



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 259 OF 2016

DAVID MWANYIKA MCHANA.....PLAINTIFF

VERSUS

SAMMY MOGAKA.....1ST DEFENDANT

CHARLES KARISA.....2ND DEFENDANT

KATANA KARISA.....3RD DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to restrain the defendants from a plot of land that he claims to own; defendants filing counterclaim contending that the plaintiff has moved beyond the boundaries of the plot that was sold to him and seeking his eviction from the alleged expanded area; plot in dispute being within a larger land parcel owned by a third party; neither plaintiff nor defendants demonstrating any right over the disputed land as neither owns the land; both suit and counterclaim dismissed)

1. This suit was instituted through a plaint dated 15th September 2016. In the plaint, the plaintiff seeks the following orders :-

a) A mandatory injunction directed to the defendants stopping them from further construction, selling, disposing, alienating and or interfering in any manner with the Plaintiff's ownership of the undivided portion of Plot No.MN/V/433 measuring approximately 100 feet by 50 feet situated within Jomvu Kwa Akatsa Village.

b) A declaration that the Plaintiff is the beneficial owner of the undivided portion of Plot No MN/V/433.

c) Costs and interest of the suit.

2. In his plaint, the plaintiff has pleaded that he is the owner of the undivided portion of a plot measuring 50 X 100 feet, within the land parcel, LR No. MN/V/433 situated in Jomvu Kwa Akatsa Village within Mombasa County, (hereinafter referred to as "the suit plot") which he contends, is Government land. The plaintiff avers that he has possessed the suit plot for over 15 years, and that on the land, he currently runs a school known as Nobel Junior Academy with 50 pupils. He further pleaded that the 1st defendant, with the help of the 2nd and 3rd defendants, has illegally commenced construction of a permanent house within the suit plot, greatly affecting the running of the school.

3. The plaintiff filed a witness statement dated 15th September 2016 where he reiterated that he is the owner of the suit property and that the people who granted to him the suit property now claim a portion of it and have sold the portion to the 1st defendant who has commenced construction on the suit property to the detriment of the school and the .learning activities therein.

4. The plaintiff filed a list of documents dated 15th September 2016 being:- a letter dated 20th June 2016 to the Chairman of National Land Commission requesting for allocation of the suit property to construct the school; pictures showing semi-permanent structures; a certificate of registration for the school No 601 from Complementary Schools Association of Kenya as well as the school's certificate of registration of a business name dated 29th April 2016; and a letter from the Assistant Chief Jomvu Kuu sub-location identifying him as a resident of Jomvu Kuu sub-location.

5. Subsequently in the course of the proceedings, the plaintiff supplied court with a copy of a Certificate of Postal Search dated 11th August 2020, for the land parcel LR No. 433/V/MN, title No CR 12403 which measures 59.5 acres. The title is in the name of Khatijabai d/o Mohamed Manji, and it bears an encumbrance in form of a caveat dated 29th September 1998 by Kenya Pipeline Company Limited claiming a grant of easement.

6. The 1st defendant did not enter appearance nor did he file a statement of defence.

7. The 2nd and 3rd defendants entered appearance and filed a joint statement of defence and counterclaim. In their pleadings, they denied the contents of the plaint and stated that the plaintiff's plot measures 70×50 feet and not 100×50 feet. The defendants asserted that what the plaintiff was allocated was a plot measuring 70×50 feet, but he ended up grabbing a further 30 feet, making his plot a 100×50 feet plot, contrary to the agreement between the plaintiff and the village elders. The defendants denied having constructed on the said 70×50 feet plot allocated to the plaintiff. In their counterclaim, the 2nd and 3rd defendants pleaded that the plaintiff is a trespasser to the 30 feet that he was not allocated. They seek the following orders in the counterclaim:-

a) A declaration that the plaintiff's property only measures 70 feet by 50 feet.

b) A mandatory injunction that the plaintiff do demolish the structures they (sic) have erected outside the property measuring 70 feet by 50 feet.

c) The costs occasioned by this suit and interest thereon.

