



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 198 OF 2017

AHMED MOHAMMED ABDULAHI.....PLAINTIFF

VERSUS

1. MWAROME JUMBALE

2. ROBERT GAMBO

3. CELESTINE KALAMA

4. DECHE HENRY

5. MATHIAS TUNJE

6. FLORA LALI

7. MARIAM ZAWADI

8. PETER RUWA

9. MWAMBIRE NYINGE

10. DECHE MWANGOVYA

11. ELVIS DECHE

12. FATUMA MUGALU

13. KAHINDI KASSIWA.....DEFENDANTS

JUDGMENT

Background

1. By his Complaint dated and filed herein on 5th October 2017, Ahmed Mohammed Abdullahi (the Plaintiff) prays for Judgment against the 13 Defendants for: -

i) A mandatory injunction to compel the Defendants by themselves, their relatives, agents, servants and/or any other person under instructions of the Defendants to give vacant possession of the suit property and to demolish the structures constructed thereon and to remove all the materials falling (sic) and/or in the alternative the structures be demolished and removed at (their) costs;

ii) An order of permanent injunction restraining the person mentioned in (i) above from trespassing and encroaching upon and/or interfering in any way with the suit property and to remove all materials falling and/or in the alternative the structures be demolished and removed at his cost (sic);

iii) An order of permanent injunction restraining the persons mentioned in (i) above from trespassing and encroaching upon and/or interfering in any way with the suit property;

iv) Upon issuance of prayer (i), (ii), (iii) above the Honourable Court be pleased to issue an eviction order against the Defendants;

v) Eviction of the Defendants from the suit property be done with the assistance of the OCS Kilifi Police Station; and

vi) Costs of this suit and interest at Court rates.

2. Those prayers are premised on the Plaintiff's position that at all times material to this suit, the Plaintiff has been and remains the registered proprietor of all that piece of land situated West of Kilifi Township containing by measurement 0.3829 acres and more particularly known as LR No. 20252/12.

3. The Plaintiff avers that in or about the year 2015, he discovered that the Defendants had encroached on the said parcel of land and put up structures without his knowledge and or consent. The Plaintiff avers that he has always been desirous of developing the suit property and that he has as a result of the Defendants encroachment suffered loss and damage.

4. But in their Joint Statement of Defence dated 4th December 2017 as filed herein on 6th December 2017, the Defendants aver that the Plaintiff's title is not valid having been acquired improperly and illegally. The Defendants aver that they have been in actual, physical, continuous and uninterrupted occupation of the suit property for more than 21 years and assert that the Plaintiff did not acquire a valid title after failing to satisfy the prerequisite conditions for acquisition of a proper title.

5. The Defendants further aver that the Plaintiff's claim is misleading since some of the Defendants sued herein have been sued in **Malindi ELC Case No. 73 of 2015**. In any event, the Defendants assert that most of those who have been sued herein are not in occupation of the suit property and that the Plaintiff has deliberately sued the wrong parties.

6. The Defendants further aver that the suit herein is statute-barred and that the orders sought cannot issue since the Plaintiff's title is void ab initio.

The Plaintiff's Case

7. At the trial herein, the Plaintiff (PW1) testified as the sole witness in his case. Relying on his statement filed herein on 5th October 2017, PW1 testified that he is the registered owner of the suit property and that the Defendants have encroached thereon and constructed structures without his consent, approval or permission.

8. PW1 told the Court that he had on numerous occasions requested the Defendants to vacate the suit property but they have ignored the requests and continue in their encroachment and trespass thereon.

9. PW1 testified that he had bought the suit property for Kshs 1 Million in July 2016 from one John Keen and that he followed all due processes before obtaining a title in his name.

10. On cross-examination, PW1 told the Court that he had not brought a copy of the Sale Agreement through which he acquired the land to Court. He further told the Court he discovered there were squatters on the land in 2016, the same year he had bought the land.

11. PW1 conceded that his title shows that the first registration was done in 1997 and that the suit herein was filed some 20 years later in the year 2017. He told the Court he had not lived on or occupied the land and that he got the names of the Defendants from their immediate neighbours.

The Defence Case

12. The 13 Defendants equally called one witness who testified on their behalf at the trial.

13. Robert Gambo Bunju (DW1) is the 2nd Defendant herein and a resident of Kilifi. He told the Court that the other 12 Defendants are his neighbours and that they did not know the Plaintiff. DW1 denied that they had invaded the Plaintiff's parcel of land and told the Court that they have also been sued in **Malindi ELC 73 of 2015** by one Okomboli Ong'ong'a who is also accusing them of trespass onto the same property.

14. DW1 further told the Court that a number of the Defendants including himself have been charged with criminal cases of forcible detainer at the Kilifi Law Courts arising from a complaint filed by the said Okomboli Ong'ong'a. Some of the Defendants such as the 3rd, 5th, 6th, 7th, 8th, 10th and 13th Defendants did not however reside on the suit property. DW1 told the Court he had lived on the suitland for over 12 years and urged the Court to dismiss the suit as it had been brought against wrong parties who did not reside thereon.

15. On cross-examination, DW1 told the Court the other 12 Defendants had given him verbal authority to testify on their behalf. He conceded that the other Defendants had not filed any statements in Court. DW1 further told the Court he did not live on the Plaintiff's land and that the piece of land he resides in is the one claimed by the said Okomboli Ong'ong'a in **Malindi ELC Case No. 73 of 2015**.

Analysis and Determination.

