



**Mumwanjesyi Development Ltd v Ali (Environment & Land Case
60 of 2016) [2023] KEELC 19837 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 60 OF 2016
SM KIBUNJA, J
SEPTEMBER 20, 2023**

BETWEEN

MUMWANJESYI DEVELOPMENT LTD PLAINTIFF

AND

MBARAK MOHAMED ALI DEFENDANT

JUDGMENT

1. The plaintiff, a limited liability company, filed this suit vide the plaint dated the April 7, 2016 seeking for *inter alia*;
 - a. A permanent injunction restraining the defendant from interfering with its quiet possession and occupation of land parcels known as Sub-division Nos 8011/1/MN and 8012/1/MN, suit properties.
 - b. A mandatory injunction compelling the defendant to demolish at his own costs the house that he has erected on the said suit properties.
 - c. Costs of the suit.
 - d. Interest on (c) above at court rates.

The plaintiff avers that on the February 28, 2016, it noted the defendant had illegally entered and started constructing on the suit properties to which it was and still is the registered proprietor. That the defendant's illegal acts constitute trespass and may cause damages to the said properties in addition to depriving it of quiet possession and occupation. That there has been no other suit pending or previous one between the parties over the suit properties.

2. The claim is opposed by the defendant through his amended defence and counterclaim dated the May 9, 2016 in which he *inter alia* averred that he bought his house that stands on plot No 624/1/MN from one Grace Mutindi Mutisya. That there are over 300 permanent houses including his on the said land



and the owners of those houses pay ground rent. That the subdivision of that land has been a subject of many suits, and it is not true for the plaintiff to allege that there was no other pending suit.

3. During the hearing, the plaintiff presented Mr. Joseph Wainaina Muraya, a director, who testified as PW1. He adopted the contents of his statements dated the April 7, 2016 and December 10, 2021 as his evidence in chief. He also produced the documents in the lists of documents dated the April 7, 2016 and December 10, 2021 as exhibits 1 to 18 and identified a survey report dated November 24, 2021 done by Geo Surveys on his instructions. He testified that he had first noted the defendant's house that encroaches onto the plaintiff's land while at first floor. He further testified that the plaintiff had bought land parcel No 624/1/MN in 1991 from Awadh Sale Salman and Said Sale Salman, commonly known as Swalengulu and subdivided it into 84 plots between 1992 to 1994. That as agreed with the vendors of the original parcel they returned to them 29 plots that had houses on them. The plots numbers 8011 and 8012, the suit properties were not among those returned to the vendors as they did not have houses on them, and he sought for the plaintiff's prayers to be granted as prayed. During cross examination, PW1 testified that the plaintiff was incorporated in 1991 and that the resolution authorizing him to represent it was filed with the plaint. That they returned the 29 plots to the vendors following a court order in a suit they filed against the plaintiff, though the initial agreement was that the plaintiff retains eight (8) acres and return three (3) acres of the land to the vendors. That the owners of the houses on the 29 plots returned to the vendors had erected them with permission from the vendors. He conceded that there were power lines passing over portions of plots 7999 to 8015 whose titles contains the wayleaves and added that the plaintiff had started engaging KPLC over the same. He denied that the plaintiff had transferred the suit properties to James Kamau Njeru, but confirmed plot numbers 7999 to 8005 had been transferred to the said person. That the plaintiff was issued with provisional certificates over the suit properties after the original copies got defaced while with their then advocate, Kagwe and denied that the original certificates for the suit properties are with the defendant. The plaintiff also called Dennis Marebeka, a land surveyor, who produced the report dated the November 24, 2021 that he did on instructions of the plaintiff over parcels 8011 and 8012 as exhibit. It was his testimony that when he visited the said plots, he found some development had encroached plot No 8011 and 8012 by 0.0106 and 0.0360 hectares respectively. During cross examination, PW2 testified that the development encroaching on the two plots had also encroached onto plot 633/R to the south.
4. In his defence, Mr. Mbarak Mohamed Ali, the defendant, testified as DW1 and adopted the contents of his statement filed on the October 29, 2021 as his evidence in chief. He testified that he had bought his house from one Grace Mutinda Mutisya through an advocate after carrying due diligence. He testified that on checking with the council, he had found that the land had unpaid rates of over 23 million and therefore could not have been subdivided without it being paid. He had also contacted the members of the family that owned the land who told him that they were not selling the land before continuing with his transactions with Grace. He asked the tenants in the house to vacate after three months and carried the finishing including plastering. That the plaintiff then lodged a claim of ownership which he disputed. During cross examination, DW1 insisted that to him parcel 624 has never been subdivided even though he has not done a search at the land office. That he bought the incomplete five roomed house from Grace through a written sale agreement at Kshs 750,000 in 2015. He admitted that he did not get a consent from the land owners before transacting with Grace and has never paid ground rent since buying the house. That he has been waiting for the land owners to subdivide the land and issue him with the title documents. The defendant called Grace Mutinda Mutisya, who testified as DW2 adopting her statement filed on February 14, 2023 as her evidence in chief. She testified that she had bought the plot in 2007 that was measured for her by Abubakar, who had authority of the owner of the land and she constructed a four roomed house and a store. That she was required to pay rates to the County Government but had not paid any. During cross examination, DW2 testified that the plot