8. In his evidence, the plaintiff testified inter alia that the 1st defendant entered into the suit plot on 27th August 2016 and started building a house. He testified that he (the plaintiff) had purchased from the family of Karisa the said land and that the 2nd and 3rd defendants were witnesses to the sale. He stated that what he bought was a 50×100ft plot which is not registered, but is within the land parcel LR No. MN/V/433, which he said he was informed by the seller belongs to the Government. He stated that on the suit plot, he has built a house, a toilet and an 8 roomed *mabati* structure serving as a school called Nobel Academy which is registered. He further stated that the issue began when the 1st defendant built between the toilet and the classes which he asserted were within the suit plot.

9. On cross examination, the plaintiff affirmed that when he bought the land from Mzee Karisa, no sale agreement was put down in writing. In addition, he stated that at the time of buying the plot it was not measured, rather it was just pointed out to him. He refuted the claims that he was called by the Chief to a meeting to discuss the dispute and insisted that he had not leased the land, but rather, he purchased it. With the above evidence, the plaintiff closed its case.

10. The 2nd defendant made a statement on his and the 3rd defendant's behalf wherein he stated that they were born and raised in Jomvu Kuu sub-location. He stated that the plaintiff came to the area on 5th August 2001, and his late father (Karisa Kisau), upon request by the village elders, allocated him a plot of land measuring 70×50 feet on the Land Parcel LR. No MN/V/433. He further stated that the plaintiff built a school on the suit property, but grabbed a further 30 feet belonging to his late father. He mentioned that the plaintiff also sold 3 other parcels of land, which caused the elders to summon him on 23rd November 2014, where he was directed to restrict himself to what was allocated to him and he should remove the toilet that was built on the additional 30 feet. He claimed that the plaintiff is illegally occupying the 30 feet area, for this portion was sold to another person, one Dismas Obuneke.

11. The defendants filed a supplementary list of documents where they availed some cards titled 'Kenya informal Settlement Improvement Project (KISIP)', giving reference numbers, presumably, for their informal housing.

12. The 2nd defendant testified as DW-1 and stated that the plaintiff came to the village elders and sought a place to reside; he was given a 70×50ft plot within DW1's father's land to build two rooms. Further to this, he stated that the plaintiff was not satisfied with the plot he was given, and without entitlement, added more land to himself which he later sold to other people. DW-1 stated that on the 70×50 feet plot, the plaintiff built a school, and on the grabbed portion, (the 30 feet disputed area) a toilet.

13. DW-2 was the 3rd defendant. He testified that his father was among the committee of elders who allocated a plot to the plaintiff. He mentioned that it was his father who gave him (plaintiff) the land since he had some space. He stated that the agreement was between the plaintiff and his father. He added that the plaintiff built a house and a school on the portion allocated to him, but a toilet on the other plot.

14. Cross-examined he stated that he was present when the plaintiff was shown the land, but they didn't measure it, so he could not confirm whether it was 70 feet or 100 feet. He also could not recall the year that the plaintiff had built the school or the toilet, and he did not know if anyone had stopped the plaintiff from building the toilet. More to that, he stated that they had not evicted the plaintiff, and the toilet was still in use, and that it can be said the plaintiff is rightfully there.

15. On re-examination, DW2 stated that the plaintiff was only invited as an occupant after he gave something small to the elders. With the above evidence the 2nd and 3rd defendants closed their case.

16. In his submissions, Mr Mangale, learned counsel for the 2nd and 3rd defendants, submitted inter alia that the suit property is part of community land as provided by Article 63 of the Constitution of Kenya, 2010 and bestowed upon the Kitsao family (the family of the 2nd and 3rd defendants). He submitted that his clients have proved that the plaintiff's property only measures 70×50 feet and the plaintiff should thus demolish what he has built outside this area.

