



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 70 of 1997

MOHAMED SAID SHIMASYPLAINTIFF

VERSUS

HAMID MOHAMED ABDULKADIR.....1ST DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA.....2ND DEFENDANT

J U D G M E N T

In the plaint dated 18th March 1997 Mohamed Said Shimasy, the plaintiff herein, applied for judgment against Hamid Mohamed Abdulkadir and the Municipal council of Mombasa, the 1st and 2nd Defendants herein, as follows:

- a) *That the 1st Defendant herein be restrained and prevented either by himself and/or his servants or agents or any other person authorized by him or otherwise from dealing, transferring, allocating, constructing and/or erecting any structure permanent or otherwise occupying and/or in any where being on and/or dealing in any manner whatsoever with the road reserve adjacent to the applicant's property known as Mombasa/Block XVII/708.*
- b) *That the honourable court to issue an order restraining the 2nd Defendant either by themselves, their servants or agents or otherwise howsoever from dealing, transferring, allocating, allowing the 1st defendant to construct and erect any structure permanent or otherwise and dealing in any manner whatsoever with the road reserve adjacent to the applicant's property known as Mombasa/Block XVII/708.*
- c) *That the 2nd Defendant be restrained from allowing the 1st Defendant to trade, occupy and in any way deal in or with the road reserve and/or permanent structures currently being constructed by the 1st defendant which said structures on and occupation of the said road reserve adjacent to property known as Mombasa/Block XVII/708 by the 1st defendant with the authority of the 2nd defendant is unlawful and illegal.*
- d) *The revocation and cancellation of the allotment of the said road reserve by the 1st defendant to the 2nd defendant, which is adjacent to the plaintiff's property MOMBASA/BLOCK XVII/708.*
- e) *An order for specific performance, the 2nd defendant to demolish and pull down any building and*

structures put up by the 1st defendant on the said road reserve which is adjacent to the plaintiff's property MOMBASA/BLOCK/XVII/708 forthwith or in the alternative the plaintiff be allowed to so demolish and pull down the said building and structure and the costs for the same be borne by the defendants jointly and/or severally.

f) The 2nd defendant be restrained from issuing allotment of the said road reserve to the 1st defendant or any other person whatsoever. The 2nd defendant be further restrained from approving plans issuing licence or in any way dealing in the allotment of the said road reserve to the 1st defendant or to any other person whatsoever.

g) Damages

h) Costs of and incidentals to this suit.

i) Any other relief that this honourable court may deem fit to grant.

The 1st Defendant filed a defence to deny the plaintiff's claim. In fact he counter-claimed as follows:

(i) Payment of Kshs.65,887.50 in respect of the value of a demolished structure and the valuer's fees.

(ii) General Damages

(iii) Interest

The 2nd Defendant on his part filed a defence to also deny the plaintiff's claim.

When the suit came up for hearing the plaintiff and the 1st Defendant each testified in support of their positions with summoning the evidence of independent witnesses. The 2nd Defendant opted not to summon witnesses in support of its defence. Mohamed Said Shimasy (P.W.1) produced in his evidence title No. Mombasa/Block XVII/708 to prove that he is the registered owner of the aforesaid property. He told this court that Hamid Abdulkadir, the 1st Defendant herein, is the owner of the plot adjacent to his known as Mombasa/Block XVII/709. The aforesaid facts were not disputed by the 1st Defendant in his evidence and pleadings. P.w.1 produced the Part Development Plan (P.D.P.) of Ziwani area where the two plots are situate as an exhibit in evidence,. It is evident from the P.D.P. that the two plots are adjacent to each other and that there is a road at the front and at the rear. P.W.1 complained that the 1st Defendant put up a permanent structure directly behind his plot at the rear reserve road. The aforesaid structure has blocked his access to his plot hence he cannot service his septic tank and or soak pit. P.W.1 said he protested to the 2nd defendant when he discovered what the 1st defendant was doing. At the 2nd defendant's offices, P.W.1 said he met with one Mr. Majani now deceased. He was given a copy of a temporary occupation licence (T.O.L.) dated 07.01.93 which P.W.1 produced in court as an exhibit in evidence. The T.O.L. authorized the 1st Defendant to put up temporary structures for use as a garage on the road reserve adjacent to Plot No. Mombasa/Block XVII/708. The plaintiff said the 1st Defendant proceeded to put up the foundation of permanent structures comprising of a permanent residential house. P.W.1 said the 2nd Defendant promised to halt the illegal structures but the 1st defendant continued unabated. P.W.1 produced in evidence copies of building plans which the 1st defendant had used to put up the structure complained of. Those building plans indicate that the structure being set up comprise of a kitchen and a living room. P.W.1 said he met the 2nd Defendant's Mayor over the dispute whereupon he was told to file the case in court. As a result of the structure, P.W.1 says that he is unable to service his soak pit and that his right to light was blocked. P.W. further told this court that the 1st Defendant was in the process of putting up a double storey building.

