



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 208 OF 2018

1. SEIF MOHAMED SAID

2. NASSOR AL-BUSAIDY

3. HILAL MOHAMED SAID NASSOR AL -BUSAIDY

4. KHALIFA MOHAMED SAID NASSOR AL-BUSAIDY.....PLAINTIFFS

VERSUS

NASSIR MBARAKA BAGHRAB.....DEFENDANT

JUDGMENT

1. By a Complaint dated and filed herein on 9th November 2018, Seif Mohamed Said Nassor Al-Busaidy, Hilal Mohamed Said Nassor Al-Busaidy and Khalifa Mohamed Said Nassor Al-Busaidy (the Plaintiffs) pray for Judgment against Nassir Mbarak Bahgrab (the Defendant) for: -

1. A declaration that the Defendant's actions complained of are unlawful and illegal;

2. An order of mandatory injunction requiring (the Defendant, his servants and/or agents to demolish the offending structures made by them on top of the existing house on the Plaintiffs' portion of land known as Plot No. 4289 Malindi and remove the debris resulting from the said demolition forthwith and in any event within seven days of service of the Honourable Court's Order and failure of which the Plaintiffs be at liberty to engage the services of a contractor who will demolish the said developments made by the Defendant on the said land and remove the debris resulting therefrom and the cost incurred thereby be paid by the Defendant in any event within a time to be specified by the Honourable Court, should this become necessary.

3. A permanent injunction restraining the Defendant either by himself, servants, agents or any other person claiming interest through him from undertaking construction and/or expansion of the existing house on Plot No. 4289 Malindi without the consent of the Plaintiffs and the approval of the County Government of Kilifi (Malindi Sub-County) on the suit premises;

4. Special damages of Kshs 3,000/-;

5. Costs and interests of the suit; and

6. Any other relief this Honourable Court shall deem fit and just to grant.

2. Those prayers arise from the Plaintiff's contention that at all times material, together with one Soud Mohamed Said Nassor Al-Busaidy (now deceased), they are the beneficial and/or lawful owners of all that parcel of land known as Plot No. 4089 Malindi (Original No. 1755/5) which parcel of land was originally in the name of Rashid Bin Azzan Bin Rashid El-Sakry before being transferred to the Plaintiffs on 3rd September 1999.

3. The Plaintiffs further aver that Plot No. 4289 is a portion of the said Plot No. 4089 Malindi. Sometime in 1988, the Defendant was allowed to enter and occupy the suit premises on a rental basis. Under the terms and conditions of the tenancy, the Defendant was permitted to only construct a single storey residential house which he did to completion. However, recently and without the consent of the Plaintiffs, or that of the County Government of Kilifi, the Defendant has engaged in expansion works over the suit premises and has added a concrete ceiling with the intention of constructing further accommodation on top of the existing house.

4. Despite demand and notice of intention to sue, the Defendant has vowed to continue the illegal construction and hence the prayers sought herein.
5. Despite service of the suit papers on 3rd December 2018, the Defendant entered appearance on 19th December 2018 but did not file a Statement of Defence to the Plaintiffs' claim nor take part in the proceedings and this suit therefore proceeded by way of formal proof.
6. At the trial, the Plaintiffs called a single witness who testified in support of their case.
7. PW1- Seif Mohamed Said is the 1st Plaintiff and a brother of the 2nd and 3rd Plaintiffs. He told the Court that together with his brothers and one Soud Mohamed Said (now deceased), they are the beneficial owners of Plot No. 4089 and that the heirs of the said Soud Mohamed Said are in the process of obtaining a Grant of Letters of Probate from the Kadhi's Court, Malindi.
8. PW1 testified that Plot No. 4089 Malindi was transferred to them on 3rd September 1999 as their share of the family's larger parcel of land. The suit property- Plot No. 4289 Malindi is but a portion of the said Plot No. 4089. The Plaintiff further told the Court that sometime in 1988, the original owners completed sub-division of the entire Plot and offered the existing tenants a chance to purchase the portions they dwelt in. Some tenants purchased while others like the Defendant chose to continue paying annual rent to the owners.
9. PW1 further told the Court that the Defendant was allowed to enter and occupy the suit premises on a rental basis under some agreed terms and conditions. One of the agreed terms and conditions was that the Defendant was only permitted to construct a single storey residential house. PW1 testified however that recently, the Defendant without their consent embarked on the expansion of the single storey building and proceeded to add a concrete ceiling with the intention of constructing further accommodation on top of the existing house. PW1 told the Court that the said actions are in breach of the terms upon which the Defendant was permitted to enter the premises.
10. PW1 further told the Court that they were as a result forced to engage a firm to identify the suit premises and confirm what was going on at a cost of Kshs 3,000/-. The firm prepared a Report which confirmed the on-going construction.
11. I have perused and considered the pleadings filed by the Plaintiffs, the testimony of their sole witness and the evidence placed before me at the trial.
12. The Plaintiffs together with one Soud Mohamed Said Nossor Al-Busaidy claim to be the owners of all that parcel of land known as Plot No. 4089 Malindi. In support of that contention, they produced before this Court a copy of the registered indenture evidencing ownership as Plaintiff Exhibit 3.
13. The Plaintiffs told the Court that the suit property herein-Plot No. 4289 is but a portion of the said Plot No. 4089 Malindi which is owned by themselves as per the Indenture cited hereinabove. In support of that position, the Plaintiffs produced as Pex 4 a Copy of the Deed Plan in respect of the said portion of land dated 25th October 1988.
14. It was the Plaintiffs' case that sometime in the year 1988, the original owners of the land one Rashid Bin Azzan Bin Rashid El-Sakry did a sub-division of the entire parcel of land (Plot No. 4089) and offered the sitting tenants a chance to purchase the portions upon which they dwelt. While some purchased the land, others like the Defendant herein chose to continue paying the annual land rent levied upon their respective portions by the owners. In that respect, the Defendant was allowed to enter and occupy the suit premises under some agreed terms and conditions, one of them being that he was only permitted to construct a single storey residential house thereon.
15. It was further the Plaintiff's testimony that as captured in the indenture the suit property was subsequently transferred to them by the original owner on 3rd September 1999 upon which they assumed ownership thereof. To their surprise however, the Defendant has recently, and contrary to the terms agreed on, embarked on the expansion of the single storey house by adding a concrete ceiling. A photo of the concrete expansions being carried out was equally produced herein in evidence.
16. The Plaintiffs told the Court that despite their protests and demand notice sent through their Advocates urging the Defendant to stop the unauthorized construction, the Defendant had failed to heed their request. They were accordingly compelled to engage the services of some topographical surveyors by the name Arch Surveys at a cost of Kshs 3000/- to identify the portion of land and to confirm the construction going on.
17. I have considered the totality of the Plaintiffs evidence which was not controverted by the Defendant. I am persuaded in the absence of any evidence on the contrary that the Plaintiffs are the owners of the suit premises and that they have proved their case against the Defendant on a balance of probabilities.
18. Accordingly, Judgment is hereby entered for the Plaintiff as prayed in the Plaintiff with costs.
19. The Defendant shall have 30 days upon service of the decree herein to demolish the offending structures failure to which the process set out at Prayer No. 2 of the Plaintiff shall set in.
20. Orders accordingly.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE