



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

KWALE CIVIL SUIT NO. 25 OF 2021 O.S

(FORMERLY CIVIL SUIT NO. 380 OF 2017

SALIM BAKARI JIRETI.....PLAINTIFF

VERSUS

SHEHE JUMA MWAMBUMBU..... DEFENDANT

JUDGEMENT

INTRODUCTION

1 The Plaintiff commenced this action by way of Plaint dated 31st August 2017 seeking for the following reliefs; -

- a) A declaration that the Defendant is a trespasser on the suit premises which piece of land is situated in Kwale County being Subdivision Plot. No. Kikoneni/Bumbani 'A'/893 or thereabouts (original No. 387) Kikoneni/Bumbani 'A'.
- b) A mandatory injunction to order the Defendant forthwith to pull down and or remove his structures from the Plaintiffs land situated in Kwale County being Subdivision Number 893(original No. 387) Kikoneni/Bumbani 'A' and or give vacant possession by removing from the said land all his properties of whatever nature as well as workmen and servants or agents.
- c) An eviction order directing the Plaintiff to evict the Defendant from all that piece pf land situated in Kwale County being Subdivision Number 893 (original No.387) Kikoneni/Bumbani or thereabouts) and pull down the Defendants construction/structures standing thereon.
- d) An order directing the Officer Commanding Msambwenui Police Station to supervise and provide security during the eviction.
- e) Costs and interest
- f) Any other relief the court may deem fit.

2 It is pleaded in the Plaint that the Plaintiffs late mother Mwanaisha Omari Kibwago Rashid Ramadhan was the owner and or allottee of parcel No. Kwale/Bumbani 'A'/387 measuring 18.5 hectares. The Plaintiff states he filed succession cause No. 235 of 2013 at Kwale Kadhis Court. He latter discovered at the Kwale land registry that he could not transfer the said parcel to himself since the title was cancelled and that a subdivision had been effected giving rise to plot Kwale/Bumbani 'A' 891,892 and 893. The Plaintiff states that he lodged a restriction against the title on 22nd May 2008 and the District Land Registrar Kwale removed the same without notifying him and registered the parcel Kwale/Bumbani 'A' 893 to the Defendant.

3 The Plaintiff further claimed that in July 2015 the National Land Commission recommended after being satisfied with the Plaintiffs details and documentation that all the transaction in respect of plot No. Kwale/ Bumbani 'A' 387 be nullified and any money purported to have been paid in purchase be recovered as a civil debt from the purported sellers. He states that subsequently on 15th September 2016 the suit property was registered in his favor. The Plaintiff stated that the defendant was therefore wrongly in occupation and use of the parcel of land title Kwale/Bumbani 'A' /893 and is thus a trespasser. The Plaintiff complained that the Defendant has denied him the right of use over the said suit property and he continues to erect illegal structures on the suit property. That unless the Defendant is evicted, he will continue with his illegal actions on the suit property occasioning the Plaintiff irreparable harm.

4 The suit is undefended and I will later delve further into this in my analysis.

5 The Plaintiff together with the Plaintiff filed a witness statement and List of Documents both dated 31/08/2017. The list of documents contained copies of five (documents) in support of his claim.

6 PW1 was the Plaintiff Salim Bakari Jireti. The case proceeded for trial on 14/10/21 and the Plaintiff was represented by Mr. Birir Advocate. He relied on the witness statement dated 31/08/2017 which the court adopted as part of the evidence. In his evidence he informed the court that the suit property belonged to him. It was originally Plot No. 387 and subsequently subdivided into three plots numbers 891, 392 and 893. He confirmed that the subject of the current suit was the plot no. 893 which belonged to him. He further pointed that the Defendant has occupied his land claiming that it belongs to him having bought it from the owner, but he was cheated. He pointed that efforts to remove the defendant from the land have been futile including demand letters. He further explained to the court the origins of the defendant which is Shimba Hills near the titanium mining fields and was among people who had received compensation for acquisition of his land for the extraction purposes. He also informed the court of how he had been denied access and threatened by the Defendant. He produced to the court Copies of 1) Title Deed for Kwale/Bumbani 'A' /893; 2) Official search of the title 3) Demand Letter from Mungai & Co. advocates 4) Letter from District Land office 5) summary minutes from National Land Commission filed vide the Plaintiffs List of Documents dated 31/08/2017 were produced as 'PW Exh. 1 to 5'.

7 It is the Plaintiff case that he is the absolute registered owner of the suit property, his rights to the same are unfettered and that the defendant was wrongly in occupation and use of the suit property and thus a trespasser. He reiterated the reliefs sought in the Plaintiff dated 31st August 2017.

