



Regional Container Freight Station Limited v Kenya Ports Authority & another (Environment & Land Case 280 of 2018) [2022] KEELC 3849 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 280 OF 2018**

NA MATHEKA, J

JULY 26, 2022

BETWEEN

REGIONAL CONTAINER FREIGHT STATION LIMITED PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

OCEAN FREIGHT LIMITED 2ND DEFENDANT

JUDGMENT

1. The plaintiff avers that they are the registered proprietors of MI/Block XLVII/157 with leasehold interest from the Government of Kenya for 99 years. The land adjacent to the plaintiff is owned by the 2nd defendant, another freight company. The 1st defendant granted the 2nd defendant the access road to parcel MI/Block XLVII/157 which belongs to the plaintiff thereby blocking its access to the said land. The plaintiff wrote to the County Government of Mombasa informing it of its incapability to utilize MI/Block XLVII/157 as a result of the blockage by the 2nd defendant and requesting its assistance to remove the same. Consequently, the County Government after its own investigation, arrived at the conclusion that the 2nd defendant did indeed construct the boundary wall blocking the plaintiff's parcel of land. The County Government therefore notified the 2nd defendant of notice of an impending demolition of its boundary wall. The 1st defendant undertook that it would create and provide another access road solely for the plaintiff's user and benefit. Further the 1st defendant expressly allowed the plaintiff to use part of MI/Block XLVII/10 as a means, of access and to also utilize the same for parking as it was of no viable economic importance or use to the 1st defendant. The plaintiff proceeded to build a perimeter wall and parking yard around its property and MI/Block XLVII/10 following approval by the County Government and the office of the Physical Planner. On the 15th February, the 1st defendant through its agents illegally and without authorisation demolished the perimeter wall on the unfounded basis that it was erected illegally. The 1st defendant had consented use of MI/Block XLVII/10. The plaintiff relied on this representation to legally utilize the said piece of land. The defendant has now



contrary to the aforesaid representation denied having created the same. The plaintiff has suffered damages as a result of demolition and has been unable to use its property. The 1st defendant has failed to make good the plaintiff's claim despite several demands. The plaintiff prays for the following orders:

1. Special damages of six million five hundred thousand Kshs 6,500,000 for demolition of the perimeter wall.
 2. General damages for loss of use of property
 3. Enforcement of the easement on MI/Block XLVII/10 for the benefit of MI/Block XLVII/157
 4. There be and is hereby granted an order of permanent injunction restraining the defendants by themselves, agents, servants, and/or anyone claiming under the defendant from re-entering, trespassing onto, cultivating, interfering with and/or in any other manner, whatsoever, dealing with the suit land that is, MI/Block XLVII/157 and MI/Block XLVII/10.
 5. In the alternative, the court do order that the initial access road and parking be registered in the interest of the plaintiff.
 6. Any other reliefs that the honourable court may deem just and equitable
2. The 1st defendant in their defence denied that the plaintiff was allocated the suit land MI/Block XLVII/10 regularly. The 2nd defendant in their defence dated April 16, 2022 denied that they are neighbouring the plaintiff's property and that the issue of the access road was settled between the plaintiff and the 1st defendant.
 3. This court has considered the evidence and the submissions therein. The plaintiff has produced a certificate of lease dated June 27, 2011, to establish they are the registered proprietor of Mombasa/Block XLVII/157, which they leased from the Government of Kenya (County Government of Mombasa) for a term of 99 years.
 4. Section 26 (1) of the [Land Registration Act](#) is to the effect that a title shall, in the absence of proof of fraud, be taken by court as *prima facie* evidence of ownership. In particular it states; The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.
 5. The defendant averred in their statement of defence dated January 11, 2019, that the plaintiff illegally acquired Mombasa/Block XLVII/157 and have prayed for a permanent injunction restraining the plaintiff from dealing with the suit property. The 1st defendant tasked the plaintiff to explain their acquisition of title to the suit property which lies within an area reserved for the 1st defendant. To support their claim, DWI has testified that the 1st defendant is the owner of the freehold interest of all properties around Mombasa port area including the suit property. In his statement dated February 28, 2022, DW1 produced Legal Notice No 19 of 1969 and Legal Notice No 160 of 2001 that showed how assets moved then East Africa Harbours Corporation to now Kenya Ports Authority. He maintained that the Map of 1097 showed the Mombasa port area among the parcels owned by the 1st defendant, including the suit property, Mombasa Island Block XLVII/157. He contended that KPA has never



transferred or allocated the suit property, and that the plaintiff was illegally allocated the same and urged court to find that the 1st defendant is the owner and was entitled to demolish the illegal structures erected on its property.

6. The court can only order for cancellation of title where it has been demonstrated through evidence, that the plaintiff was privy to any fraud in the process of its acquisition, and the 1st defendant has the burden of proving that. In the case of *Koinange & 13 others v Koinange* [1986] KLR 23 it was held, *inter alia*, that;

It is a well-established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud had the burden of proving it and had to discharge that burden. Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities.”

