



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 5 OF 2019

FARID FARAJ AWADH.....PLAINTIFF

VERSES

BILLY THUVA KALUME.....1ST DEFENDANT

BERNARD OCHIENG OLUOCH.....2ND DEFENDANT

JUDGEMENT

At all material times, the Plaintiff has been in possession of a plot measuring 80 by 50 ft situated on Plot NO. 742/111/MN Mtwapa situated along Mombasa/Malindi road having acquired the plot from the 1st Defendant and the building from Ziro Murihe Sudur. The 2nd Defendant on 10th December 2018 invaded the said Plot and demolished the Plaintiff's structure thereon and began constructing a permanent structure on the said building plot directly interfering with the Plaintiff's use of the plot which action has caused irreparable damage and the loss of the plot with the new construction. The Plaintiff avers that the 2nd Defendants action have resulted in eviction from the plot. The Plaintiff's claim against the Defendant is a permanent injunction restraining the 2nd Defendant from constructing and evicting the Plaintiff from the said plot and a declaration that the Plaintiff is entitled to the portion of the Land. The Plaintiff avers that the Defendant intend to evict him from Plot NO. 742/111/MN/Mtwapa situated along Mombasa/Malindi road by carrying out the said demolitions. The Plaintiff's claim against the Defendants is a permanent injunction restraining them from demolishing and evicting the evicting the Plaintiff from the registered situated within Mtwapa and a declaration that the Plaintiff is entitled to the portion of the land. The Plaintiff prays for Judgment to be entered against the Defendant for;

- a. A permanent injunction restraining the 2nd Defendants by themselves, servants and /or agents from continuing with the construction of his building on the portion measuring 50 by 80 ft the house and evicting the Plaintiff from Plot NO. 742/111/MN/Mtwapa situated within Mtwapa.
- b. That this Honourable Court do grant in the alternative an order of eviction of the 2nd Defendant/Respondent from a portion of Plot Number 742/111/MN Mtwapa at and for the demolition of the structures thereon.
- c. Costs of die suit with interest thereon at court rates
- d. Such other or further relief as this Honorable court may deem fit and proper.

The 1st Defendant did not testify in open court but submitted that the gist of the 1st Defendant's defence is that his role was limited to executing the consent of transfer pursuant to the sale agreement of the house without land to the Plaintiff as a tenant acting as the administrator of the Estate of Ziro Murihe Sudur which house has since been demolished by the 2nd Defendant thus precipitating this suit. The grant of representation authorizing the 1st Defendant to be administrator of the said estate was annexed in his list of documents filed in court. Thus, the 1st Defendant relied on his defense on record, list of documents and statement.

That the plaintiff has confirmed that it is the 2nd Defendant who demolished the structure/building and not the 1st Defendant. The same is further confirmed in the Plaintiff's submissions. Any claim for compensation lies not as against the 1st Defendant. There is no doubt from the pleadings and evidence that the Plaintiff seeks compensation/restitution from the said demolition orchestrated by the 2nd Defendant. That the 1st Defendant was not a party to the subsequent agreement between the plaintiff and the 2nd Defendant in respect to the demolished structure. Further, it is not in doubt that the 2nd Defendant was not a party to the sale agreement dated 3rd April 1995 between the Plaintiff and a third party. It was purely agreements that revolved between the plaintiff, 2nd Defendant and the third party. The role played by the 1st Defendant was restricted to signing the transfer/consent pursuant to the grant of representation as Administrator of the Estate of Ziro Murihe Sudur in the concept of sale of a house without land. That the Plaintiff's obligation to pay the ground rent was agreed upon by the parties and the Plaintiff was paying the same to the 1st Defendant as a lessee/licensee as envisaged in Section 108(h) of the Transfer of Property Act. The same did not confer to him proprietary rights over the parcel of land in question which position remain as such

to date. The 2nd Defendant offered no defence.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, 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.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

In the instant case ownership of suit land Plot No. 742/111/MN Mtwapa has not been established. The Plaintiff testified that he has been in possession of a building plot measuring 80 by 50 ft situated on Plot NO. 742/111/MN Mtwapa situated along Mombasa/Malindi road having acquired the plot from the 1st Defendant and the building from Ziro Murihe Sudur. The 2nd Defendant on 10th December 2018 invaded the said Plot and demolished the Plaintiffs structure thereon and began constructing a permanent structure on the said plot directly interfering with the Plaintiff's use of the plot which action has caused irreparable damage and the loss of the plot with the new construction. PEX2 is the agreement for sale of house without land. In the case of Murtahar Ahmed Dahman & another vs Athuman Sudi (2013) eKLR the court held that;

“The land question within the coastal region is complex due to its peculiar historical and legal origins. The region is in a very unique position because of its geographical positioning and with it the peculiar historical ties unlike the other parts of the country.

It is common knowledge that where a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act, Cap 281 has defined land to include things embedded for the permanent beneficial enjoyment of that to which it is so attached.

However, the Land Title Act, Cap 282, which is applicable to the Coastal region, and which has since been repealed, abrogated partly the Mohammedan law.

Under the Mohammedan Law and the Land Titles Act, cap 282, a building erected by one person, even by a trespasser, on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests, however, are supposed to be noted on the certificate of title.

It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent.

The concept of owning a house or coconut trees by a person who is not the owner of the land was and is still being used by absentee landlords to either generate an income for themselves or to forestall the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years.

This interesting concept of “Owning a house or coconut trees without land” as recognised under the Land Titles Act, which was enacted in 1908, was followed up by the enactment of the Eviction of Tenants (Control) (Mombasa) Ordinance, Cap 298 which came into effect on 31st December 1956 and lapsed on 31st December 1969.

Section 2 of the Ordinance defined a “house” to mean any building or erection used as a piece of residence and constructed on land which is not owned by the owner of such building or erection.

Although the Ordinance lapsed in 1969, many people in the coastal region, and especially within Mombasa Municipality still own houses without land. The owners of those houses pay a monthly rent to the owner of the land.”

In the instant case no evidence has been adduced before this court to show the ownership of this suit land as the Plaintiff claims a portion of it. I have reviewed the Plaintiff's exhibits and I find no search certificate of the same or title. There is no dispute on the issue of ground rent, sale of the house without land and the transfer of the interest in the same. But for the purported lessor, what were his rights over the suit land? Did he have the capacity to lease the land at the material time? All these questions remain undetermined. For these reasons I find that the Plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with costs to the 1st Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE