



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 253 of 2004
MOHAMED YESLAM AWADH.....PLAINTIFF
VERSUS
JUMA NGAO.....DEFENDANT
JUDGMENT

In the plaint filed in court on 19th November 2004, the plaintiff claimed the following:-

- a) **A declaration that the defendant has never purchased the Land known as sub-division No. 494 (Original No. 39/377) of section 111 Mainland North) (hereinafter “the suit land”) and that the land is the property of the plaintiff and the defendant is a mere trespasser.**
- b) **An order that the defendant do forthwith pull down and remove at his own expense the structure now erected on the suit land so as to restore the land to its original state as it were before the defendant broke and entered upon the said land and thereby deliver the land to the plaintiff.**
- c) **General damages for loss of use of the land.**
- d) **Costs.**
- e) **Interest on (c) and (d) above at court rates from 1st August 2004 until payment and delivery of possession of the suit land.**

In the amended defence and counter-claim dated 26th June 2007, the defendant denied the plaintiff's claim and averred in the alternative that if the plaintiff had been deprived of the use of the suit land he wholly contributed to the deprivation. He set up a counter-claim for an order directing the plaintiff to compensate him for the development carried out on the suit land. In the defence to the said counter-claim, dated 13th March 2008, the plaintiff denied the defendant's counter-claim and averred that the defendant had carried out the construction notwithstanding warning from the plaintiff.

When the suit came up for hearing before me on 1st March 2010, neither the defendant nor his counsel attended. As I was satisfied that the service of a hearing notice had been effected on counsel, I ordered that the hearing proceeds upon which the plaintiff testified and called two witnesses.

The plaintiff testified that he is the registered proprietor of the suit land. He had purchased the same from one Kobena Binti Salim and was subsequently issued with a certificate of title under the Registration of Titles Act (Cap 281 Laws of Kenya). He had the original certificate which he showed the court but produced a photocopy of the same as PEX 3. He also produced the agreement of sale between him and the said Kobena Binti Salim as PEX 2. Also produced as “PEX 4B” was a certificate of Postal Search of the suit land as at 12th September 2000. That certificate showed that the suit land is registered in the plaintiff's name.

It was the plaintiff's further testimony that in the year 2004, he learnt from his wife that someone was trespassing upon his land. On receipt of that information, he proceeded to the suit land and found the wife of the defendant who was supervising construction on the suit property. He informed her that the suit land was his and that the construction should be stopped. He then instructed counsel to make a demand on his behalf. He produced the demand notice as PEX 5. In the premises, the plaintiff sought the prayers claimed in the plaint. He also denied the counter-claim contending that he notified the defendant of his interest in the suit land early and consequently the defendant's counter-claim has no basis and should be dismissed and his claim be allowed as prayed.

Abdalla Mangi Mohamed (PW 2) supported the plaintiff's evidence that the plaintiff had indeed purchased the suit land from the said Kobana Binti Salim, who was his (PW 2's) grandmother. It is on the suit land, according to the testimony of Mohammed, that the defendant trespassed and carried thereon construction. That was in 2004. He witnessed the initial trespass and informed the plaintiff's wife. He also cautioned the trespassers against continuing with construction on the suit land without success. To his knowledge his

grandmother did not sell any land to the defendant.

The plaintiff also called Isaack Muriuki Kinyua. He testified as PW 1. He testified that he is a process server by occupation and on the plaintiff's advocate's instructions, he served a notice to vacate the suit land upon the defendant on 1st September 2004. He prepared an affidavit of service which he produced as PEX 1. The notice he served was produced as PEX 5.

In his oral submission before me, counsel for the plaintiff contended that the plaintiff had proved the tort of trespass against the defendant and was entitled to an order for the defendant's eviction and for damages for loss of use of the suit land since 2004. In counsel's view the defence and counter-claim filed by the defendant make propositions which are unknown in law and should be dismissed with costs.

Having considered the pleadings, the evidence adduced before me and the submissions of counsel, I have no hesitation in finding that the suit land belongs to the plaintiff. The Original Certificate of Title was shown to me by the plaintiff when he testified. The certificate is in the name of the plaintiff. The postal search carried out further confirms that the plaintiff is the registered proprietor of the suit land. As such proprietor, the plaintiff is entitled to exclusive possession of the suit land. That right had and has been violated by the defendant intentionally and deliberately despite notice of the plaintiff's right.

On the evidence adduced before me, I find and hold that the defence and counter-claim have no basis in law. The defendant did not in any event establish the same by evidence. Pleadings can never take the place of hard evidence. I, in the premises, further find that the defendant is unlawfully on the suit land as he is not a purchaser thereof. It appears from the amended defence and counter-claim that the defendant justified his possession and occupation of the suit land on the failure of the plaintiff to produce title to the suit land and therefore alleged that he slept on his rights thereby contributing to the defendant's belief that another party had capacity to sell to him the suit land. I find and hold that the defendant's belief had no basis in Law and is misconceived. The counter-claim is dismissed.

Having proved that he is the registered proprietor of the suit property and that the defendant is a trespasser on the suit land, I hold that the plaintiff is entitled to the declaration claimed in paragraph (1) of the prayers. Accordingly, I declare that the defendant did not purchase the suit land and that the same is the property of the plaintiff whereas the defendant is a trespasser thereon. I also further find and hold that the plaintiff is entitled to prayer (ii) of the plaint. The defendant is hereby ordered to give the plaintiff vacant possession of the suit land forthwith by pulling down and removing at his own expense the structure erected on the suit land in default, an order for his eviction to issue.

The defendant has been a trespasser upon the suit land for nearly six (6) years. I award the plaintiff general damages for trespass in the sum of Kshs. 200,000/=.

The defendant is also condemned in the costs of the suit and the dismissed counter-claim.

I award interest at court rates on the general damages from the date of this judgment until payment and interest on costs at the same rate from the date of taxation.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF APRIL 2010.

F. AZANGALALA

JUDGE

Read in the present of:-

Mr. Kimani for the Plaintiff.

F. AZANGALALA

JUDGE

15TH APRIL 2010