



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 227 OF 2013

**MADIN CLEARING AND FORWARDING
LTD.....PLAINTIFF**

-VERSUS-

BAMBURI SUPERMARKET LTD.....DEFENDANT

JUDGEMENT

1. The plaintiff MADIN CLEARING & FORWARDING LTD sued the Defendant, BAMBURI SUPERMARKET LTD vide a plaint dated 7th August 2012 and lodged in Court on 8th August 2012. The plaintiff accused the defendant of wrongly occupying her plot L. R No MN/1/12056. She prayed for vacant possession, general damages and costs of the suit.
2. The Defendant opposed the suit and filed a defence and counter – claim. In the defence, the Defendant has denied the existence of plot L R No M/1/12056. The Defendant pleaded that if this suit plot exists, then the same has been irregularly hived off from his parcel of land and the plaintiff is therefore not entitled to the orders sought. In the counter – claim, the Defendant avers that she owns L. R No M/N/1/3413 which has come to its attention the plaintiff is claiming a part thereof. It prayed for a declaration that the registration of Land Reference No. MN/1/12056 is irregular, null and void and the property to revert to its original state shown on the deed plan No 109497 of 1980.
3. After the pre – trial directions was done, the matter was listed down for hearing. The plaintiff gave his testimony through Sammy Silas Komen Mwaita as PW 1 on 24.2.2014 and 14.10.15. PW 1 testified and said that he lives in Nairobi. He is a director of the plaintiff who owns land title No CR 35161 LR No MN/1/12056. He produced a copy of the certificate of title as Pex 1. PW 1 stated that the suit plot neighbours L R Nos MN/1/3413, 3418, 12057 and 3107.
4. PW 1 continued that the plot No MN/1/3413 is owned by Defendant in this case who has trespassed on his land. It is his evidence that as a result of the trespass, he instructed a lawyer to write them vide the letter dated 27.4.2012 addressed to Horizon Coach, Cyber Case, Tattoes body Piercing, Make up Gallery & Movie House. The letter is produced as Pex 2.
5. The defendant responded to this letter through their advocates on record. The response is dated 30.5.2012 in it the defendant claimed ownership of the suit property that they were given permission by the Municipal Council to use the premises. Subsequently, the plaintiff wrote demand letters directly to the Defendant seeking vacant possession. He produced the letters as Pex 3, 4 and 5. He prayed for an order directed to the defendant to vacate the suit property. The parties then requested to bring in a survey report.
6. On 14.10.2015, the plaintiffs witnesses introduced their survey report as MFI P6 showing the extent of the encroachment. The surveyor Peter Mwaura Karanja testified as PW 2. He gave his

qualifications and said he has been a practicing surveyor since 2010. He was instructed by the plaintiff to establish the ground positions and extent of developments around plot No MN/1/12056.

7. PW 2 carried the survey and observed that the plot is used as parking area by the neighbouring plot 3413. Further that there are two buildings on the plot and a gate used to access the parking. He drew a sketch map which he presented to Court which confirmed encroachment on the suit plot. He produced the sketch map as Pex 6 and receipt of payment of his Court attendances charges as Pex 7. The plaintiff closed its case with these evidence.
8. The Defendant did not attend the hearing when the surveyor testified thus the plaintiff applied to have their case closed as they were duly served. On 29.10.15, Mr Magiya advocate expressed intention to re – open the defence case but this was not done within the time given. The plaintiff's evidence so far is thus unchallenged.
9. The plaintiff submitted that it is the sole registered owner of L. R No MN/1/12056 with exclusive use of the property. On this submission, she relied on section 26(1) of the Land Registration Act and case law of **Mary Chelangat Chesirsir vs Charles Ruto & 2 Others (2005) eKLR**. The plaintiff submitted that they have proved through the evidence of PW 2 that the Defendant has encroached on her parcel.

10. On the allegations of whether the suit parcel was hived off L. R No MN/1/3413, it submits that no evidence was presented by the Defendant to prove this assertion. The plaintiff urged the Court to grant the orders sought as no evidence was tendered to challenge her claim.

11. From the record, the Defendant is duly represented but did not present evidence to support their statement of defence or counter – claim. The plaintiff has tendered evidence to show the existence of L. R No MN/1/12056 both on paper and on the ground. The certificate of title produced as Pex 1 confirms that the plaintiff is the proprietor. As the proprietor, she wrote to the Defendant before filing the suit so that the Defendant would surrender vacant possession. The defendant in reply indicated they were using the land on permission from the Municipal Council (now county government).

12. As proved by evidence, the suit property does not belong to the Municipal Council therefore they could not bestow any interest on the Defendant. Further no evidence of such permission has been shown to this Court. The defendant has not denied that it is using the suit property. The survey report confirmed this when PW 2 made observations that the proprietor of plot No 3413 is using the suit plot as a parking bay.

13. Article 40 of the Constitution gives an owner of land the right of protection of her property. Similarly section 24 and 25 of the Land Registration Act bestows on a registered proprietor all rights and interest to use, occupy and enjoy the land to the exclusion of all other persons. Since the Defendant is using the suit property against the will of the the registered owner, the defendant's act thus amount to a breach of the law. He is trespassing on the plaintiff's property.

14. I am therefore satisfied that the plaintiff has proved her case on a balance of probabilities as required by the law and is therefore entitled to orders sought in her plaint. Consequently I do hereby grant prayers (a), (b), (c) (d) and (f) of the plaint as presented. The plaintiff failed to lay a basis for any loss she has suffered to entitle her to a claim for general damages. I will award none.

Judgement dated and delivered in Mombasa this 22nd day of April 2016

A. OMOLLO

JUDGE