



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT 79 OF 2009

ALOISE NYAMBU JEREMANI.....PLAINTIFF

-VERSUS-

IDDI MAULIDI.....DEFENDANT

JUDGEMENT

1. **ALOICE NYAMBU JEREMANI**, the Plaintiff herein, claiming to be the registered proprietor and legal owner of land parcel No.LR 43 in Watamu Township of Kilifi District has brought this suit against the Defendant seeking three main prayers;-

(a) A declaration that the Plaintiff is entitled and is the legal owner of land known as subdivision Number L.R.437 situate in Watamu Township in Kilifi District.

(b) An order by way of a mandatory injunction that the Defendant do demolish and/or pull down to ground level the illegal structure standing on land known as Subdivision Number L.R. 437 situate in Watamu Township in Kilifi District.

(c) A permanent injunction restraining the Defendant whether by himself, his servants, agents or otherwise whosoever from encroaching and/or trespassing and/or taking possession, moving into occupy, developing and constructing any structures whatsoever on land known as Subdivision Number L.R.437 situate in Watamu Township in Kilifi District.

His action is based on the tort of trespass to land.

2. The Defendant was acting in person. In his defence filed on 18/9/09, the Defendant disputes the Plaintiff's claim and asserts that he has been in physical possession of the suit land "since time immemorial". He further asserted that any registration of title in the Plaintiff's name "was obtained fraudulently and ought to be revoked".

3. The hearing of the suit proceeded *ex parte* on 1/12/2011 as the Defendant did not attend, despite being served with a hearing notice on 28.10.11, according to the affidavit of service filed by the Plaintiff.

4. The Plaintiff testified that he acquired the suit property in 1995. He produced the allotment letter (Exh 1) and the Title Document (Exh 2), both in his name. He stated that the Defendant trespassed into the suit property in 2008, by commencing construction of a foundation for a building. The Plaintiff said the suit property was vacant when he acquired it and the defendant only appeared in 2007-2008 to lay claim on it.

5. Counsel for the Plaintiff submitted that the Plaintiff's title is indefeasible as no fraud or misrepresentation has been proved by the Defendant. He relied on the provisions of section 23 of the

Registration of Titles Act and the Court of appeal decision in **Wreck Motors Enterprises Vs The Commissioner of Lands and 3 Others** wherein the said provision was upheld.

6. The Plaintiff`s evidence stands uncontroverted. The documents of title tendered by the Plaintiff clearly demonstrate that he is the registered owner of the suit property. The title is protected by section 23 of the Registration of Titles Act save where fraud on misrepresentation is proved.

7. In the present case the Defendant did not adduce evidence to support averments of fraud contained in his defence. The particulars of the alleged fraud are not pleaded as required under O2r 4 (1) (a) and (2) of the Civil Procedure Rules which are in the following terms;-

O2r4(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality;-

(a) Which she alleges makes any claim or defence of the opposite party not maintainable;

(b)

(c)

O2r4(2) without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

8. The Defendant neither pleaded the particulars of alleged fraud nor counter claimed for the suit land. His averment that he has been in possession of the land is not only insufficient but also not supported by evidence. The defence therefore offers no challenge to the Plaintiff`s claim.

9. I find that, on a balance of probabilities, the Plaintiff has proved his claim and will enter judgment for him against the Defendant as prayed in the plaint.

Delivered and signed on this **22nd** day of **February, 2012** at Malindi

in the presence of Mr. Otara holding brief for Mr. Kibara for plaintiff.

No appearance for defendant

C. W. Meoli
JUDGE