



REPUBLIC OF KENYA



KENYA LAW
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**Nkya v Awadh & another (Environment & Land Case 145 of 2016)
[2022] KEELC 2248 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 145 OF 2016**

NA MATHEKA, J

MAY 17, 2022

BETWEEN

SHABAN SWEDI NKYA PLAINTIFF

AND

MOHAMMED MAHFUDH AWADH 1ST DEFENDANT

HUSSEIN KABILIA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff's claim is that at all material times to this suit he was the registered owner of parcel of land known as Plot No. 739/XV/MI situated at Majengo Area within Mombasa County. The Defendants have without any colour of right or authority severally trespassed upon and taken possession of portions of the suit property and constructed perimeter walls thereon without the Plaintiff's permission. The Plaintiff avers that the Defendants' joint and/or several actions are unlawful and in complete disregard of the Plaintiff's proprietary rights and interests over the suit property. The Plaintiff's claim is for an Order of injunction to restrain the Defendants, jointly and/or severally from remaining on, further constructing and/or fencing or in any other way interfering with or alienating the suit property or any portion thereof. The Plaintiff prays for judgment, jointly and severally against the Defendant's for:-
 1. A declaration that the Defendants' actions are illegal, null and void ab initio.
 2. A mandatory injunction to compel the Defendants to pull down to the ground the perimeter wall and any other illegal structures that they have illegally erected on the Plaintiffs Plot No. 739/XV/MI within Mombasa County and to remove any debris or waste from the suit property.
 3. An Order to compel the Defendants to forthwith vacate the suit property.



4. An Order for permanent injunction to restrain the Defendants from fencing, alienating, wasting, trespassing upon or in any other way interfering or dealing with the Plaintiffs Plot No. 739/XV/MI.
 5. Damages for trespass.
 6. Costs of and/or incidental to this suit.
2. The 1st Defendant avers that the perimeter wall complained of has been in existence for over 20 years and the same was done long before the original Plot No. MSA/Block XV/487 was subdivided, and the Plaintiff had, by CMCC No. 984 of 2012, called upon the Court to order for its demolition, but his application in that respect, i.e., Notice Motion dated 17th May, 2012 was dismissed. That suit eventually was withdrawn. Therefore by virtue of Sec. 7 of the *Limitation of Action Act*, Cap. 22, the Plaintiffs claim is time barred. Besides the foregoing, the 1st Defendant avers that the Plaintiffs suit is inherently incompetent and fatally defective for failing to comply with the mandatory requirement of Order 4 rule 1(l)(f), as its verifying affidavit is not verifying what is envisaged under Order 4 rule 2, both of the *Civil Procedure Rules*, 2010. That this suit is time barred, inherently incompetent and fatally defective, and he will submit that the Honourable Court should decline to entertain it, and accordingly dismiss the same. The 1st Defendant avers that originally this parcel of land was MSA/block XV/487 and was measuring approximately 0.0320 Ha. That this land belonged to the late Swaleh Nguru. That his father the late Mahfudh Awadh and one Mbarak Islam bought it in common, owning equal i.e. half ($\frac{1}{2}$) shares each, i.e., 0.0160 Ha each. That his father passed on, and he inherited his $\frac{1}{2}$ share, and Mr. Mbarak Islam also passed away, and his daughters, Ms. Naima Mbarak Islam, and one Warda Omar inherited, in equal share, his half of the said property. Thus, they were now owning a quarter ($\frac{1}{4}$) each, of the entire property. His (i.e., the 1st Defendant) $\frac{1}{2}$ share remained intact. That Ms. Naima Mbarak Islam DW2 testified that later in 2008 she sold her quarter ($\frac{1}{4}$) share to the Plaintiff herein, while Warda Omar sold hers to one Hussein Kabilia (the 2nd Defendant). That after the said transaction, this property was now owned by him (the 1st Defendant), the Plaintiff, and the said Hussein Kabilia, and a Title Deed was issued. That it is apparent therefore, that he (the 1st Defendant) owned $\frac{1}{2}$ of the said original property, and the Plaintiff and the said Hussein Kabilia (2nd Defendant) owned , in equal share the remaining half. The 1st Defendant stated that each and every one of them knew their portion on the ground since they already had houses on the subject plot. That when he erected a perimeter wall around his house, he did so along the known boundary, and the same was done way back before the subdivision. That the Plaintiff secretly contracted Mr. Edward Kiguru, Surveyor, to carry out a Topo-Cadastral Survey on the subject land without involving him, which survey was used in the aforesaid case, and is now surprised that the Plaintiff, has used the District Surveyor, Mombasa without involving him. That when the Plaintiff bought his portion from Ms. Naima Mbarak Islam, he presented himself as a good and sincere person who had a heart to assist, and volunteered to help him and the co-Defendant with the issue of subdivision. He (the Plaintiff) was entrusted with that role, little did he (1st Defendant) know that he (the Plaintiff) would take more than what he bought. However, he is not in a position to ascertain whether it was fraudulently done or it was a mistake. What is apparent on the face of the record is that something is not right with the survey and subdivisions as conducted by tire Plaintiff.
3. That the Plaintiff was only entitled to a quarter ($\frac{1}{4}$) of MSA/BlockXV/487 which translates to 0.0080 Ha and not 0.0114 Ha, as shown in his document of title. That the (1st Defendant) is entitled to half ($\frac{1}{2}$) of MSA/BlockXV/487 which translate to 0.0160 Ha. The 1st Defendant maintains that it is apparent from the foregoing that the Plaintiff's claim lacks bona fide, and characterized by evident concealment of material facts.



4. The 1st Defendant prays that the Plaintiff's suit be dismissed with costs and judgment be entered for his Counter-Claim for:
 1. A declaration that the Plaintiff is only entitled to a quarter ($\frac{1}{4}$) of land comprised in MSA/Block XV/487.
 2. An Order directing the Registrar of Land, Mombasa, and the Provincial, or as the case may be County, Surveyor, to respectively cancel the Plaintiff's title, and to re-survey MSA/Block XV/487, curves out a ($\frac{1}{4}$) of the said parcel of Land and have the same registered in the Plaintiff's name.
 3. Any other relief which the court may deem just in the circumstance.
 4. Costs of this suit.
5. This court has carefully considered the evidence and the submissions therein. The 2nd Defendant never filed any pleadings and did not attend court. 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.”
6. 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.”
7. 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. Hon Justice Munyao Sila 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”.



8. In Civil Appeal No. 246 of 2013 between *Arthi Highway Developers Limited vs West End Butchery Limited and Others* the Court of Appeal the Court expressly declared the indefeasibility of title except on allegation of fraud. It declared;

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

9. The issues for determination in this case are as follows;
1. Whether the Plaintiff is the registered owners of Mombasa/Block XV/739.
 2. Whether the Defendants trespassed into Mombasa/Block XV/739.
 3. Whether the Plaintiff is entitled to damages for trespass.

Whether the Plaintiff is the registered owners of Mombasa/Block XV/739

10. It is a finding of this court that the suit property was originally part of the larger Mombasa/Block XV/487, which was held by Mohamed Mahfudh Awadh, Hussein Kabilia and Shaban Swedi Nkya jointly. The title document to Plot No. 487 issued on 17th November 2008, indicated that the co-owners held particular portions of the suit property. Mohamed Mahfudhi Awadh and Hussein Kabilia held half a share while Shaban Swedi Nkya held the other half. In tenancy in common, each tenant has a distinct share in the suit property which has not yet been divided among the co-tenants. From the evidence on record an application for partition of the suit property was done on 24th February 2011, and was signed by the co-owners Mohamed Mahfudh Awadh, Hussein Kabilia and Shaban Swedi Nkya and registered at the Land Registrar’s office. The said application led to Land Reference No. Mombasa/Block XV/487, being divided as follows;
- a) Mohamed Mahfudh Awadh to get Mombasa/Block XV/738,
 - b) Hussein Kabilia to get Mombasa/Block XV/740,
 - c) Shaban Swedi Nkya to get Mombasa/Block XV/739
11. After the partition was completed, the Plaintiff was issued with a certificate of title to Mombasa/Block XV/739 which measures 0. 0114 ha. This certificate of title, proves to court that the Plaintiff is the registered owner of the suit property. The Plaintiff produced the certificate of title issued on 25th February 2011 in his name and a certificate of official search dated the same day in regards to the suit property. That served as a confirmation that the suit property is no longer held jointly but rather held individually by the Plaintiff as the proprietor.

Whether the Defendants trespassed into Mombasa/Block XV/739.

12. It is the Plaintiff’s case that the 1st Defendant who owns the adjacent Plot No. 738 constructed a perimeter wall into his suit property, while the 2nd Defendant who owns Plot No. 740 removed the boundary beacons that separate the two plots and replaced with his which encroach into the suit



property. The Plaintiff then wrote to the 1st Defendant on 4th May 2012 demanding that he pulls down the portion of the perimeter wall that encroaches on his plot. PW2 was Halid Abass, the Surveyor who surveyed Plot No. 739 at the request of the Plaintiff with the intention of determining the boundaries. The surveyor concluded that there was an encroachment of a wall onto Plot No. 739. I am satisfied that with the Plaintiff's evidence, that the 1st Defendant built the perimeter wall that has intruded into the suit property. The 1st Defendant having unlawfully entered the suit property without permission from the Plaintiff is a trespasser. Section 3 (1) of the Trespass Act, provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

13. The 1st Defendant intruded into the Plaintiff's plot by constructing a perimeter wall that encroached into the suit property. The Plaintiff is entitled to judgement against him for eviction and for a permanent injunction to restrain any further acts of trespass.

Whether the Plaintiff is entitled to damages for trespass.

14. The 1st Defendant's entry and occupation of the suit property without authorization deprived the Plaintiff of the use and quiet enjoyment of the suit property. Having found that the 1st Defendant's perimeter wall is an act of trespass onto the Plaintiff's suit property, the Plaintiff is entitled to damages. I find that the Plaintiff did not attach any evidence as to the value of the suit property before and after the trespass and/or how much damage was occasioned on the suit property by the perimeter wall built by the 1st Defendant. For this reason, I do not award any general damages for trespass as the same have not been proved. Consequently, I find that the Defendant has failed to prove his counter claim and the same is dismissed with costs to the Plaintiff. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The Defendants are ordered to vacate the Plaintiff's suit property Land Parcel No. Mombasa/Block XV/739 and deliver vacant possession to the Plaintiff within the next sixty (60) days from the date of this judgement and in default eviction order to issue.
 2. A permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their servants or agents, from remaining on or continuing in occupation of Mombasa/Block XV/739.
 3. The costs of the suit are awarded to the Plaintiff.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF MAY 2022.

N.A. MATHEKA

JUDGE

