



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CIVIL SUIT NO. 47 OF 2001**

**ANTHONY KOLANI MWANYALE .....PLAINTIFF**

**VERSUS**

**MWAKA OMAR ALI .....DEFENDANT**

**JUDGEMENT**

Anthony Kolane Mwanyali (plaintiff) has filed this suit against Mwake Omar Ali (defendant) seeking that judgment be entered in his favour against the defendant for:

- a) A declaration that the defendant's entry and occupation of the plot No. Kilifi/Township Block 3/1077 on 4<sup>th</sup> August 2007 is illegal and amounts to trespass.
- b) An injunction restraining the defendant whether by herself, servants, agents or otherwise howsoever from trespassing, occupying developing, constructing and/or taking possession of plot No. Kilifi/Township Block 3/1077
- c) An injunction compelling the defendant to demolish and/or pull down to the ground the structures erected on the said plot.

The plaintiff's claim is that he is the legal leaseholder owner of the unsurveyed plot measuring 0.045Ha, having been allocated the same by the Commissioner of Lands on 6<sup>th</sup> November 1987. Subsequent to the allocation, the plaintiff continued to pay the requisite land rates for the said plot and he hired a surveyor, who surveyed the plot and put beacons markings on boundaries of the said plot with a view to drawing up a Deed Plan and subsequently register the same. On 4<sup>th</sup> August 2000, the defendant without any colour of right, trespassed into the plaintiff's plot and commenced construction thereon without the consent or knowledge of the plaintiff. Despite protests and caution from the plaintiff, the defendant has continued to hurriedly construct yet she has no legal or justifiable cause for such occupation and her continued acts of trespass are prejudicial to the plaintiff's interests.

The defendant denies that plaintiff is the legal owner of the said plot saying plaintiff has never been in physical possession of the land and he simply misled the Commissioner of Lands into believing that he was residing there and had developed the land, as a consequence he was illegally allocated the plot.

Defendant stated that no vetting was done to find out where any other person was in occupation of the

plot and that even after the issuance of the allotment letter, the plaintiff has carried no developments on the said land. The defendant denies the claims that she is a trespasser saying she bought a mud and wattle house (without land) from one Samuel Hare Kiraga sometimes in 1996. The house stood on the land which is now subject of this suit. She reconstructed the house into a permanent one and has lived on the plot since then whilst the defendant and Samuel Hare Kiraga have lived as neighbours to the said plot.

She prays that the suit be dismissed with costs.

At the hearing Miss Njagi appeared for the plaintiff while Miss Mango acted for the defendant. The plaintiff's testimony is that the plot in question has been surveyed and issued with No. 1077 as per the Certificate of Lease (ex. 1) which reads Kilifi/Township Block 3/1077 issue don 13<sup>th</sup> October 2000 to Anthony Kolani Manyale and Beatrice Pola Mwanyale.

There is no dispute that defendant occupied the same plot. However the plaintiff obtained orders from court on 19<sup>th</sup> September 2003 (ex.2) which saw the defendant vacating the plot.

On cross-examination plaintiff confirmed that he owns the plot jointly with his wife and maintained that he had her authority to file his suit although that was not in writing. He stated that the plot was allocated to him in 1986/87 but he did not carry out any developments. The next time when he went onto the plot he found defendant had developed it.

He argues that if he had developed the plot, he would have realized Kshs. 500,000/- which he says defendant should pay him as damages for losses incurred. On cross-examination he admits that he does not have an assessment or valuation report nor has he pleaded such claim.

Incidentally when this matter was heard by Hon. Lady Justice Joyce Khamiwna, she ruled in favour of the plaintiff as against defendant to this effect, that:

- a) The defendant's entry and occupation of the plot was illegal and amounted to trespass.
- b) An order of injunction as issued against the defendant and she was ordered to demolish and/or pulled own the structures thereon.
- c) General damages for trespass were to be assessed later.

A summary report (ex.3) confirmed demolition of the defendant's house and indeed plaintiff confirmed that plaintiff is no longer on the plot. Which means the acts of trespass ceased as on 19-09-03. When did the trespass begin? According to defendant (Dw1) having bought the land from one Samuel, she developed the structure in the year 2002.

Her pleadings confirmed that what she bought was the house not the land. When plaintiff pointed out to her the encroachment, she offered to buy the plot from him, but he declined. Upon being served with the court order in 2003, she demolished the house.

She explained that she had genuinely believed that the house belonged to the seller and urges this court not to award any damage because plaintiff did not produce any documents to support his claim of having incurred a loss of kshs. 500,000/-.

On cross-examination she stated that at no time did the plaintiff utilize the land and even after her vacating the land, he has still not developed it.

Plaintiff's counsel submitted that he is entitled to damages for trespass because once the trespass is established then he is entitled to legal redress whether or not he has suffered damage. Plaintiff's counsel

argues that he has to hire the services of a bulldozer to demolish the structure and for this, he ought to be awarded damages kshs. 500,000/-.

He urges this court to be guided by the decision in **Hannah Wairimu v Wanjiru Muchiri HCCC 1324/00(Msa)**. The defence counsel urges this court to consider that at the time defendant moved into occupation, the land was unsurveyed and remained undeveloped.

As per the sale agreement D.Ex1, she bought in the belief that the seller was the owner. He urged the court to take into account that even plaintiff admitted that the trespass was only on a portion of his plot i.e the part which had the house erected on it. Counsel submitted that since the trespass was for less than 3 years and this court ought to be guided by the decision in **Yohaa Namirand v Keya Lihanda Alejo** (no citation given nor has a copy of the decision been supplied to this court), to find that whatever estimates are given by the plaintiff should be reduced by 40%, the plaintiff suggested the figure of kshs. 500,000/= saying he would have constructed residential quarters. However there is no valuation report, no building plan or drawings of the intended project to confirm that the purported intended development was even going to be effected. What's more? It is pretty obvious that after allocation of the land, plaintiff took not a single step to develop it – he left it idle, and even after defendant was declared a trespasser, he has taken no steps towards developing it. I am inclined to believe that the plaintiff's failure to call any tangible evidence to support his estimates are not accurate and are merely self serving.

The plaintiff's interest on the land was only rekindled in the year 2000 and that is the period I will use to calculate damages for trespass which ended by September 2003 courtesy of a court order. To my mind the sum of kshs. 500,000/- constitutes special damages which ought to have been specifically pleaded and proved. The plaintiff cannot just pick a figure from the abacus and cling to it and expect to be awarded such sum. I acknowledge that there is already a finding that defendant was a trespasser. It is also confirmed that she too has suffered loss in that she has had to demolish the house she had constructed thereon demolished. If the plaintiff is the one who incurred expenses – on the demolition exercise, then this has not been established with concrete evidence. I think plaintiff will be entitled to a minimal figure for the period that the house stood on his land otherwise unused and unplanned or land – he has already partially benefited from legal remedy by orders of demolition. I would therefore award kshs. 50,000/- (fifty thousands only) on the basis that the court has not even been told the value of the land and if one were to rent the land, then my view is that an annual rent of approximate kshs. 16,000/- would be modest, so from the year 2000 to 2003, kshs. 50,00/= (fifty thousands only) is appropriate and I so award.

I award costs of this suit to the plaintiff.

Interest at court rates from date of filing suit until payment in full.

Delivered and dated this 21<sup>st</sup> day of **February 2011** at Malindi.

**H. A. Omondi**  
**JUDGE**

Mr Mrima for Plaintiff  
Miss Mango for Defendant