



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 121 OF 2009

MALINDI MAGAZINE LIMITED.....PLAINTIFF

=VERSUS=

1. AISHA OMAR FAMAU

2. YUSUF BURHANI

3. ALI ABDALLA TWAHA

4. MWANAISHA MOHAMED SAID

5. LUCY WAMBUI KIMANGU.....DEFENDANTS

J U D G M E N T

Introduction

1. This matter commenced by way of a Plaint dated 16th December 2009. In the Plaint, the Plaintiff is seeking for a permanent injunction restraining the Defendants from trespassing, entering, remaining or putting up any construction on the portion of land known as Plot number 419 Watamu. The Plaintiff is also seeking for the orders of eviction.
2. The Plaintiff has averred in the Plaint that it is the registered proprietor of plot number L. R No.419 Watamu; that the Defendants have decided to trespass onto its land and that the Defendants are putting up structures on the land.
3. The Plaintiff's counsel withdrew the suit as against the 1st, 2nd, 3rd and 4th Defendants on 20th August 2013. The suit proceeded for hearing as against the 5th Defendant.
4. The 5th Defendant filed her Defence on 15th February 2013 and averred that the suit property belongs to the Municipal Council of Malindi and by extension, to the public; that the allocation of the suit property to the Plaintiff was irregular and unlawful and that the suit should be dismissed on that basis.
5. When the matter came up for hearing on 10th February 2014, neither the 5th Defendant nor her advocate were in court although the date had been fixed in the registry by consent.

The Plaintiff's case

6. The Plaintiff's director, PW1, informed the court that the Plaintiff is the registered proprietor of the suit property. PW1 produced in evidence the certificate of incorporation as Plaintiff's exhibit

- number 1 and a certified copy of the certificate of title.
7. It was the evidence of PW1 that the Plaintiff purchased the suit property from Mr. Alfred Mramba. The witness produced the agreement of sale dated 1st August 2006 as Plaintiff exhibit number 3. The Plaintiff then processed the title documents by paying the requisite stamp duty. The witness produced in evidence a duly approved Part Development Plan as Plaintiff exhibit number 5 and the letter from the Chief Land Registrar forwarding the grant to the District Land Registrar, Mombasa for plot number 419, Watamu.
 8. The Plaintiff explained to the court that although he was given the original certificate of title for the suit property, he used the said title as security. The witness produced the certified copy of the title as Plaintiff's exhibit number 9 and the agreement between the Plaintiff and the Company that lent it money as Plaintiff's exhibit number 8.
 9. It was the evidence of PW1 that the Plaintiff has always paid the requisite rates to the Municipal Council of Malindi. The witness produced the clearance certificate from the Municipal Council of Malindi as exhibit number 10 and the official search showing that he is the registered proprietor of the suit property as Plaintiff exhibit number 11.
 10. PW1 further stated that the Plaintiff's application for the approval of the construction of a perimeter fence around the suit property was approved by the Municipal Council of Malindi in the year 2009. The approved plan was produced as Plaintiff exhibit number 12.
 11. It was the testimony of PW1 that the 5th Defendant has encroached on the suit property and that she is putting up structures. Before the Plaintiff filed the suit, the 5th Defendant put a container on the suit property. She however started constructing on the property when the Plaintiff filed the suit before she was stopped by the court.
 12. The Plaintiff's advocate filed his submissions on 18th February 2014 which I have considered.

Analysis and findings

13. The documents produced in court shows that the Plaintiff is the registered proprietor of the suit property. The Plaintiff produced an official search for plot number 419 and the copy of the certificate of title as exhibit numbers 11(a) and (b) respectively.
14. The Plaintiff also produced the rates clearance certificate for the year 2009 from the Municipal Council of Malindi and a plan approved by the Municipal Council of Malindi.
15. The Plaintiff's evidence has not been controverted by the 5th Defendant. Although the 5th Defendant averred in her Defence that the suit property belongs to the Municipal Council of Malindi and not the Plaintiff, the Council accepted the rates from the Plaintiff in respect to the property. The council also approved the Plaintiff's plan for the construction of a perimeter wall around the suit property.
16. It is true that a public spirited member of the public can file a suit to recover public land. However, the 5th Defendant did not file a counter-claim to have the Plaintiff's title cancelled neither did she present any evidence in court to show that the Plaintiff's title was acquired unlawfully.
17. In the circumstances and on the basis of the evidence before me, I find and hold that the Plaintiff has proved his case on a balance of probabilities.
18. For the reasons I have given above, I shall, which I hereby do, allow the Plaintiff's Plaint dated 16th December 2009 in the following terms:

(a) A permanent injunction be and is hereby issued restraining the 5th Defendant, her agents, servants, legal representatives, or anyone claiming interest through her from trespassing, entering, remaining, or putting up any construction of any kind on the Plaintiff's land known as plot number 419, Watamu.

(b) An eviction order and or demolition of the 5th Defendant's structure on the suit property be and is hereby issued.

(c) The 5th Defendant to pay the costs of the suit.

Dated and delivered in Malindi this **28th** Day of **March, 2014**

O. A. Angote

Judge