



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 5 OF 2018

JUMA MOHAMED MWACHIHI.....PLAINTIFF

-VERSUS-

SAMUEL HEZRON KAMUNYA & 8 OTHERS.....DEFENDANTS

JUDGMENT

(Suit by plaintiff seeking orders to have defendants give vacant possession of the disputed land and to have them permanently restrained from it; plaintiff demonstrating ownership of the suit land; no evidence forthcoming from the defendants to justify their possession of it; judgment entered for the plaintiff)

1. This suit was instituted on 17 January 2018 through a plaint that seeks the following prayers :-

- a) *A permanent injunction restraining the defendants whether by themselves, agents, employees, relatives, tenants, or any other person from remaining on or continuing in occupation of the suit land.*
- b) *Vacant possession off the suit land.*
- c) *Cost of the suit and interest.*

2. It is the case of the plaintiff that at all material times, he has been the *bona fide* and registered proprietor of all that parcel of land known as Kwale/Ukunda/1009 (hereinafter referred to as the suit land). It is pleaded that over the years and on diverse dates, the plaintiff discovered that the defendants had been encroaching on the suit land and constructing structures thereon, and hence on 29 April 2014 he issued them with a notice to vacate the suit land within 60 days.

3. The plaintiff further pleaded that upon receipt of the notice to vacate, the defendants opted to come into a negotiation for the sale of the respective portion of the land under their possession, and the plaintiff and defendants further agreed on the terms of the sale. In the sale agreement, the defendants were termed as trespassers to the suit land, and they were therefore, provided with time within which they were to pay the deposit. Upon default in payment of the agreed sum, on or about 30 September 2014, the plaintiff exercised his right to rescind the contract.

4. It is the position of the plaintiff that the defendants are therefore in wrongful possession of the suit land hence this suit.

5. The suit against the 1st defendant was however subsequently withdrawn before the 1st defendant could enter appearance or file defence.

6. The 2nd defendant filed defence through the law firm of M/s Mburu Nyamboye & Company Advocates. He more or less denied all the contents of the plaint and contended to have occupied the suit land for over 30 years and paying rent to the real owners of the property.

7. The 3rd to 9th defendants filed a joint statement of defence through the law firm of M/s George Odull & Associates Advocates. In a very brief defence, they merely pleaded that they are strangers to the claims of the plaintiff.

8. No appearance and no defence was filed on behalf of the 10th defendant.

9. On 5 March 2020, I fixed the case for hearing on 2 November 2020, in the presence of Mr. Maundu learned counsel for the plaintiff, and Mr. Mkanzi, learned counsel holding brief for Mr. Odul for the 3rd – 9th defendants. There was no appearance on the part of M/s Mburu Nyamboye & Company Advocates for the 2nd defendant and I directed Mr. Maundu to serve the said firm with a hearing notice.

10. On 2 November 2020, only Mr. Maundu and Mr. Mkanzi were present. There was no representation of the part of M/s Mburu Nyamboye & Company Advocates despite being served. The plaintiff testified as the sole witness. He testified that he is a retired teacher. He affirmed to be the owner of the suit land. He was however stood down as he had not carried the original title deed and search and the matter was adjourned to 4 November 2020. Again, there was no appearance on the part of M/s Mburu Nyamboye & Company Advocates. The plaintiff this time had the original title deed and a search. He relied on a witness statement where he inter alia stated that while he was away on official duties, the defendants allocated to themselves his land and erected structures. He confronted the defendants on 30 June 2014 and they opted to purchase the suit land. They thereafter entered into a sale agreement of even date. He stated that the defendants however failed to pay the deposit as agreed. His attempts to remove them from the land bore no fruit despite various notices issued to the defendants which he produced in evidence.

11. Cross examined by Mr. Mkanzi, he testified that the defendants failed to make payment as agreed in the sale agreement. He then rescinded the agreement as he concluded that they were not prepared to pay for the land. He testified that he withdrew the suit against the 1st defendant because he had died.

