

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 83 OF 2000

JACKSON MWENDWA KIMULI PLAINTIFF

VERSUS

KENETH CHARO KARISA DEFENDANT

JUDGMENT

The Plaintiff in this suit is the legal Representative of the estate of his mother Beatrice Mbula Kimuli who is now deceased. His mother was the registered owner of all that property known as plot No.553 at Mariakani Township. He says in the plaint dated 16th February 2000, that sometimes in 1994 the defendant entered upon the same parcel of land, began to erect a permanent house. Plaintiff reported this to Mariakani Town Council and the Defendant was ordered to stop the construction and to demolish the structure. Despite several reminders by the Defendant has refused and/or ignored to remove the same structure. The Plaintiff is praying for an order that the Defendant do forthwith pull down and remove the said house/structure from Plot No.553 Mariakani Township and he is also praying for damages for trespass and costs of the suit. The Defendant was duly served but he failed to enter appearance and interlocutory judgment was entered. I am not certain in my mind that this was a case where interlocutory judgment should have been entered but whatever happened the suit was eventually set down for formal proof.

The Plaintiff Jackson Mwendwa Kimuli was the only witness in the case. He resides at Marikani. The subject land is registered in the name of his late mother Beatrice Mbula Kimuli who passed away in August 1993. The witness obtained grant of letter of administration on 1.9.1999 and he produced it as exhibit 1. There is also certificate confirming the grant and that was produced as Exhibit 2. He also produced Provisional Certificate showing the land in question was registered in his mother's name. The Defendant constructed a building on his plot No.554 but the construction of the same building encroached on to the land No.553 which is registered in the name of the Plaintiff's late mother. The building is a permanent building built of stones and having iron sheets for its roofing. The Defendant runs a bar and Restaurant in the same building. The encroachment of the same structure on to the Plaintiff's plot is about 3 metres long and 7 metres wide. There is also a toilet constructed on the Plaintiff's plot and this is in use. On being asked to demolish the same structure the Defendant said he could not do so unless he was given KSh.240,413/- and he wrote a letter demanding KSh.240,413/- so that he may demolish the structure. The letter was produced as Exh. 4. He ended his evidence by asking the court to issue an order to demolish and prayed for and damages for trespass.

I have considered the evidence before me which has not been challenged. It is clear from the evidence that part of the Defendant's structure is on the plot that was registered in the name of the Plaintiff's mother which according to the certificate of confirmation of a grant Exh.2 is now one of the properties left in the hands of Jackson Mwenda Kimuli, the Plaintiff and one Rachel Mwikali Matuku.

The Defendant appears to know this and he has written a letter dated 30th October 1999 Exhibit 4 in which he quotes the amount he would need to demolish the structure. I am satisfied that a part of the structure is on the plaintiff's mother's plot. I am satisfied that part is illegally on the Plaintiff's mother's plot and it should not be there. I do order the Defendant to demolish the same part of the structure on the plaintiff's late mother's property within 30 days of the date hereof failing which the plaintiff will demolish the same structure.

As to damages, the Plaintiff has not proved any loses and has not stated how the encroachment affected him or has affected him. I will order nominal general damages amounting to KShs.1,000/- to be paid to the Plaintiff for trespass on to the plot. Costs to the Plaintiff. Plaintiff has liberty to apply in case the Defendant fails to comply with the judgment.

Dated and delivered this 13th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE