



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 43 OF 2020**

**SIMON M. ONYAMBU.....PLAINTIFF**

**VERSUS**

**DANIEL WAWERU MWANGI.....DEFENDANT**

**JUDGMENT**

By a plaint dated 5<sup>th</sup> February 2020, the Plaintiff herein sued the Defendant seeking for the following orders:

- a) An order of permanent injunction do issue restraining the Defendants, his agents or anybody authorized by him or his heirs from interfering with, disposing, selling, constructing any structure, tilling, on plot no. Lamu/Hindi Magogoni/455 herein the Plaintiff's land pending the hearing and determination of this suit.***
- b) A declaration that the Plaintiff is the owner of the suit property herein Lamu/Hindi Magogoni/455.***
- c) That the OCS LAMU POLICE STATION and OCPD LAMU to ensure compliance of the court order.***
- d) Costs of the suit.***
- e) Any other relief that court deems fit to grant.***

The Defendant was served with summons to enter appearance but neither entered appearance nor filed a defence therefore the plaintiff proceeded with the case by way of formal proof.

PW1 adopted his statement dated 5<sup>th</sup> February 2020 and produced documents in the list of documents in support of his case as exhibits. PW1 stated that he is the registered owner of the suit land known as LAMU/HINDI MAGOGONI/455.

It was PW1's testimony that the Defendant without the consent or authority of the Plaintiff trespassed to the suit property and built a temporary structure where he is living with his family. PW1 stated that the he had reported the matter to the local administration but the Defendant would leave the land and come back to the suit land hence the filing of this suit.

Counsel for the Plaintiff filed submissions in which he reiterated the evidence of the Plaintiff and submitted that the Plaintiff being the registered owner of the suit land is protected by the law.

**ANALYSIS AND DETERMINATION**

The issue for determination is whether the Defendant has trespassed on the suit and whether the Plaintiff is entitled to orders sought for injunction.

The Defendant neither filed a defence nor gave evidence to Defend the Plaintiff's claim. The Plaintiff's evidence is therefore uncontroverted. The Plaintiff has produced a copy of the titled deed which shows that he is the registered owner of the suit land.

Section 26 of the Land Registration Act, 2012 provides that:

- (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 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.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

The court therefore is duty bound to hold that the title deed that was issued to the Plaintiff by the Registrar proves that he is the absolute and indefeasible owner of suit land unless the same was acquired through fraud, by mistake or unprocedurally. Since there is no such evidence that this title was acquired fraudulently, I hold that the Plaintiff is the owner of the suit land to the exclusion of other like the Defendant.

Section 3 (1) of the Trespass Act, Cap 294 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 Defendant has no business being on the Plaintiff's land as he is a trespasser. I have considered the pleadings, the evidence and the submission by Counsel together with the relevant law and find that the Plaintiff has proved his case on a balance of probabilities. The Plaintiff's claim is allowed as prayed. Defendant to give vacant possession to the Plaintiff within 30 days failure to which eviction notice to issue.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***