12. With the above evidence, the plaintiff closed his case. Mr. Mkanzi applied for adjournment for defence hearing but I did not see any merit in it and I declined to grant it mainly because the date was by consent and the defendants had absented themselves on both days that the matter had come up for hearing. The case of the defendants was thus closed. I directed counsel to file written submissions and further directed the matter to be mentioned on 28 January 2021 to confirm the filing of submissions. On that day, only Mr. Maundu was present and he confirmed that he has filed his submissions. None had been filed on behalf of the defendants and I reserved judgment for 14 April 2021.

13. Before I could deliver judgment, an application dated 10 February 2021 was filed by the law firm of M/s Mburu Nyamboye & Company Advocates on behalf of the 2nd defendant, seeking to reopen the case. Given that application, I arrested the judgment scheduled for 14 April 2021 to allow for the application to first be canvassed. I heard the application and delivered ruling on 10 May 2021. I allowed the application subject to payment of thrown away costs. The costs were never paid and counsel for the 2nd defendant never appeared in court subsequently.

14. On 19 March 2021, an application dated 18 March 2021 was filed on behalf of the 3rd – 9th defendants who had now changed counsel from George Odull & Associates Advocates to M/s Waziri Omolo & Company Advocates. That application similarly sought orders to reopen the case so that the 3rd – 9th defendants could avail their evidence. The application was fixed for hearing on 25 October 2021. However counsel for the 3rd – 9th defendants did not appear and I had no option but to dismiss the application.

15. It will thus be seen that the only evidence I have is that adduced by the plaintiff. The submissions on record are also only those of counsel for the plaintiff. Mr. Maundu pointed out that the defendants did not adduce any evidence. He submitted that the defendants have no basis to remain in the suit land as they have failed to show any claim or interest. Counsel cited several cases and submitted that the plaintiff holds the title deed to the property which is conclusive evidence of proprietorship.

16. I have considered the pleadings, the evidence, and submissions of counsel. The defendants have not adduced any evidence to rebut or challenge the plaintiff's ownership to the suit land. The defendants have also not illustrated in any way their right to be on the suit land. The plaintiff adduced an original title to the land and a current official search which demonstrates that he is the legal owner of the land. Section 26 of the Land Registration Act provides that a certificate of title is prima facie evidence of proprietorship. It is drawn as follows: -

“(1) 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, and the title of that proprietor shall not be subject to challenge, except—

a) on the ground of fraud or misrepresentation 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

17. It is my view that the plaintiff has proved on a balance of probabilities that he is the owner of the suit land and therefore is the person who is entitled to enjoy the proprietary rights over the suit land. This right is enshrined in Section 24 of the Land Registration Act, which provides as follows :-

24. Interest conferred by registration.

Subject to this Act—

a. 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; and

b. (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

18. It will be seen from the above that it is the registered proprietor who is entitled to enjoy the proprietary rights over the land. This would

include the right of ingress, egress, and right of use. The defendants have not demonstrated any claim over the suit land and therefore have no right to continue remaining in possession of it or to use it in any way without the permission of the plaintiff. I am therefore of opinion that the plaintiff has made out a case for the eviction of the defendants and for them to be permanently restrained from the suit land. I give the defendants 30 days to vacate the suit land and in default the plaintiff is at liberty to appoint a court bailiff and proceed to evict them. The plaintiff will also have the costs of this suit.

19. I now make the following final orders:-

a) The defendants are hereby ordered to give vacant possession of the land parcel Kwale/Ukunda/1009 within 30 days of this judgment and in default the plaintiff is at liberty to evict them and/or anybody claiming possession under them.

b) A permanent injunction is hereby issued restraining the defendants from entering, remaining, being upon, utilizing, trespassing, developing, or in any other way dealing with the suit land parcel Kwale/Ukunda/1009.

c) Costs of the suit awarded to the plaintiff to be borne by the defendants jointly and/or severally.

20. Judgment accordingly.

DATED AND DELIVERED THIS 20TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In the presence of:

Mr. Maundu for the plaintiff

No appearance for the defendants

Court Assistant; Wilson Rabong'o.