8 With the above the Plaintiff closed his case.

SUBMISSIONS

9 Mr. Birir counsel for the Plaintiff in his oral submissions urged that based on the evidence adduced the Plaintiff had on a balance of probability proved his case. Despite service the Defendant did not enter appearance and the court was urged to assume from this failure to respond to the claim that he did not have a case against the Plaintiff. Further that the documents adduced in court by the Plaintiff there was no reason for the court to believe that the Plaintiff was not the legal owner of the suit property. Moreover, the same has not been controverted by the defendant.

10 It was further submitted that the Plaintiff had demonstrated the frustrations he has undergone to access his property including intervention from lawyers and the National Land Commission. The defendant did not respond to these complaints including summons for mediation by the District Lands office. This corroborates the hostile character of the Defendant. He urged that the orders sought should be granted. Due to the defendant's hostility the Police should help in enforcing the orders should the same be granted.

ANALYSIS AND DETERMINATION

11 The Defendant did not respond to the claim despite service. An Affidavit of Service sworn by Alois Kitsago Mwandeka on 31st October 2017 was filed on 20/03/2018 returning the summons unserved following service upon the wife who accepted but declined to sign the summons. The Deputy Registrar on 16/07/2019 while considering a request for interlocutory judgement directed that the Defendant should be served in person. Service was again effected on 20/09/2019 with the same outcome (see Affidavit of Service sworn on 1st October 2019 by Shem O. Obutho).

12 I have reviewed both affidavits of service and I'm satisfied that service herein was proper based on the provisions of Order 5, rule 12 which provides;-

'Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.'

Service was effected twice upon the defendant's wife who confirmed she was the wife. It is noted that on both occasions the husband was away and never bothered to leave instructions on acceptance of the same. I find the behavior evasive and calculated to defeat service. In accordance to Order 5 Rule 13 this court declare the summons to have been duly served.

13 The suit is not defended but it was incumbent upon the Plaintiff to prove his claim before this court. I will therefore proceed to determine whether the Plaintiff has established his case on a balance of probability and if so whether the reliefs sought should be granted.

14 I have considered the Plaintiff's pleadings, witness statement, the oral evidence led in court and the documents produced in support of the Plaintiff's case. The Plaintiff narrated in his evidence the entire history of the suit property and how his title document was obtained. I have seen and read the Minutes forming the deliberations of the National Land Commission. The demand letters from Kamau Mungai advocates corroborate the struggles the Plaintiff has been through. The Title Deed dated 15th September 2016 for Kwale/Bumbani 'A' /893 is indeed registered in the name of **Salim Bakari Jireti** the Plaintiff herein This alone goes to prove ownership of the suit property by the Plaintiff. In making this finding this court is guided by the provisions of Section 26 of the Land Registration Act which provides as follows; -

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.

15 Further the registration of the Plaintiff as proprietor of suit property herein has vested in the Plaintiff the absolute ownership together with all rights and privileges appurtenant thereto – see Section 24 (a) of the Land Registration Act (supra). The evidence is uncontroverted, the defendant despite being given an opportunity to lay his claim on the suit property for consideration by this court, did not do so. I have also looked at the title deed and there are no entries registered in Part C thereof -encumbrance section. This court has also considered the evidence on the efforts made by the Plaintiff to remove the defendant from the suit property herein without success. I have no reason to doubt them and they go to buttress the fact that the Defendant is indeed on the suit property without the permission of the Plaintiff.

16 This court therefore finds that on a balance of probability the Plaintiff has demonstrated the suit property lawfully belongs to the him. I find that the Defendant is wrongly on the suit property Kwale/Bumbani 'A' /893 without the permission of the Plaintiff and is therefore a trespasser and ought not to be on the suit property.

17 In view of the foregoing judgement is hereby entered for the Plaintiff against the Defendant as follows; -

a) A declaration that the Defendant is a trespasser on the suit premises which piece of land is situated in Kwale County being Subdivision Plot. No. Kikoneni/Bumbani 'A'/893 or thereabouts (original No. 387) Kikoneni/Bumbani 'A'.

b) A mandatory injunction to order the Defendant forthwith to pull down and or remove his structures from the Plaintiffs land situated in Kwale County being Subdivision Number 893(original No. 387) Kikoneni/Bumbani 'A' and or give vacant possession by removing from the said land all his properties of whatever nature as well as workmen and servants or agents within 90 days of today.

c) An order of eviction is hereby issued requiring the defendant to vacate the suit property situated in Kwale County being Subdivision Plot. No. Kikoneni/Bumbani 'A'/893 or thereabouts (original No. 387) Kikoneni/Bumbani 'A' within 90 days from today.

d) For the avoidance of doubt orders b and c above shall run concurrently.

e) The Plaintiff shall have the costs of this suit.

Delivered and Dated at Mombasa this **23rd Day of February, 2022.**

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for thePlaintiff

Mr. Denis Mwakina..... Court Assistant.