16. I have perused and considered the pleadings filed herein, the oral and written testimonies of the witnesses as well as the evidence adduced at the trial herein. I have similarly considered the rival submissions and authorities as placed before me by the Learned Advocates for the parties.

17. The Plaintiff claims vacant possession of the suit premises and for orders of mandatory injunction compelling the 13 Defendants to give vacant possession of the suit property by demolishing the structures constructed thereon.

18. On their part, the Defendants contend that the Plaintiff's title is not valid as the same was acquired improperly and illegally. It is further the Defendants case that some of those sued do not reside on the suit property and that those who reside therein have been in actual physical, continuous and uninterrupted occupation of the suitland for more than 21 years and that hence the orders sought by the Plaintiff cannot issue.

19. In support of his case, the Plaintiff has produced a copy of a Certificate of Title indicating that the parcel of land which previously belonged to an entity known as Coast Development Company Ltd was transferred to his name on 19th September 2016. In addition, the Plaintiff has produced a Certificate of Postal Search dated 15th June 2017 from which it is indicated that the suit property measuring 0.3029 Ha is registered in his name.

20. According to the Defendants, only one of them resides on the suit property while the rest reside on a parcel of land being claimed by one Okomboli Ong'ong'a in ***Malindi ELC Case No. 73 of 2015***. It is further their case that a number of them have criminal cases pending against them in respect of the property they live on following a complaint filed by the Plaintiff in the said ***Malindi ELC Case No. 73 of 2015***.

21. In support of that contention, the Defendants produced herein a copy of the Plaintiff filed in the said ***Malindi ELC Case No. 73 of 2015***. A perusal thereof reveals that some seven individuals have been sued therein for an illegal encroachment on a parcel of land known as Plot No. 20252/13, title Number CR 30853. That is clearly a different parcel of land from the suit property described herein as LR No. 20252/12, or CR No. 30852.

22. In the said ***Malindi ELC Case No. 73 of 2015***, the Seven (7) Defendants named therein are accused of trespassing on the stated property on or about 3rd April 2015 and proceeding to build temporary structures thereon. I was not persuaded that by virtue of that claim alone, the Plaintiff herein was estopped or barred in any way from making a claim against the Defendants herein.

23. I say so because it was clear to me from a perusal of the documents that the parcel of land for which the seven Defendants are sued in the said ***Malindi ELC Case No. 73 of 2015*** appears to me from the numbering to be an adjacent or neighbouring parcel of land to the suit property herein. The Defendants have not availed to this Court a copy of the Statement of Defence filed by the named Defendants in ***Malindi ELC Case No. 73 of 2015*** and this Court was left to speculate as to whether or not they had admitted the claim.

24. It was however more probable that they had denied the claim as from the testimony of DW1 herein, that case remains pending for determination. Whatever the case, I did not think that the mere presence of a party in one parcel of land could be used as evidence to demonstrate that that party was not in the next parcel of land.

25. In support of his contention that the Defendants herein were on the suit property, the Plaintiff produced in evidence a Survey Report dated 22nd August 2017 prepared by P.M. Karanja & Associates. That Report clearly indicates the boundaries of the suit property and observes that within the property, there were four semi-permanent structures with iron roofs and six mud-walled houses with makuti thatched houses.

26. Both the Plaintiff and the Defendants confirm that the Plaintiff neither resides on the suit property nor does he have structures thereon. The Plaintiff testified before this Court that the suit property belongs to him and that the houses were built by the Defendants without his consent.

27. As it were, the Defendants did not produce in evidence any other Survey Report to show that their structures alleged to be on a different parcel of land did not encroach the Plaintiff's land.

28. From the material placed before me, there was nothing to demonstrate that those in occupation of the suit property had been in actual physical occupation thereof for more than 21 years as stated in the Defendants pleadings. Indeed, Robert Gambo (DW1) as the sole witness recanted that Statement during cross-examination and told the Court he had only lived on the land for more than 12 years. There was however nothing tendered by himself to demonstrate that he had either lived on the suit property or the other parcel of land for the period stated.

29. As it were, I did not find any consent or authority given by the other 12 Defendants to DW1 to represent them in these proceedings and it was apparent to me that their Statement of Defence was undefended and remained a mere denial of the Plaintiff's claim herein without any supporting evidence.

30. Indeed, while the Defendants boldly pleaded that the Plaintiff's title was not valid and that the same was acquired improperly and illegally, they did not place anything before this Court in support of that contention. In this respect, Section 26 of the Registered Land Act provides as follows: -

(1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute

and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-

a) On the ground of fraud of misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2)

31. It is now well settled law that fraud is a serious accusation which procedurally has to be pleaded and proved. In this respect, I find guidance in the words of Tunoi J.A (as he then was) in **Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another (2000) eKLR** where the Learned Judge observed as follows: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred upon from the facts.”

32. The Defendants before me have neither filed a Counterclaim challenging the Plaintiff’s title nor have they brought any evidence compelling or otherwise in support of their claim that the Plaintiff’s title is invalid and or that the same was acquired unprocedurally or illegally. That being the case, I found no ground to fault the Plaintiff’s title.

33. In respect of the right of a registered owner of land, Section 27 (a) of the Registered Land Act provides thus: -

“(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto: -

b)

34. In the circumstances herein I am persuaded that the presence of the Defendants in the suit property derogates from the Plaintiffs rights as the registered proprietor of the suit property. In the premises, I am persuaded that there is merit in the Plaintiff’s case as against the Defendants and I hereby accordingly enter Judgment for the Plaintiff as prayed in the Plaintiff.

35. The Plaintiff shall also have the costs of this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.

J.O. OLOLA

JUDGE