17. On his part, Mr Obara, learned counsel for the plaintiff, submitted that the 2nd and 3rd defendants have introduced the aspect that the land is community land but have not tendered evidence in support. He submitted that if the land is community land, they have not demonstrated that they have authority to act on behalf of the community.

18. I have read the pleadings, the evidence on record and the submissions filed by the both parties.

19. First and foremost, I feel the need to delve into the question of ownership of the suit property. Counsel for the 2nd and 3rd defendants, in his submissions, alleged that the suit property is community land and should be treated as such. The definition of community land is in Article 63 (2) of the Constitution which provides as follows:-

Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

20. Section 8 of the Land Registration Act, states that all community land has to be registered and issued with a certificate of title save for unregistered community land held in trust by the County Government. The 2nd and 3rd defendant have not produced a certificate of title to prove that the suit property is indeed part of community land. A certificate of title is the conclusive evidence of proprietorship as stated in Section 26 of the Land Registration Act which provides as follows:-

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.

21. The Certificate of Postal Search dated 11th August 2020, reveals that the land parcel LR No. MN/V/433 measuring 59.5 is freehold in the name of Khatijabai d/o Mohamed Manji. From the search, it is clear none of the parties can claim ownership of the suit plot as it is within land that is neither owned by the plaintiff nor the defendants and none of the parties claim that they have derived title from the registered owner. From the reading of Section 25 (1) of the Land Registration Act, it is the proprietor, in this case, Khatijabai d/o Mohamed Manji, who is the holder of all the rights and privileges incidental to the suit plot to the exclusion of all others, including the parties before court. These rights are free from all other interests and claims and are only subject to the registered easement. None of the parties demonstrated to this court that they have purchased any portion of land from the said Khatijabai d/o Mohamed Manji or that they have been authorized through lease, licence, or other known methods of acquiring an interest in land, by the registered owner.

22. The plaintiff pleaded that the suit property is Government land while the 2nd and 3rd defendants stated that the suit property is part of community land, but the search reveals the contrary. As I have mentioned, the land is freehold and has a registered owner. The 2nd and 3rd defendants relied on a letter dated 31st October 2016 from one Mzee Rashid confirming that the elders allocated the plaintiff a plot measuring 70×50 feet as opposed to 100×50 feet. The elders did not have title to the land and neither could they pass any title to the plaintiff. It is only a registered proprietor who has the right to transfer title and ownership of land.

23. The search divulges that the suit property measures a whopping 59.5 acres. In issue is a plot measuring 100×50 feet (or 70×50 feet) within that land. I have no evidence of any subdivision of the land nor any vesting of title of any bits of land within the larger land parcel upon anybody else including the plaintiff and defendants. I have no evidence of any subdivision of this land into sub-plots by the registered owner or anybody else authorized by him. The small chits produced by the defendants indicating an informal settlement identification does not help the defendants. Those chits cannot override the clear title that I have seen for the disputed land.

24. From the evidence, it appears as if persons simply moved into the larger land and started hiving out portions and selling to the unsuspecting public, including the sale to the plaintiff. Such sales have no legal validity and I do not see how the plaintiff can claim to have properly purchased the disputed plot, whether it be 50x100, or 50x70 feet. Indeed, he himself stated that no formal agreement was put down in writing which clearly reveals the informal nature of the manner of his settlement on the land. The defendants also have not demonstrated any right to be on the land or any right to sell it.

25. The long and short of the above is that both parties have failed to prove ownership to the disputed plot or any special circumstances that would persuade court to exercise its discretion to grant any order in favour of either party. None of the parties have a legal basis for the prayers they have sought. For reasons given above I find no merit in the plaintiff's suit and in the counterclaim. I dismiss both the plaintiff's suit and the counterclaim by the 2nd and 3rd defendants. I make no orders in favour of or against the 1st defendant. Each party to bear his/her own costs.

26. Judgment accordingly.

DATED AND DELIVERED THIS 6TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIROMENTAL & LAND COURT OF KENYA

AT MOMBASA