



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 103 OF 2006

SALEH MUHSIN SHIGOG.....PLAINTIFF

VERSUS

AUGUS M. DISHI & 18 OTHERS.... DEFENDANTS

JUDGEMENT

1. The plaintiff sued the 19 defendants vide his plaint dated 30th January 2006 seeking that judgment be entered in his favour as against the defendants as follows;

a. That mandatory injunction compelling the defendants to demolish the illegal structures and/or houses on the plaintiffs Plot No 79/II/MN.

b. That permanent to restrain the defendants by themselves, relatives, friends, employees, workmates, servants or agents or any other person or otherwise howsoever from entering, forcefully entry, building/constructing/erecting any structures/houses, excavating, further erecting/construction/building or in any other manner interfering with the plaintiff's dues enjoyment Plot No 79/II/MN measuring 12.08 acres.

c. An eviction order against all the defendants from the plaintiff's Plot No 79/IIMN.

d. Declaration that the Plot No 79/II/MN measuring 12.08 acres is legally leased to the plaintiff.

e. General damages.

f. Costs of this suit plus interest thereof.

g. Any other relief that this Honourable Court may deem fit to grant.

2. The plaintiff pleads that the suit land Magogoni/79/ii/MN measuring 12.08 acres situated at Tudor, Mombasa Island was leased to him by the WAKF Commission of Kenya from 1st September 1987 at a consideration of Kshs100,000/=. That the lease was registered in the plaintiff's name after which the plaintiff sub-divided it and subletted the portions to tenants under the caretaker of Ali Ramadhan.

3. The plaintiff pleaded further that in the year 2000, the defendants overpowered his caretaker and encroached and or illegally occupied the suit plot claiming ownership. The plaintiffs state that the defendants proceeded to erect structures as well as lease out some parts to unsuspecting members of the public. That he is the one paying land rents and rates thus entitled to exclusive possession.

4. The suit is defended through a joint defence dated 31st May 2006. The defendants pleaded that the plaintiffs claim is time-barred. They also deny over-powering the plaintiff's caretaker and or trespassing on the suit plot. The defendants deny that the plaintiff has any cause of action against them and put the plaintiff to strick proof. The defendants urge the court to dismiss the plaintiff's suit with costs.

5. The plaintiff testified on 24th October 2018 by adopting his witness statement dated 12th September 2011 and filed in court on 14th October 2011. He also adopted the documents contained in his list dated 14th October 2011 as exhibits in support of his case. The statement reiterated the contents of paragraphs 6, 9 and 10 of the plaint and urged the court to grant the orders sought in the plaint.

6. The list of documents enclosed 13 documents as follows:-

a. General power of attorney dated 8th day of January 2004.

b. Title Number Cr. 1306, Plot No. 79/II/MN.

c. Lease between Wakf Commissioners of Kenya and Saleh Muhsin Shigog (Plaintiff herein) in respect of Plot No. 79/II/MN, CR. No 1306.

d. Miscellaneous income receipt No 00038831 issued on 29th day of July 2006 in respect of Plot No. 79/II/MN.

e. Land rates receipt No. 000011140 issued on 19th day of July 2006 in respect of Plot No. 79/II/MN.

f. Certificate of postal search dated 30th day of May 2006.

g. Vacation notice dated 31st day of December 2003 in respect of Plot No. 79/II/MN.

h. Letter dated 17th day of May 2006 from Chief's Office, Kisauni Location, Kisauni.

i. Letter dated 13th day of June 2005 from District Commissioner's Office Mombasa.

j. Letter dated 16th day of January 2007 from Chief's Office Kisauni Location.

k. Vacation notice dated 28th day of March 2005.

l. Letter (response to vacation notice) dated 12th day of January 2004.

7. In cross examination, the plaintiff stated that a Wakf is like a trust. That the property was not transferred to the plaintiff. PW1 did not know whether the 5th defendant ALI Ramadhan was a beneficiary of the Wakf. That he did not obtain the consent in writing from the Wakf Commissioners before filing this suit. That when the houses seen in the photographs were being built, he reported to the chief. That he gave Antony Mwangeka (17th Defendant) a portion of the land to stay on. That PW1 learnt later that it is the plaintiff's caretaker who allowed the defendants to build on the land. That the people they found existing on the land as per the list annexed as SS7 pay them rent as they inherited them from the Wakf Commissioners. PW1 also said they have permitted some people to be on the land. That none of the defendants pay them rent.

8. Ramadhan Ali Tua , the 5th defendant testified on 13th December 2018. He adopted his witness statement dated 24th March 2015. He said he does know Jackton Mutiso (3rd defendant) but he does not know his whereabouts. That Laban Otero (7th defendant) is deceased. Mr Ali said that the plaintiff found him on the suit land where he had been a caretaker for over 20 years. He said that he found the other defendants on the suit land.

9. It is the 5th defendant's evidence that his mother was given a portion of the land by the Wakf Commissioners to farm. That he was born on the land and he continues to live on it with his family. That he is the one who allowed the 17th defendant to live on the land. Mr Ali denies the land belongs to the plaintiff.

10. In cross examination, Mr Ali said he was born in 1948. That he ceased being a caretaker in the year 2012. That the 17th defendant worked as the plaintiff's driver but he has no document to prove such employment. That he was given permission to build by the Chief Kadhi but he had no document to prove. This marked the close of the defence case.

11. Parties filed written submissions which I have considered and will make references to in the course of this judgment. The plaintiff produced the lease between the Wakf Commissioners and himself. The plaintiff also presented a certificate of postal search as at 30th May 2006 showing the plaintiff as the registered leasehold owner from 1st September 1987 at annual rent of Kshs6000/= per annum. Further the plaintiff presented to court copies of correspondences issued to some of the defendants to give vacant possession.

12. The defendants through the evidence of Ramadhan Ali have not denied they are on the land. Their defence is that the plaintiff's claim is time barred. The 5th defendant in his witness statement dated 24th March 2015 said that when he was engaged as a caretaker in 1991 by the plaintiff, the 1st defendant August M Dish was already on the land. The witness added that the plaintiff wanted him to take care of the land so that the trees are not destroyed and the land is not turned into a quarry. He worked for 10 years. That all the 19 defendants were already on the land. Mr Ali said the 17th defendant was an employee of the plaintiff and it is the plaintiff who introduced them. That the plaintiff instructed him to show the 17th defendant where to build.

13. The evidence of the 5th defendant is contradictory in material respects. First he said he found all the 19 defendants living on land when he was engaged as a caretaker. Yet he stated in his oral evidence that he was born on this land. If he was born in 1948 as he says then the 19 defendants ought to have found him on the land and not just when he was engaged as a caretaker. Secondly, among the 19 defendants, he states that he was instructed by the plaintiff to show the 17th defendant (who was the plaintiff's driver) where to construct a house. Thus the 17th defendant was not on the land as at the date of his engagement as a caretaker. He also states that the 3rd, 7th and 12th defendants are deceased without providing any evidence of proof of death.

14. The plaintiff has submitted that the defence of limitation of actions is not available to the defendants because of two reasons. First that the defendants did not file pleadings as provided under Order 2 rule 4 of the Civil Procedure Rules and secondly that Section 15 of the Wakf Commissioners Act exempt Wakf properties from a claim under adverse possession. Section 15 of the Act provides that, “**Titles to Wakf property shall not be acquired by prescription or adverse possession after commencement of the Act.**” The date of commencement of the Act is given as 8th June 1951.

15. There is no evidence presented to the court on behalf of the defendants that their occupation of the suit land was prior to 8th June 1951. The 5th defendant admitted that it is the Wakf Commissioners who gave his mother permission to be on the land. He also confirmed that he was on the land on permission of the Chief Kadhi.

16. From the evidence, it is established that the defendants are on the land. Besides the defendants failing to prove that their occupation was adverse to that of the plaintiff and or the Wakf Commissioners, the law by virtue of Section 15 of Cap 109 does not avail to them the defence of prescriptive rights. Consequently in the absence of permission from the plaintiff, the defendants are essentially occupying the land illegally. I am therefore satisfied that the plaintiff has made out a good case. Accordingly I enter judgement in his favour as prayed in the plaint.

Dated, Signed and Delivered at Mombasa this 4th day of July 2019.

A. OMOLLO

JUDGE.