



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 236 OF 2017

SHAKUE ISSA ALL.....PLAINTIFF

VERSUS

MWANAISHA ISSA.....DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by way of a plaint dated 28TH June, 2017 seeking for judgment against the defendant for:

a. An order compelling the defendant and her authorized agents and/or servants and/or assigns to vacate from the Plaintiff's plot which measures 46.5ft by 52 ft on the larger parcel of land known as MN/III/3842, CR.3337 at Mtwapa.

b. Alternatively to prayer (a) hereinabove, the court bailiff to evict the defendant and/or servants and/or assigns from the plaintiff's plot which measures 46.5ft by 52 ft on the larger parcel of land known as MN/III/3842, CR. 3337 at Mtwapa.

c. That the OCS Mtwapa Police Station or any other police station with jurisdiction to provide security during the eviction of the defendant and/or their authorized agents and/or servants and/or assigns from the plaintiff's plot which measures 46.5ft by 52 ft on the large parcel of land known as MN/III/3842, CR. 3337 at Mtwapa.

d. A permanent injunction restraining the defendant and/or her authorized agents and/or servants and or assigns from trespassing into the plaintiff's plot which measures 46.5ft by 52ft on the larger parcel of land known as MN/III/3842, CR 3337 at Mtwapa.

e. Costs of the suit and interest.

f. Any other order and/or relief that the court may deem fit to grant.

2. The plaintiff avers that he is the owner of a plot measuring 46.5ft by 53ft (hereinafter referred to as the 'suit plot') on the larger parcel of land known as MN/III/3842, CR 3337 at Mtwapa on which plot he has built his residence. The plaintiff further avers that he acquired the suit plot in 1992 when he and Mohamed Issa; his brother, leased the same from one Kadzo Kalume Kitsao who is now deceased. The plaintiff further avers that he has since purchased the suit plot vide an agreement dated 16th August, 2013 and upon acquiring the suit plot, he developed the same by building a residential house thereon after which he welcomed his parents and siblings, the defendant included, into the suit plot. The plaintiff further states that at some point, he allowed the defendant to build a single room extensions to his residential house and a pit latrine on the said suit plot.

3. It is the plaintiff's case that sometime in April 2017, the defendant demolished a wall of the plaintiff's residential house on the suit plot without the plaintiff's consent, leading to a bitter dispute between them, with the defendant alleging some proprietary rights over the suit plot. That the dispute ended up with the area chief and the police. The plaintiff avers that at the Chief's Office, Shimo la Tewa Location, he was directed to pay the defendant Kshs.250,000/= so that she could vacate from the suit plot, but the defendant totally refused to accept the said pay off and has instead demanded that the plaintiff pays her Kshs.4,000,000/= before she vacates from the suit plot. The plaintiff avers that the defendant's continued unwelcome and forceful occupation of a part of his residential house on the suit plot is preventing the plaintiff from renovating the said residential house and thereby depriving him of his right to enjoy quiet possession of the said property.

4. The plaintiff testified as PW1 and adopted his witness statement dated and filed on 28th June 2017 as his evidence –in-chief. He also produced documents listed in his list of documents dated and filed on 28th June 2017 as p.exhibits Numbers 1 to 10. It was his evidence that he acquired the suit plot in 1992 when he and Mohammed Issa (PW2) leased the same from one Kadzo Kalume Kitsao. The plaintiff testified that he welcomed the defendant who is his sister in 1999. He stated that he had leased the plot and was paying monthly rent of Kshs.100 and

used to give the defendant the money to go and pay, but instead the defendant had the receipts issued in her name. The plaintiff denied subdividing the suit plot and giving the defendant a portion of it. He also denied that the defendant constructed a residential house on the suit plot at a cost of Kshs.2.5million. The plaintiff testified that their problems started after the demise of their parents who he said were living in Lamu but the plaintiff said he brought them to his home when they fell sick. He stated that attempts to resolve the dispute including through mediation did not bear fruit. That whereas he offered to pay the defendant Kshs.250,000/= the defendant demanded Kshs.4 million.

5. When cross-examined by Mr. Gachiri, counsel for the defendant, the plaintiff stated that the defendant is their first born sister. That he acquired the plot in 1992 and had leased it for Kshs.100/= per month. He stated that he welcomed the defendant in 1999. When shown some receipts issued in 1994 upto 2000 he confirmed that they were all in the name of the defendant, though he termed them as forgeries.

6. PW2 was Mohammed Issa, a brother to both the plaintiff and the defendant. He adopted his witness statement filed on 28th June, 2017 as his evidence in chief. His evidence was that the suit plot belongs to the plaintiff and that the defendant was welcomed by the plaintiff to the suit plot. He denied that the plot is divided into two portions, one for the plaintiff and the other for the defendant. He stated that the problem between the plaintiff and the defendant began when the defendant demolished a wall without informing and obtaining the plaintiff's consent to do so.