On his part, Mohamed Abdulkadir (D.W.1), the 1st Defendant, prayed for the dismissal of the plaintiff's suit. He also prayed for judgment as prayed in the counter-claim. D.W.1 was categorized that

the land in dispute was a dumping site hence it was not a road reserve. He conceded that the 2nd Defendant had been given a temporary occupation licence and that he would be required to vacate with a month's notice. He claimed that in 1997 he was served with an order of injunction which restrained him from carrying on with the constructions which had been approved by the council (2nd defendant). At the time of issuing the order. D.W.1 said he had assembled building materials worth Kshs.64,887/50 which materials were destroyed and or stolen as a result. He now counter-claims for the loss of those materials. D.W.1 said though the temporary occupation licence allowed him to put up temporary structures, he went ahead to lay a foundation slab for a structure which he said was temporary in nature. He produced some photographs which show that D.W.1 has put up a one storey building. D.W.1 denied the allegations that his building blocked the plaintiff's access to light and air. D.W.1 claimed that the 2nd defendant approved his building plans. He produced a letter which was given to him dated 14.3.1997 permitting him to proceed with constructions. D.W.1 admitted in cross-examination that the structure he put was a residential house as opposed to a garage. He also admitted that he did not obtain a building permit from the 2nd Defendants to build the structure complained of.

At the end of the evidence learned counsels were given leave to file and rely on written submissions. At the time of writing this judgment the 1st Defendant's counsel had not filed his submissions. The plaintiff's and the 2nd defendant's counsels duly filed their submissions. I have taken into consideration those submissions plus the evidence on record. The plaintiff and the 1st defendant each filed their issues separately. I have perused the two sets of issues and I think the following issues arose for my determination;

- (i) *Whether or not the plot in dispute is a road reserve?*
- (ii) *Whether or not the 1st Defendant complied with the terms of the temporary occupation licence.*
- (iii) *Whether or not the plaintiff has rights in respect of the plot in dispute and if so were those rights breached?*
- (iv) *Did the 1st Defendant suffer any damage and if so who is to blame?*

Let me now address each of the above issues singularly. The first issue is whether or not the plot in dispute is a road reserve. It is not difficult for me to determine the issue. To begin I must examine the part Development Plan of the area which was produced by the plaintiff as an exhibit. There is no doubt that the plaintiff is the registered owner of Plot Mombasa/Block XVII/708. The aforesaid plot is adjacent to plot No. Mombasa/Block XVII/709 the property of the 1st Defendant. The P.D.P. shows that the two plots with others have access to Ronald Ngala Road at the front. The plots also have access to an open space at the rear. From the P.D.P., it is clear that the space at the rear is a road reserve. In fact the plaintiff produced in evidence as an exhibit a copy of the temporary occupation license dated 7.1.93 given to the 1st Defendant by the 2nd Defendant. The aforesaid letter is explicit in its terms that the 2nd Defendant had permitted the 1st Defendant to use part of the road reserve adjacent to Plot No. 708/XVII as a garage for repair of a limited number of vehicles only. I am convinced the plot dispute is a road reserve contrary to the assertion by the 1st Defendant that the same was a dumpsite.

The second issue is whether or not the 1st defendant complied with terms of the T.O.L. The licence had specified five conditions to the 1st Defendant. The following are relevant to the issue at hand:

- “(i) That the site be used as a garage for repair of limited number of vehicles only.*
- (ii) That the structures erected thereon will be of temporary nature.*
- (iii) That the occupancy of the said space will be of no interference with the smooth flow of traffic and other road users.”*

The 1st Defendant in his evidence confirmed that he put up a slab foundation of a permanent building though he tried to say it was a temporary structure. It is also not denied that the aforesaid structure has blocked the access to the road reserve by the owner of Plot No. Mombasa/Block XVII/708. It is argued by the 1st Defendant that since there is no gate fixed by the owner of the aforesaid plot leading to the space in dispute, he has not blocked his access. I do not think that is correct. The owner of Plot No. Mombasa/Block XVII/708 is entitled to access to the road reserve at the rear of his plot like all other plot owners including the 1st Defendant. One wonders why the 1st defendant did not put up such a structure adjacent to his plot no. Mombasa/Block XVII/709. I am convinced the 1st defendant breached the terms of Temporary Occupancy Licence (T.O.L). He blocked the plaintiff's access to the road reserve. He also put up a permanent structure instead of a temporary one. The evidence given shows that the 1st Defendant caused building plans to put up residential premises instead of a garage. He admitted on cross-examination that he secured building plans to put up a residential premise with a kitchen and a living room. In short, I am satisfied the 1st Defendant breached the terms of the temporary occupation licence.

