



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMASA**  
**CIVIL SUIT NO. 509 OF 2001**

**KINANGO KITONYO .....PLAINTIFF**

**VERSUS**

**HORST DIETHER THOMASE IDA THOMASER.....**  
**.....DEFENDANTS**

**J U D G M E N T**

The plaintiff filed this suit against the Defendants on 9<sup>th</sup> October, 2001 and seeks the following orders:-

1. *A permanent injunction to restrain the Defendants by themselves, their servants or agents from remaining on or continuing in occupation of Plot No. M.N./III/413.*
2. *Vacant possession of Plot No. M.N./III/413 and an order compelling the defendants to demolish and/or remove all structures built on the said plot.*
3. *Damages for trespass.*
4. *Costs and interest of this suit.*

The plaintiff in his plaint dated 8<sup>th</sup> October 2001 avers that:

- At all material times he has been the registered owner and entitled to the possession of all that parcel of land known as Plot No. M.N./III/413
- On or around 1994, the Defendant wrongfully entered the plaintiff's said plot and wrongfully took possession of the same, built on it permanent structures and has thereby trespassed and is still trespassing thereon.
- By reason of the said matters, the plaintiff has been deprived of the use and enjoyment of the said land and premises and has thereby suffered loss and damage. Notwithstanding repeated requests by the plaintiff to vacant and deliver up the same and notice of intention to sue the defendants have wrongfully failed and/or neglected to do so.

The defendants filed their defence on 31<sup>st</sup> October 2001. They are a

couple who state that they do not work for gain and only come to Kenya for holidays. They state in the

defence that:-

- The plaintiff was not the owner of Plot No. MN/III/413 as alleged.
- He only acquired the same fraudulently by filing a suit number HCCC No. 383 of 1993 against Holiday Inn Limited claiming adverse possession when in fact he was not occupying the land in question.
- At the time the plaintiff filed the said suit he filed it against Holiday Inn Limited, a non-existent Company when the owner of the plot from 7<sup>th</sup> April 1977 is Beach Villas Limited and not Holiday Inn Limited.
- It is not true that they built and/or entered the plaintiff's plot in 1999.
- They bought Plot No. 412/III/M.N. from Dr. Enoch Japhet M'rabu on 5<sup>th</sup> July 1994 with all the buildings trees and amenities intact.
- That the building constructed and trees planted on the said plot were done by Alfred Harry Shrives in 1966 and 1967 after the said Alfred Harry Shrives acquired the plot from Thomes Elsworth McCulough.
- The plaintiff has not been deprived of anything as the plot never belonged to him and he has never used it and/or occupied it.
- The plaintiff is not entitled to possession of the Plot nor to damages as there is no trespass whatsoever.

The case went to full trial. The plaintiff testified on oath. He testified that:-

- He carried on the business of a driving school.
- He was the registered owner of Plot No. MN/III/413. He produced the title as Exhibit No. 1 a.
- He filed a case in court and obtained a vesting order in his name. He produced the Vesting Order as exhibit No. 1 b.
- That the Defendants who are his neighbours have built on his land.
- That he wanted to build a residential house on his land.
- He is unable to construct now.
- He consulted a Surveyor Mr. Paul Wambua to advise him.
- He denied that he obtained the property through fraud.
- That he got the vesting in 1996.

Mr. Paul Wambua the Surveyor was called by the plaintiff as a witness. He stated that he was engaged to value the suit property. In the course of the work he found that there was encroached upon plot No. 413. He produced a Report and Valuation dated 17.07.2003 (Ex. No. 5). In the said report and valuation, it is stated that the property is registered at Mombasa District Lands Registry as CR 13544 whose tenure is freehold and title is registered in the name of Kinango Kitonyo. He valued the property for Kshs.550,000/- at the time.

The 1<sup>st</sup> Defendant testified on behalf of the Defendants. He said that he resides at Kikambala. He is a German Pensioner. The 2<sup>nd</sup> Defendant was his wife. He stated also that:-

- He is the owner of Plot No. 412, MN Kikambala.
- He was registered as owner of the property on 1994.
- He took possession in 1994.
- That Plot no. 413 belongs to someone else in Nairobi.
- He was not served with any court papers in respect of the proceedings leading to the Vesting order.
- That the plaintiff was never his neighbor
- That the plaintiff should have sued Beach Villas Company and not Holiday Inn.

The second Defendant testified on oath.

Upon conclusion of the testimonies, parties agreed to file written submissions which were duly done.

I have considered the pleadings, testimonies and submissions by counsel.

The plaintiff produced the Provisional Certificate to the property

(Ex. No. 1). It shows that on 10.11.1997; a vesting was registered against the Title. It was a court order issued in High Court Civil case No. 388 of 1993 vesting the property in Kinango Kitonyo, the Plaintiff herein. The previous owner was Holiday Inn Limited which changed its name to Beach Villas Limited on 7<sup>th</sup> April 1977. I perused the Vesting Order given on 7<sup>th</sup> November, 1994. The plaintiff was Kinango Kitonyo and the Defendant Holiday Inn Limited. The plaintiff obtained judgment and the court declared the land is his and vested it in his name.

On the basis of these two documents, I do find that the plaintiff herein is the registered owner of the suit property and is therefore entitled to ownership, use and abuse of the said property.

The Defendants have disparaged and questioned the ownership of the plaintiff and termed it fraudulent. I do find that these allegations are baseless and lack merit in the absence of any evidence. In any case they have not positively challenged the ownership and asked for revocation or cancellation of the Title by way of a counterclaim. The Defendants have merely made serious allegations without any evidence and without taking any steps to pursue their challenge of the title of the plaintiff or validity or legality of his title.

In the case of **MBOTHU & 8 OTHERS –VS- WAITIMU & 11 OTHERS, (1986)** C.L.R. 171 at 187, the Court of Appeal said:-

**“.....A certificate of Title issued by a purchaser of land upon a transfer or transmission by the proprietor of it shall be taken by all courts as conclusive evidence that the person name in it as proprietor of the land is the absolute and indefeasible owner, of it, subject to the encumbrances, easements, restrictions and conditions contained in it or endorsed in it and the title of the proprietor shall not be subject to challenge except on ground of fraud or misrepresentation to which he is proved to be a party.”**

I would say that the same would apply to ownership and registration of a Vesting Order”. In this case the Defendants are not claiming ownership of plot No. 413. They do not say it is theirs. They have their own plot No. 412. They do not claim any legal or equitable claim. They have not filed any counterclaim.

The Defendants have misconceived that they can challenge the Plaintiffs title through this suit. They cannot do so in law. They could have challenged the plaintiff’s registration and set up a counter claim, if they sought or claimed some proprietary rights or interest in their own behalf. I find that even if they had a claim on Plot 413 they could only do so by or after setting aside the Vesting order in favour of the plaintiff and registration thereof. The Defendants are not said to be shareholders of Holiday Inn Limited or Beach Villas Ltd which it later became to be known. The **said** company has not made any claim in the suit. The vesting order suggests that it was granted after the company was served and after trial after they failed to appear. In any event, simply put, this court has no jurisdiction to question the Vesting order and registration of the plaintiff as owner.

The defendants are busy-bodies who use abusive and derogatory words like “fraud” without any evidence or right to do so as they have no Interest or any locus standi to speak for Holiday Inn Ltd.

The Defendants have not denied and to the contrary admit that they were on Plot No. 413 on the basis of some acquiescence or permissions by third parties. They did not whatsoever.

The Defendants admit that they are in occupation of the suit premises on at least the portion they

occupy. They claim that they took their land after being shown the boundaries and nobody has occupied Plot No. 413.

This may be so but they did nothing to legitimize their occupation, if any. Any boundaries they were shown could only be sustained by a proper survey of the land, Plot no. 412.

The Defendant cannot in law challenge the Judgment in Civil suit No. 304 of 1993 and the Vesting order through this suit. The Defendants have been ill-advised to purport to question a judgment and orders of the High Court in another suit through this suit. They are not even parties in the previous suit. If the Defendants had any rights to claim adverse possession or to make in respect of Plot No. 413 they are certainly too late and the defendant has beaten them to it. We cannot go behind the Vesting order and the Title in these proceedings.

In the light of the foregoing, I do find that the Defendant's Defence has no merits. They have admitted being on a portion of the suit premises. This is against the will of the registered owner. They were served with a demand letter and have defied it including the plaintiff's ownership.

I do find that the Defendants have encroached on the plaintiff's property, Plot No. 413. They have admitted this and are therefore trespassers. They are on the land unlawfully and illegally. The plaintiff became registered owner on 10.11.94. The Vesting order had been issued on 7.11.1994. The Defendants have therefore been trespassed on the land from the said period after they themselves acquired Plot No. 412 on 5<sup>th</sup> July 1994.

I do hold that the Defendants have deprived the plaintiffs as owner of his land without any colour of right, consent or fair compensation.

The plaintiffs would be entitled to more damages for trespass once trespass is proven. Upon assessment of damage for trespass the court may award general damages as compensation. The plaintiff did not pursue this claim for any specific award. As trespass is a wrongful act and is frowned upon by the law, I would award nominal damages as a matter of principle. The Defendants in effect denied the plaintiff from exercising his proprietary rights while using a portion of his property as they came into Kenya as they pleased as holiday makers. I think that in the circumstances, the Defendants ought to be penalized for taking the law into their hands and causing the said deprivation. I would award a sum of Kshs.1000/- per year as nominal damages for each year of trespass making a total of Kshs.16000/- to register that what the Defendants did was against the law. The sum is a slap on the hand considering that the plaintiff could have gone for the full pound.

The net result is that I find that on a balance of probabilities the plaintiff has proved his case against the Defendants. I do enter judgment for the plaintiff against the Defendants as prayed i.e. Permanent injunction, Vacant possession and Kshs.16,000/- being nominal damages for trespass. The Defendants shall also pay the cost of the suit to the Plaintiff.

There shall be stay of execution of the decree for 30 days to enable the Defendants to remove their structures and movables on the said portion of the suit property.

**Dated and delivered at Mombasa this 9<sup>th</sup> day of December 2010.**

**M. K. IBRAHIM**

**J U D G E**

**Coram**

Ibrahim, J

Court clerk – Kazungu

Mr. Gikandi for the plaintiff

Mrs. Juma holding brief for Mr. Chakera for the Defendant

Judgment read in their presence.

Ibrahim, J

Mrs. Juma

I apply for proceedings and judgment.

ORDER

Certified proceedings and judgment be supplied upon payment.

Ibrahim, J

Later

Coram

Ibrahim, J

Court clerk – Kazungu

In Chambers

ORDER

After delivery of judgment the court realized that it had awarded trespass from 1994 to 2010 i.e. 16 years in the nominal sum of Kshs.1000/- per year, making a total of Kshs.16,000/- The plaintiff filed suit on 9.10.2001 and damages can only be awarded from the date of filing suit. I find this to be an accidental slip and I do hereby correct the judgment and substitute the sum of Kshs.16,000/- with Shs.9,000/- (i.e. 9 years from October 2001 to date). The amendment is done in exercise of this court's powers under Section 99 of the Civil Procedure Act.

**Dated at Mombasa this 9<sup>th</sup> day of December 2010.**

**M. K. IBRAHIM**

**J U D G E**