



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 185 OF 2012

RAMADHAN MASHUA MAVUMBA.....PLAINTIFF

VERSUS

GEORGE KAMAU.....DEFENDANT

JUDGEMENT

PLAINTIFF'S CASE

1. The suit was instituted by way of a plaint dated 4th September 2012 which was later amended on 7th May 2013 and seeks the following prayers:-

a. An order of permanent injunction to restrain the defendant whether by himself, his servants, or agents or otherwise whosoever from entering or using the suit premises and a declaration that the defendant unlawfully and wrongfully entered, trespassed into the plaintiff's parcel of land Kwale Township, Golini and known as Plot K PDP 140 17.2007.

b. Damages for wrongful entry into, occupation and possession of and trespass onto the suit premises of the plaintiff.

B1) An order of vacant possession upon the defendant be issued and the defendant vacate the suit premises known as Kwale Township Golini and known as Plot K PDP 140.17.2007

c. Cost of the suit.

d. Interest thereon at court rate.

e. Any other relief this Honourable court may deem fit and just to grant.

2. The plaintiff averred that he is the registered allottee of the parcel of land Plot No K PDP 140 KWL 17.2007, measuring approximately 40 feet×60 feet which is situated in Golini, after purchasing it from one Rachel Tabu Kauli on 3rd July 2010. The plaintiff has pleaded that he entered into a sale agreement with Rachel Tabu Kauli, and the suit premises was transferred into his name after he paid Kshs 4,000 as transfer fees to Kwale Town Council, as required by the Trade and Markets by-laws 2003. After purchasing the suit premises, the plaintiff avers that he applied for development on 2nd August 2010, and on 19th August 2010 paid Kshs 5,000 for the building plan, and on 23rd August 2010 a further Kshs 3,700 for its approval, and has been paying the rates for the suit premises ever since.

3. The plaintiff further avers that on or about 22nd July 2012, the defendant wrongfully entered into the suit premises, and began constructing a foundation without the plaintiff's consent or authority and for this reason, deprived the plaintiff of the use and enjoyment of the suit premises, and has caused him loss and damage. The plaintiff further stated that on 3rd August 2012, the plaintiff, the defendant, Kwale Town clerk, and surveyor conducted a site visit on the suit premises, and the surveyor confirmed that according to Plan Ref No. 140 KWL 17.2007 the suit premises belong to the plaintiff. The plaintiff has pleaded that he has suffered loss and damage, due to the actions of the defendant, of denying him the usage of the suit premises that he has developed and asked court for vacant possession and damages.

4. The plaintiff filed a reply to the amended defence and counterclaim on 25th March 2014, and reiterated that the defendant is not the lawful allottee of Plot K 140 KWL 17.2007 Kwale Township, which the plaintiff lays claim to, and claimed it is different from Plot No. K. 140 10.2002 K. The plaintiff denied all the particulars of fraud that were pleaded by the defendant in his counterclaim, and stated that he has all the legal documents of the suit premises from Kwale Town Council, and that the defendant did not have up-to-date documents from Kwale District Survey to prove ownership of the suit premises.

5. The plaintiff denied the counterclaim and stated that the plaintiff's suit premises is Plot K No. 140 KWL 17.2007, and not Plot No. 140 KWL.10.2002K, and further denied that the letter dated 22nd February 2005 from Town Council of Kwale was not an allotment letter but a letter of offer. The plaintiff denied that he is a trespasser on his own plot, and reiterated that he is the owner of the suit premises and that the counterclaim should be dismissed with costs.

DEFENDANT'S CASE

6. The defendant filed an amended defence and counterclaim on 20th March 2014, and reiterated that he is the lawful allottee of the suit premises, and that the plaintiff's purported documents of allotment and purchase of the suit premises, were obtained illegally through fraud, and with the intention of denying the defendant the ownership of the property. The defendant pleaded the particulars of fraud as; changing of documents, and records to indicate allocation of allotment, and ownership of the suit premises to the plaintiff, illegal transfer of the defendant's plot to the plaintiff and the entering into an agreement with the plaintiff with the intention of dispossessing the defendant of his property.

7. The defendant made a counterclaim and pleaded that he is the lawful owner of the suit premises Plot No. K Plan No. 140, KWL. 2002/K measuring 0.044 hectares Kwale Township, having been allocated the same by the Town Council of Kwale vide an allotment letter dated 22nd February 2005. The plaintiff further pleaded that he paid the stand premium and annual rent, and been enjoying quiet possession since 2005. That the defendant has never transferred the suit premises to anyone, and it's the plaintiff who has trespassed on the defendant's plot, and prayed for judgement against the plaintiff for:-

a. An order of permanent injunction against the plaintiff whether by himself, his servants or agents or otherwise whosoever from entering or using the suit premises and a declaration that the plaintiff is a trespasser who wrongfully and unlawfully entered into the defendant's plot.

b. Damages for wrongful entry into, occupation and possession of and trespass onto the suit property of the defendant.

c. Costs of this suit.

d. Interest at court's rates.