7. In her statement of defence dated 24th August, 2017, the defendant alleged that since she had lived in the suit plot continuously from 1992, she had acquired ownership rights to the same by the doctrine of adverse possession. The defendant claimed that she owns half of the suit plot where she has allegedly built her residential house. She denied that the plaintiff leased the whole of the suit plot but admitted that the plaintiff leased part of it in 1992 and invited the defendant to the said plot and divided it into two, with the defendant thereafter building her residential house on her portion of the plot while the plaintiff built his house on another portion. The defendant avers that on coming to the suit plot leased by the plaintiff, she paid all the rent from the year 1992 to 2013. The defendant denied that the plaintiff purchased the entire suit plot. The defendant avers that she spent Kshs.2,500,000/= to construct her house besides other amenities.

8. In her counter-claim, the defendant seeks a declaration that the plaintiff's interest on the part of the suit plot that the defendant has built her residential house is vanquished by operation of adverse possession and she is entitled to the exclusive and unimpeded right to possession, occupation and quiet enjoyment of the said parcel for land plus an order for permanent injunction restraining the plaintiff and the 2nd defendant in the counter-claim. The defendant wants the plaintiff and 2nd defendant in the counter-claim to be compelled to repay the defendant rent paid for the larger plot known as MN/III/3842 C.R 337 from 1992 to 2013 plus costs and interest. In the alternative, the defendant wants the plaintiff to be compelled to compensate her for the value of the plot on the larger plot on the part the defendant has built her residential house at current market value and to compensate the defendant for the value of the residential house she built on the said parcel of land and for the improvements made thereon.

9. The defendant adopted her witness statement dated 23rd August 2017 as her evidence in chief. The defendant admitted that she was invited by the plaintiff into the suit plot, and added that she constructed her house on a portion of the plot. The defendant testified that she wanted to sell her house to the plaintiff for Kshs.4 million.

10. Both parties filed written submissions through their respective advocates on record. I have reviewed and considered the pleadings, the evidence by the parties and submissions made. The court identifies the following issues for determination:

i. Whether the plaintiff has proved his case against the defendant.

ii. Whether the defendant has proved her counter-claim

iii. What are the remedies available to the parties.

iv. Who pays the costs of the suit and counter-claim.

11. The plaintiff's claim is that he is the owner of the suit property described as a plot measuring 46.5ft by 52ft on the larger parcel of land known as MN/III/3842 CR. 3337 at Mtwapa. This claim is based on two unregistered agreements dated 8th February, 1992 and 16th August 2013 produced as P.exhibits 2 and 6 respectively. The plaintiff's case is that he developed the suit plot by building a residential house thereon and thereafter welcomed his parents and siblings, the defendant included, to live with him thereon. That at sometime, he allowed the defendant to build a single room extension to the plaintiff's residential house together with a pit latrine. A dispute arose when the defendant allegedly demolished a wall of the plaintiff's residential house. Although attempts were made by the parties to resolve the dispute, including seeking assistance of the area chief, and the police, no agreement was reached, especially on the amount the plaintiff was required to pay the defendant as compensation for the development done by her on the plaintiff's plot. The matter was even referred to court annexed mediation, but still no agreement was reached. Whereas the defendant is asking for a sum of Kshs.4,000,000/= as compensation for the residential house and other improvements or amenities constructed by her on the suit plot, the plaintiff on his part had agreed to pay the defendant the sum of Kshs.250,000/-. The plaintiff is however amenable to both parties engaging a valuer to determine the value of the structures put up by the defendant on the suit plot. From the material on record, and especially the evidence by both the plaintiff and the defendant, in my view, the only point of divergence between the plaintiff and the defendant is the determination of the fair valuation of the residential house and the pit latrine built by the defendant on the suit plot.

12. Considering the most touted peculiar nature of this suit which involves siblings who are unable to reach an amicable settlement on the dispute at hand, despite attempts by the area chief, and even the court through the annexed court mediation, the most viable order to make in the circumstances is for the parties to agree on a valuer who shall value and file a report on the market value of the residential house and pit latrine put up by the defendant on the suit plot. The valuation report to be filed will be used for purposes of determining the amount which the plaintiff shall pay to the defendant and this matter, hopefully, will be settled. Needless to say, the valuation proposed for the purposes of settling this dispute involving siblings should be done in good faith, professionally and by a qualified valuer with the sole aim of obtaining the best price reasonably obtainable for the said structures. Once such a valuation is undertaken, any party who alleges it does not reflect the

best price obtainable for the said structures bears the evidential burden to prove otherwise.

13. Accordingly, judgment is entered in the following terms:

a. The plaintiff and the defendant are directed to appoint a joint independent valuer within sixty (60) days to value the residential house and pit latrine constructed by the defendant on the suit plot which measures 46.5 ft by 52ft on the larger parcel of land known AS MN/III/3842 CR 3337 at Mtwapa, to determine the fair market value of those structures.

b. Should the parties fail to agree on a joint valuer within sixty (60) days, the Government Valuer, Kilifi County is directed to carry out the said valuation and file a report in court within one hundred and twenty (120)days from the date of this judgment.

c. The plaintiff shall pay to the defendant the amount arrived at in the valuation and the defendant will upon receipt of such payment, vacate from the suit property.

d. Both parties are to share the cost of the valuation referred to in paragraphs (b) or (c) above.

e. Considering the relationship of the parties herein, I order that each party shall bear own costs of suit.

f. The matter to be mentioned after 120 days to confirm compliance and for further orders.

14. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 26th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE