the name of the plaintiff. To prove his ownership further, the plaintiff also produced certificates of postal searches as on 9th March 2010 for each of the titles showing he is the registered owner of the freehold tenure for the suit titles.

7. PW 2 swore an affidavit dated 29th April 2011 stating that he received letters dated 20th April 2011 from the plaintiff's advocates on record to deliver to 33 squatters at Pongwe/Kidimu Location within Shimoni area. He was able to serve the 33 persons with the letters

through the help of an assistant chief he gave his name as Rashid. None of the defendants have contested the evidence as presented by the plaintiff.

8. Under the provisions of section 25 of the Land Registration Act No 3 of 2012, the rights of a proprietor shall not be defeated except as provided in this Act (under section 26). That the said rights vested by section 24 of the same Act are absolute and subject only to leases, charges and any encumbrances if any shown in the register. In the case before Court, no such lease or restriction was shown to exist.

9. The provisions of article 40 (2) of the Constitution Parliament is obligated not to enact a law that permits the state or any person to “(a) to arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description.” The Constitution thus abhors arbitrary deprivation of property. The plaintiff has pleaded that the defendants sometime in 2009 without his consent or justification trespassed on the suit title and have since continued with the said acts of trespass by remaining on the suit land. The defendants’ action thus amount to deprivation of the plaintiff of his suit properties/titles thus contrary to the Constitution this entitles the plaintiff to be given an order for vacant possession.

10. In submitting under the head of damages for trespass, the plaintiff cited **Reuben K. arap Serem vs Zipporah Meli (2017) eKLR** where M. A. Odeny J while quoting the case of **Anthony K. Mwanja vs Mwaka Omar Ali (2011) eKLR** awarded the plaintiff Kshs 60,000 as nominal damages. The plaintiff urged this Court to award him Kshs 2.5 Million taking into account that his land is measuring 100 acres and that he has been denied use for a period of 9 years from 2009 - 2018.

11. I am satisfied that the plaintiff has proved his case on a balance of probabilities going by the circumstances where no contrary evidence was led to challenge his title documents and that he has been denied user of the land as a result of the defendants’ occupation. Consequently I do enter judgement for him as prayed in paragraphs:

(a) An order directed at the defendants to vacate and demolish any structures erected thereon by the defendants on all those pieces or parcels of land known and described as LR No. 12638/1; LR No. 12638/2; LR NO. 12638/3; LR No. 12638/4; LR No. 12638/5; LR No. 12638/6; LR No. 12638/7; LR No. 12638/8; LR No. 12638/10; LR No. 12638/11 and give the plaintiff vacant possession within 60 days of service of the decree. In default, the defendants be forcibly evicted.

(b) Nominal award of Kshs 660,000= broken down @ Kshs 20000 payable by each defendant for trespass. I have not awarded the 2.5 Million requested for because the plaintiff did not tell the Court what he intended to put the land for use.

(c) Costs of the suit awarded to the plaintiff.

(d) Interest on (b) & (c) at rates from date of judgment till payment in full.

Dated, signed & delivered at Mombasa this 28th March 2019

A. OMOLLO

JUDGE