7. The 1st defendant has not placed any evidence before court to establish this fraud. Section 116 of the *Evidence Act* provides that, when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. Further, the plaintiff is a lessee to the County Government of Mombasa and holds a leasehold interest as opposed to freehold interest, which the 1st defendant claims to have over the suit property. The 1st defendant has failed to demonstrate the illegality of the leasehold interest, the legal notices produced and the map of 1971 fails to pinpoint to court the exact plot in question. On examination of the legal notices and the map, this court cannot determine with the certainty required by section 26 of the *Land Registration Act*, that indeed the title to the suit property belongs to the 1st defendant. A charge of fraud is a serious charge. It must be pleaded, particularized and specifically proved to the satisfaction of the court. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No 106 of 2000) Tunoi, JA (as he then was) stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

8. The plaintiff seeks to enforce an easement on Mombasa/Block XLVII/10 for the benefit of Mombasa/Block XLVII/157. The plaintiff claimed that the 1st defendant created an easement over plot 10 allowing the plaintiff use part of plot 10 as access road and parking lot. This was after the 2nd defendant, freight company and owner the plot adjacent to the plaintiff elected a perimeter wall blocking the plaintiff from accessing his plot. The plaintiff is also seeking to recover Kshs 6,500,000 from the defendants as special damages for the demolition of their perimeter wall.
9. The acquisition of the easement is based on a letter dated May 30, 2014 from the 1st defendant written by Hussein Maamo, the then Senior Land Surveyor. Which stated that the 1st defendant acknowledges that the 2nd defendant has utilized the access road to plot No 157 and the 1st defendant offered a small portion plot No 10, which had no economic use to them as an access and parking to plot No 157. From the plaintiff's list of documents, page 15 there is the site layout plan. The plaintiff's claim is denied by the 1st defendant in their statement of defence. It has been stated that the allocation of plot No 10 to the plaintiff and the creation of a road reserve was irregular. The 1st defendant further prayed for the court to find the plaintiff's encroachment on plot No 10 is fraudulent and unlawful and further to restrain the plaintiff from dealing in any way with plot 10 DW1 stated that the plaintiff was not granted



access to plot 10 as they have not made a formal application to the developmental committee of the 1st defendant which approves and grants easements. Further DW1 stated that a surveyor has no authority to grant an easement as seen in the letter dated May 30, 2014. I find that a right of way, as sought by the plaintiff over the 1st defendant's land is a type of easement that allows a person to use another person's property in order to access their land. An easement and access rights can only be created within the meaning of part X of the Land Act and part X of Land Registration Act. Section 138 of the Land Act provides for the rights capable of being created by an easement over the servient land, they include any right to do something over dominant land or the right requiring the owner of the servient land to do something over his land. Section 28 of the Land Registration Act, provides a right of way subsisting at the time of first registration is an overriding interest over all registered lands.

10. For an easement to be enforceable against a registered owner it has to be registered. From the reading of section 98 of the Land Registration Act, the creation of an easement is a discretion of the owner of the land. It states that;

An owner of land or a less or may, by an instrument in the prescribed form, grant an easement over the land, lease or a part of the land to the owner of another parcel of land or lease for the benefit of that other parcel of land.”

11. In the case of Johnbosco Muinde Kamali & 5 others v Stephen Kaliti & another; Muasya M Makai & 9 others (Proposed Interested Parties) [2019] eKLR, it was held that,

If indeed the most convenient access road to their properties is parcel number 450, then the procedure for creating a public access road should be followed. That procedure is provided for under the Public Roads and Roads of Access Act or section 98 of the Land Registration Act. Under section 98 of the Land Registration Act, an owner of the land can voluntarily grant an easement over his land. The law does not allow the court to compel the owner of the land to create an easement over his land.

12. If indeed the proposed interested parties are landlocked, which they have admitted they are not, then the court, under the provisions of section 140 of the Land Act, can make an access order in respect of the suit land, subject to several conditions including reasonable compensation. However, nowhere in the applicant's affidavit have they agreed that they are ready and willing to pay the 1st respondent for the easement.
13. The other ground that the interested parties can succeed in creating an easement over the suit land is if they prove that they have used the proposed “road” for a period of twenty (20) years.”
14. There is no evidence that the easement was registered and since section 98 of the Land Registration Act does not compel a proprietor to create an easement over his land, the plaintiff cannot enforce the easement. The plaintiff has not provided evidence that an easement was registered against the title of Mombasa/Block XLVII and as such the court cannot enforce the said easement.
15. If the plaintiff's plot is landlocked, the remedy would be for the plaintiff to make an application to court under section 140 of the Land Act for an access order granting reasonable access through the 1st defendant's land. However, the plaintiff maintains that the cadastral plan shows the access road to their plot has been blocked by the 2nd defendant hence they were granted an alternative easement in writing. From the facts and evidence, I find that the whether the 1st defendant granted the easement or not the same was not registered and this court cannot enforce it. The plaintiff ought to revert to the County Surveyor and Land Registrar to confirm the original access road as they appear to me to be land locked. For these reasons I find the plaintiff has failed to prove its case on a balance of probabilities



and the same is dismissed with no orders as to costs. The prayers sought in the statement of defence are also dismissed with no orders as to costs as the same are not proved on a balance of probabilities.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2022.

NA MATHEKA

JUDGE

