



Mauta t/a The Place Bar & Restaurant v Gideon (Environment & Land Case 91 of 2016) [2023] KEELC 20993 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20993 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 91 OF 2016
NA MATHEKA, J
OCTOBER 26, 2023

BETWEEN

FRED KINYALA MAUTA T/A THE PLACE BAR & RESTAURANT PLAINTIFF

AND

ATHMAN MAVINDA GIDEON DEFENDANT

JUDGMENT

1. The Plaintiff avers that he has been the owner of all that unsurveyed portion of land known as Plot No 113/1/MN located opposite Vescon I Estate gate in Bamburi, within Mombasa County. The Plaintiff is, among many other people, a squatter in the said piece of land. The Plaintiff was welcomed on the said property by one Seth Mueni Mumo who is the Defendant's mother. However, neither the said Seth Mueni Mumo nor the Defendant had any proprietary interest on the said property as the said piece of land namely Plot No 113/1/MN is registered in the name of a different person. The Plaintiff states that he developed the suit property single handedly by constructing a building for a bar and restaurant business which is popularly known as The Place Bar & Restaurant. The said business has been in operation since 2002. The Plaintiff obtained appropriate licenses and has at all material times carried out a Bar & Restaurant business thereon. The Plaintiff states that his occupation of the said suit property has been open and continuous for the last 15 years and the said occupation has not been interrupted by the Defendant or any other person,
2. That in 2014 he granted the Defendant and his family one room in the suit property where the Defendant carries on his business. The Plaintiff further states that the rent payable by the Defendant is Kshs 7,500/= and that the Defendant is currently in arrears of up to Kshs 195,000/=. The Plaintiff states that he was recently shocked when he received a notice dated 15.3.2016 from the Defendant demanding that the Plaintiff vacates from the suit property by October, 2016. The Plaintiff states that the Defendant further sent the Plaintiff a doctored receipt No 26 dated 20.11.2015 alleging it to be for payment of rent by the Plaintiff for the month of October, 2015 which the Defendant alleges that that the Plaintiff paid through Mpesa and which allegations are strange and false. The Plaintiff further



states that the Defendant thereafter instructed Kameta Enterprises Auctioneers to levy distress for the alleged rent arrears and the Plaintiff was on 18.4.2016 served with a letter of proclamation of movable properties by the said Auctioneers. The Plaintiff prays for orders that:

- a. A declaration that the Plaintiff is entitled to a peaceful and quiet possession of the suit property known as The Place Bar & Restaurant situated opposite Vescon I Estate gate Bamburi in Mombasa County.
 - b. An Injunction Order be granted restraining the Defendant, his servants or agents from interfering with the peaceful and quiet possession of the suit property known as The Place Bar & Restaurant situated opposite Vescon I Estate gate Bamburi in Mombasa County.
 - c. An order that the Defendant pays rent at Kshs 7,500/= per month.
 - d. Costs of the Suit be provided for.
3. The Defendant avers that it was an agreement between the parties herein that he was to construct a temporary structure on the suit land and that the same was to be demolished when the Defendant demanded vacant possession. The Defendant is not a squatter on the suit land and that he was allocated the suit land by the Seth Mueni Mumo (Deceased) to construct a temporary structure and pay rent to her. The Defendant avers that he is the landlord to Plaintiff and has a right to claim the same since Plaintiff was a paying tenant. The Defendant counter claims and prays for;
1. A declaration that the Plaintiff is illegally occupying part of the Defendant's unsurveyed Plot to wit, Plot No 113/1/MN.
 2. The Plaintiff's suit be dismissed with costs,
4. This court has considered the evidence and the submissions therein. In a civil suit, the burden of proof lies with the Plaintiff who has to prove his case on a balance of probabilities. Under Section 109 of the *Evidence Act*, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. He who asserts must affirm, and in this case, the Plaintiff pegged his case on an agreement of sale dated 2nd June 2002 (PEX-9) said to have been executed between himself and Kadzo Nyale Chamanga who sold to him Plot No 113/1/MN for Kshs 35,000/=. The Plaintiff has however failed to adduce any evidence as to the existence of Plot No 113/I/MN as well as its ownership within the meaning of Section 26 of the *Land Registration Act*.
5. The question that comes to the mind of the court therefore is how a party to a suit can adduce evidence to establish the existence of a parcel of land in order to satisfy this burden of proof. The Plaintiff had the burden of proof to adduce evidence on the balance of probabilities that, there exists Plot No 113/I/MN, that he is in occupation of the suit land, he has legal or equitable interest in the said parcel of land, which ought to be protected by the court. All land parcels in Kenya that bear a title number exist in a conveyance instrument, may it be a certificate of title or certificate of lease, where the land parcel is described and exact measurements indicated. Both the Plaintiff and defendant (Plaintiff in his counterclaim) claim Plot No 113/I/MN, however, neither have produced any conveyance document to support the existence of the land parcel or who is the registered owner and what legal interest is held. Even where parties are seeking equitable interest, such as any overriding interest stipulated under Section 28 of the *Land Registration Act*, it is trite law that he who asserts the existence of any land parcel must prove its existence.
6. One cannot pass a valid title to what he does not lawfully own. Kadzo Nyale Chamage (PW3) testified to the effect that she did not own the suit land, she was simply allowed by an Arab to move into the



suit land, when the Arab died she began subdividing the land and later sold it to the Plaintiff. The defendant on his part claimed that his late mother Seth Mueni bought the suit land from Kadzo Nyale in 2002 and later leased it to the Plaintiff. Kadzo Nyale could not pass valid title to either the Plaintiff or the defendant's mother since she did not own the suit land. There is no evidence of survey documents, any completion document e.g. a transfer document or a certificate of title that can point out that Kadzo Nyale or either the Plaintiff or the defendant is duly registered as the proprietor of Plot No 113/I/MN.

7. The parties herein were obligated to carry out the necessary due diligence to establish whether Kadzo Nyale had the capacity to sell the suit land. In his cross-examination, the defendant referred to Plot No 262/I/MN, which he intimated existed and was owned by the community before the subdivision took place. In his Further List of Documents dated 18th October 2022, the defendant has attached a judgement obtained in Mombasa High Court Misc. Application (OS) No 287 OF 2011 Omar Salim Shee and others vs Mohamed Bin Salim Muhashanu, where the court allowed Seth Mueni Mumo and Kadzo Nyale Chamanga among other 32 applicants to be registered as the proprietors of Plot No 262/I/MN by virtue of adverse possession. There is no evidence adduced before this court that Plot No 262/I/MN was ever subdivided and created Plot No 113/I/MN or the said judgement was ever executed and the said registration effected.
8. The court is not satisfied that either the Plaintiff or the defendant has any interest in the suit land, they both have no legal possession of the suit land and in my view have neither capacity to sue for any interest in Plot No 113/I/MN. Both the parties herein have failed to discharge the burden of proof on the balance of probabilities as required by Sections 107, 108 and 109 of the *Evidence Act*. In my assessment of the facts of the case, both the Plaintiff and the defendant are squatters on the suit property, neither has legal rights or interest to the suit property. In light of the above findings, this court finds that the Plaintiff's plaint dated 28th April 2016 and the defendant's counterclaim dated 20th July 2016 are both unmerited and are dismissed as none of them have met the evidential threshold set out in law. Each party is to bear its own costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE

