



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CIVIL SUIT NO. 265 OF 2008**

AMIRAL HASSANALI MOHAMMED.....1<sup>ST</sup> PLAINTIFF

ZARINA AMIRALI HASSANALI MOHAMMED.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

JOHN ODERO NYAGANGA.....DEFENDANT

**JUDGEMENT**

1. The plaintiffs are registered as owners of Land parcel No. Mombasa/Block V/Mainland South/133 measuring 0.267 Ha as joint proprietors as at 13<sup>th</sup> February 1989. They acquired the land by purchase sometime or about August 2008, the defendant entered the land and started developing it without the consent and or permission of the plaintiffs. As a consequence of the defendant's action, the plaintiffs filed this suit seeking judgement in the following terms:

**i) A declaration that the Defendant, whether by himself or his servants or agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly, trespassers on the same and therefore, not entitled to remain on the suit property.**

**ii) Vacant possession of the suit property.**

**iii) An injunction restraining the Defendants whether by himself or his servants or agents or otherwise howsoever from remaining on or continuing in excavation and construction on the suit property.**

**iv) Costs.**

2. Initially the suit proceeded undefended and the plaintiffs got a decree on 22<sup>nd</sup> April 2010 but which was later set aside on 11<sup>th</sup> March 2016 allowing the defendant to file a defence to the suit. In his defence, the defendant denied the plaintiffs' claim.

3. The parties proceeded to adduce oral evidence. The plaintiffs called two witnesses while the defendant was a sole witness. PW 1 is Amirali Hassanali Mohamed, he relied on his witness statement filed in Court and the bundle of documents which annexed the following documents:

**a) Title deed for the suit property**

**b) Transfer form**

**c) Certificate of official search**

**d) Property rates statements**

**e) Photographs of the building on the land**

PW 1 stated that he does not know who built the house but he thinks it is the defendant. This was done without his permission.

4. On cross – examination, the witness said he purchased the land for Kshs 150000 although he did not produce a sale agreement. That he is the one who took a loan with the title as security which loan he has already repaid and sent the documents to his advocate to register the discharge. That the house is built on the entire piece of land. That there are other houses on the plot which does not belong to the defendant. PW 1 stated that he asked the defendant for Kshs 30,000,000 for the entire plot. That his caretaker used to be on the plot until 2006 when he went home and never returned because he died. That if the defendant intends to buy then he should buy ½ an acre since they do not intend to sell only a portion. The witness put the value of ½ acre at between 40 – 50 Million. Lastly that he did not sue the other occupants of the plot before they entered into an agreement for them to leave.

5. William Munyoki Maundu testified as PW 2. He works as a caretaker for the plaintiffs. That he found the defendant’s structure at the foundation level. On cross – examination, he denied giving permission to the defendant to build. That the building is on a portion of the land. That he knew the suit was filed in 2008 because he accompanied Mr Ndegwa advocate’s representative who went to serve. He was beaten during the service of the summons. PW 2 says the building is currently at five floors and is completed. That he was present when the survey exercise was done and the defendant was represented by Mr Waweru. That the survey report confirmed the defendant’s building are inside the suit plot. That the defendant was served with an order of injunction not to build. The plaintiffs closed their case at this point.

6. The defendant said he is called Joseph Obura Nyangaga but he does not know a person called Paul Joseph Odera Nyangaga. DW 1 works with the Ministry of Education and came to know about this case in 2013 when the police went to arrest him. He adopted his statement dated 31<sup>st</sup> October 2016 as his evidence. He also relied on his documents filed which included the following:

**a) Sale agreement dated 4.4.2008**

**b) Photographs**

**c) Consent dated 18.3.14 and filed in Court on 2.5.14**

**d) A bundle of letters**

7. The defendant annexed photographs of his development. He said that it took him six (6) years to do the development. The defendant said that he did not avail a representative because he was not informed hence the survey exercise was done without his participation. That they attempted to settle the matter for the portion he occupied but it failed. He did a valuation report for the portion he occupies at Kshs 800,000= . He denied trespassing on the land as he had purchased the land before buying. He denied having a caretaker called Waweru. The defendant stated that he is still willing to purchase the land he occupies.

8. In cross – examination, the defendant said he does not have a title deed showing Juma and Abdalla as the owners of the title 133. He also did not have receipts showing he was paying rates. He also did not have a certificate of official search indicating the plaintiff is not the owner of the suit property. The defendant’s valuation report at page 2 identified the plaintiff as the registered owner of the suit property.

He also agreed that he had no lease or consent from the plaintiffs to develop the land. In re – examination, he stated that the valuation report was to give value of the land he occupies. The defendant also closed his case.

9. Both advocates filed written submissions. It is not denied that the defendant is in occupation of the suit property albeit only a portion. The defendant took issue with the name of the person given as a defendant in the suit papers. That he only learnt of this case in 2013 when the police went to arrest him therefore was unaware of the injunction. He also denied being a trespasser because he had purchased the portion of the land as per the sale agreement. The defendant however admitted knowledge that ownership records of land being kept at the lands office and he also did not have any document to show that the people who sold him that land owned it.

10. The defendant attempted to rely on the provisions of section 3 (3) of the Law of Contract Act that the plaintiffs did not produce a sale agreement. However as at the time of purchasing the land, the title was already in the name of the plaintiffs thus rendering the provisions of section 3 (3) of Contract Act inapplicable. The defendant could only question the title of the plaintiffs under section 26 (1) of the Land Registration Act which provides ***“that title of a person is not subject to challenge except***

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

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

11. Further there was no transaction between the plaintiffs and the defendant that would call for the application of section 3 (3) of the Law of Contract. Instead the plaintiffs are saying the defendant are on their land without their consent or authority which in effect is an act of trespass. Trespass is defined in Concise Oxford dictionary (new edition) to mean ***“To make an unlawful or unwarrantable intrusion (especially on land or property); to enter into a person’s land or property without permission.”*** Therefore the plaintiffs having proved they are the owners of the suit property and not having authorized the defendant to carry out development on the land, such action can only be treated as trespass. The persons who allegedly sold the land to the defendant did not have any document of ownership to pass any interest to the land.

12. Section 25 gives the plaintiffs the rights, privileges and appurtenances belonging thereto free from all other interests and claims except for the overriding interests. The defendant’s claim does not fall under the claims against a registered proprietor as given in the Land Registration Act. In conclusion, I find no merited defence to the plaintiffs’ claim. I am satisfied that the plaintiffs have proved their case within the standards provided in law and is thus entitled to the prayers contained in the plaint.

13. The defendant submitted that this Court do order for ADR and or the plaintiffs be compensated in monetary terms for the market value of the portion he occupies. This Court is unable to make such an order because parties have already given evidence and closed their case so ADR does not come into play. Secondly the Court cannot make contract for parties so it is not within my powers to determine the purchase price or direct the plaintiffs to sell the land to the defendant. Just as the parties had attempted to negotiate this matter during the pendency of this suit, the granting of the prayers sought will not bar them from entering any consent. Accordingly I enter judgement for the plaintiffs as prayed in the plaint.

**Dated, signed & delivered at Mombasa this 1<sup>ST</sup> November 2017**

**A. OMOLLO**

**JUDGE**