The third issue is whether the plaintiff has any rights over the disputed space and whether or not those rights were breached. I have already stated that the plaintiff just like the other property owner were entitled to access the road reserve at the rear of his plot. The plaintiff has said that he is unable to service the facility because the trucks servicing the same cannot access as the road reserve has been occupied. The building plan in possession of the 1st Defendant appear to have been approved by the 2nd Defendant. The same was in respect of storey building. That is contrary to the terms of the temporary occupation licence which prohibited the erection of permanent structures. The 1st defendant admits that the 2nd defendant did not give him a building permit. It is curious to note that the 2nd defendant approved the 1st Defendant's building plan. I can only infer that there was a collusion between the 1st defendant and some unscrupulous officers of the 2nd defendant to approve the building plans which had no backing in law. It is a direct contradiction to the local Government Building By-law 252(1). The 1st Defendant has produced photographs showing that he has put up a high rise building. That evidence in itself buttresses the plaintiff's claim that his access to light was blocked. The plaintiff herein is a land owner adjacent to a road reserve. Under Section 2 of the Public Roads and Road of access Act (Cap.399 Laws of Kenya) a road reserve means a public road. I am convinced that the road reserve which has been encroached by the 1st Defendant with the permission of the 2nd Defendant is a public road. The plaintiff's rights are not in the circumstances of this case confined to the boundaries of his land. There is a general presumption that the owner of land adjoining a public road is the owner of the soil of half of the road that is up to the middle line. However there is limitation to the exercise and enjoyment of such rights. He has the right to all above and underground except to the right of passage by the public. He cannot exercise his rights of ownership which is inconsistent with the public right to passage. Where a person encloses or encroaches upon part of his land comprised in public road, he has a right to maintain an action for trespass against such a person who unlawfully places anything on its surface even against a public body. The correct position in law is captured in Volume 21 Halbury's Laws of England 4th Edition page 72 para.102 as follows:

“ 102. Expert and exercise of owner's rights

Apart from any Statutory provision, the owners of soil of a highway “has right to all above and underground, except only the right of passage for the king and his people” and may exercise all rights of ownership not inconsistent with the public right of passage.

Thus the owner may bring an action for recovery of possession if a person encloses, or encroaches upon, part of his land comprised in the highway. He may maintain an action for trespass against anyone who unlawfully places anything on its surface, and even against the highway authority if it imposes upon his land a burden not justified by the public right or by its statutory powers. He may also maintain a like action if persons or cattle are on the highway for any purpose not justified by the public right and may remove anything unlawfully placed upon the highway, whereas a mere passenger may only do so if he is actually obstructed by it and cannot easily circumvent it.”

The above excerpt is in my view the correct exposition of the law applicable to the dispute at hand.

In conclusion I am convinced that the 1st Defendant has interfered with the plaintiff's right to access to the easement of light and access by use of the rear road reserve to Mombasa/Block XVII/708. The 2nd Defendant is equally guilty of permitting the 1st Defendant to occupy a road reserve adjacent to the plaintiff's plot without consulting him. The 2nd defendant also breached its relevant Building By-laws when it approved building plans in respect of the construction of permanent structures on a road reserve and on the basis of a temporary occupation licence. The 2nd defendant also failed in its duty in enforcing the law of removing such illegal structures.

The last issue is whether the 1st Defendant suffered damage and who is to blame? I have carefully considered the evidence and the submissions. It is clear that the 1st Defendant suffered damage when the constructions of the illegal structure was stopped. It is difficult to ascertain how much loss was incurred. This court can only consider the valuation prepared by Ali A. Mandhry dated 23.7.97. That report was produced by the 1st Defendant as an exhibit in evidence. The loss is assessed at Kshs.174,764/-. Since there is no dispute over the figure I can safely state that that should be the damage suffered by the 1st Defendant. The second limb of the issue is who is to blame? I have already stated that the 1st defendant was given Temporary Occupation Licence with conditions. He admitted in his evidence that he breached the terms of the temporary occupation licence. In my considered view I do not hold any party liable. He took a big risk in putting up an unauthorized structure. He admitted that he put up the structure without the 2nd Defendant's permit. He has himself to blame. He colluded with some dishonest staff in the employment of the 2nd defendant. Being of that view, the counter-claim must be dismissed with costs to the plaintiff.

In the final analysis I am satisfied that the plaintiff has proved his case to the required standards in civil cases. I enter judgment as prayed in the plaint. The 1st and 2nd defendants should meet costs of the plaintiff. The 1st defendant's counter-claim is dismissed with costs to the plaintiff.

Dated and delivered at Mombasa this 28th day of May 2009.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Gathuku h/b Ngigi for the 2nd defendant.

Mr. Hamza for plaintiff

N/A Lijoodi for 2nd Defendant.