she had leased and not bought the plot that was 30 by 55 feet from Abubakar at Kshs 100,000 through a written agreement. That the agreement stated that she was to pay Kshs 300 to the Municipality per month but she never made any payment. That she did not meet the owner of the land or his family members but that Abubakar had told her that he had their authority to lease the land. That she sold the house she had built to the defendant at Kshs 700,000 without involving the land owners and by then Abubakar had died.

5. That after the parties closed their respective cases, the learned counsel for the plaintiff and the defendant filed their submissions dated the May 5, 2023 and June 8, 2023 which the court has considered.
6. The following are the issues for the court's determinations;
 - a. Whether the suit properties are subdivisions from LR No 624/1/MN.
 - b. Whether the plaintiff is the registered proprietor of the suit properties.
 - c. Whether the defendant has trespassed into the suit properties, and if so, whether the plaintiff is entitled to the prayers sought.
 - d. Who pays the costs of the suit.
7. The court has considered the parties' pleadings, oral and documentary evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings;
 - a. The available evidence in the form of the testimony of PW1, and the sale agreement between the plaintiff and Mohamed Saleh Sherman, the vendor, of June 14, 1991 produced as exhibit 6, that has not been rebutted, confirms that the Plaintiff bought a portion of L.R No 624/1/MN. The evidence by PW1 that the plaintiff proceeded to subdivide the land into several plots, including the suit properties herein has also not been challenged, as the defendant who stated that he believed no subdivision had taken place did not tender any documentary evidence like a certificate of official search or certified copy of the register to confirm that parcel number 624/1/MN was still intact. The court order issued in Mombasa HCCC No 129 of 2005, that was a suit between the vendor as plaintiff and the plaintiff as defendant, produced as exhibit 10 further confirms that the said land was subdivided and the 29 plots particularized therein transferred to the vendor. The said 29 plots did not include the plot numbers 8011/1/MN and 8012/1/MN, the suit properties, that evidently are still in the name of the plaintiff from the copies of the certificates of title and provisional certificates produced as exhibits 1, 2, 15 and 16 respectively.
 - b. That the plaintiff as the registered proprietor of the suit properties is in accordance of section 24(a) of the [Land Registration Act](#) No 3 of 2012 vested with absolute ownership of the said plots together with all rights and privileges belonging and appurtenant thereto. That further, section 26(1) of the said [Act](#) provides that "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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 or 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.”

There is no evidence adduced to suggest that the Plaintiff’s title to the suit premises had been successfully impugned.

- c. The defendant’s claim to the parts of the suit properties occupied by the house/structure that PW2 found was encroaching thereon, is traced to a sale transaction between him and DW2. The evidence of DW2 is that she had leased a plot measuring 30 by 55 feet from one Abubakar in 2007 upon paying him Kshs 100,000, and on the understanding that she would be paying Kshs 300 monthly as rates to the Municipal Council. It was her testimony that the said Abubakar had the authority of the owners of the land to enter into the said lease arrangement with her, even though she conceded that she never met the said land owners. It was her testimony that she has not paid any monthly rates to the Municipal Council, but proceeded to erect a four roomed house and a store which she eventually sold to the defendant in 2015. Again the owner of the suit land was not involved in the transaction between DW1 and DW2. Just like DW2, the testimony of DW1 is that he has not paid any rates to the County Government, but he has been waiting for the land owners to subdivide it and transfer the portion on which the house he had bought is situated to him. That what the court understands the defendant to have bought from DW2 is the house the latter had erected on the leased portion of LR No 624/1/MN. DW2 had not bought the land she built the house on, and did not as such own it. Assuming that Abubakar had authority of the land owner to lease that portion to DW2, then she owned the house she erected. In the case of *Abdulrazak Khalifa Salimu versus Harun Rashid Khator & 2 Others* [2018] eKLR, the Court of Appeal cited the case of *Famau Mwenye & 19 Others versus Mariam Binti Said* Malindi HCCC No 34 of 2005 in which the concept of a house without land was described as follows;

“The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to a ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the latin maxim, *cujus est solum ejus est usque as coelom*, meaning whose is the soil, his is also that which is above it.”

In that case, the Court of Appeal was persuaded by the dictum in the *Famau Mwenye’s* case [supra] that likened the concept of house without land as a lease stating that “No matter what the arrangement is called, in my view it is a lease within the meaning of section 105 of the Transfer of Property Act.” From the testimony of DW2, Abubakar who had leased the land to her had died by the time she sold her house to DW1 in 2015. That even if the court was to assume that the said Abubakar had authority of the land owner to lease the portion of the land to DW2 for a moment, it follows that by the time DW2 was selling the house/lease to the Defendant, the consent of the land owner that was necessary was not sought or obtained. It is therefore doubtful whether the defendant acquired any legal interest over the lease/house under the sale transaction between him and DW2, that did not have the consent of the land owner.

- d. That as the plaintiff’s title to the suit properties have not been challenged by the original proprietor, vendor, or shown to have been obtained through fraud or misrepresentation involving the plaintiff or acquired illegally, unprocedurally or through a corrupt scheme as provided under section 26(1) of the *Land Registration Act*, and as it has not been proved to have



been unlawfully obtained, the court finds it should be protected. That the plaintiff has through the testimonies of PW1 and PW2 shown that the defendant's house has encroached onto the suit properties which amounts to trespass. The court finds that the defendant encroachment onto the plaintiff's suit properties as detailed by PW2 in his report produced as exhibit 19 amounted to trespass as defined in Section 3 (1) of the Trespass Act, Chapter 294 of Laws of Kenya which provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

The plaintiff cannot have quiet possession and occupation of the suit properties when the defendant's house/structure is occupying parts of the same.

- e. Having found that the Defendant has trespassed into the Plaintiff's suit properties, the next issue is whether as a result of the same, the plaintiff is entitled to the permanent and mandatory injunction orders sought against the defendant. The court having considered the totality of the evidence presented finds that the plaintiff has established its case in accordance with the principles of injunction as set out in the celebrated case of *Giella v Cassman Brown & Co Ltd* (1973) EA 358. The plaintiff has established on a prima facie case that it is the registered proprietors of Land Parcel No 8011/1/MN and 8012/1/MN, the suit properties, and its entitlement to the grant of the permanent and mandatory injunctive orders sought to enable it have full enjoyment and usage of the suit properties.
 - f. The plaintiff having succeeded in its case against the defendant is under the dictate of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya entitled to costs of the suit and interest thereof at court's rates.
8. The upshot of the foregoing findings is that the plaintiff has established its claim against the defendant on a balance of probabilities. The court therefore finds and orders as follows;
- a. That an order of mandatory injunction is hereby issued directing the defendant to demolish and remove at his own cost that part of his house/structure encroaching onto the plaintiff's plots LR No 8011/1/MN and 8012/1/MN, suit properties, within the next ninety (90) days. In the event of the defendant failing or neglecting to comply with this order, the plaintiffs be at liberty to cause to be demolished in accordance with the law, all that part of the defendant's house/structure that is encroaching onto the suit properties at the cost of the defendant.
 - b. That a permanent injunction be and is hereby issued restraining the defendant, his servants and or agents from trespassing onto, and interfering with the plaintiff's quiet possession and occupation of the suit properties.
 - c. The defendant to pay the plaintiff's costs of the suit and interests at court's rates.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 20TH DAY OF SEPTEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : Mr. Kiarie for Kabole for Plaintiff



Defendant: No Appearance.