EVIDENCE ADDUCED

8. The plaintiff testified as PW1 and adopted his witness statement as evidence-in-chief. He produced a sale agreement dated 3rd July 2010 (P.exhibit-1). He stated that he entered into a sale agreement with Rachel Tabu Kauli, where he purchased the suit premises Plot No.K. measuring 40ft×60ft. He stated that the suit premises was subsequently transferred to him vide a transfer letter (P.exhibit-3), and produced the receipt (P.exhibit-4) of Kshs 4,000 that he paid as transfer fees on 6th July 2010.

9. PW1 testified that after acquiring the suit premises, he applied and paid Kshs 1,000/= for the development of the plot, and produced the receipt as (P.exhibit-5). That he also paid for building plan which were approved, and he produced the application form for the plan approval receipt as (P.exhibit-6a), and an approval of the building receipt of Kshs 5,000 as (P.exhibit-6b). The witness stated that the suit premises was vacant and that he had been paying rate since he acquired it, and produced the rates receipts as (P.exhibit-7) and the building plans as (P.exhibit-8).

10. PW1 stated that after getting approvals for developments, he went to clear the suit premises for development, only to find the defendant had dumped building materials, stopping him from commencing the development. That on 3rd August 2012, the plaintiff, defendant, lands' officer, and the clerk to the County Council conducted a site visit on their respective plots, and that a letter dated 31st August 2012 and marked (P.exhibit-9), confirmed the suit premises belongs to the plaintiff.

11. PW1 further testified that the defendant had laid construction materials on the suit premises, and requested the plaintiff for a week to remove them, instead he commenced construction. This prompted the plaintiff to write a demand letter to the defendant (P.exhibit-10). The plaintiff clarified that his plot and that of the defendant were different in number, location and payment; that the defendant's allocation letter dated 22nd February 2005 is for Plot PDP NO. 140 KWL.10.2002/K measuring 0.044ha, which is different from his plot which is Plot NO. 140/KWL/005K measuring 40×60ft. PW1 stated that another difference between the two plots was in terms of payment for their respective plots. That the defendant paid Kshs 15,500 while the plaintiff had paid Kshs 10,700, and that for the rates the defendant paid Kshs 3,500 while the plaintiff paid Kshs 2,040. PW1 further sought to clarify that the defendant's (PDP Plot K) is in Block 4, while his plot (K) is in Block 5, and that the transfer of the plaintiff's plot was done from the County Council while that of the defendant PDP comes from the lands office.

12. On cross-examination, the plaintiff maintained that his plot is PDP 140/KWL/OO5/K that measures 40×60ft, which he bought from Rachel Tabu Kauli while the defendant's plot is PDP 140/KWL/10/002K. The witness denied knowing whether Rachel Tabu Kauli was the wife to the Town clerk of Kwale Town Council, and stated that she was allocated the plot on 29th December 2005 while the defendant was allocated on 22nd February 2005, and that if reference was made to one plot it's the defendant who was allocated earlier. The witness stated that his receipt, which was signed by the Town Clerk, Mr. Francso N. Kauli, shows that payment was made on 6th July 2010 but he could not confirm if it was paid within 30 days as indicated on the letter.

13. PW1 testified that before he purchased the suit premises he was shown the original allotment letter, and that he is not colluding to defraud the defendant. He further stated that on 31st August 2012, he went to the land surveyor with the defendant, though the exhibits he produced did not indicate that the defendant was present. He also stated that the defendant was charged in a criminal case but was acquitted

of the charges.

14. In reference to the map on the defendant's documents, PW1 stated that his map is different from the defendant's and that (K) is the shaded part which is present in each block, and he affirmed that his block is (5) and that of the defendant is (4). He testified that that when they conducted a site visit, with the relevant officers, the defendant requested for a week to shift the materials to his plot. The witness told court that his plot is smaller in size compared to that of the defendant's, and he refuted claims that the defendant's plot had been subdivided. He further affirmed he has paid the rates from 2006 until 2012 and that the defendant should go to his plot not his.

15. On re-examination, PW1 sought to clarify that when he bought the suit premises in 2010, it was vacant with no development and that the same year, allotment was done and later transfer was completed when he paid the outstanding rates. He also stated that the defendant has not filed a counterclaim against the County Council to accuse it of taking his plot.

16. PW2 (Hussein Said Garashi) testified and sought to produce his witness statement dated 4th September 2012 and filed in court on 2nd October 2012, and he adopted it in court as his evidence in chief. On cross examination he stated that he has never lived on the suit premises that measures 50m×50m, neither has he ever brought any document to court showing that he agrees with the plaintiff's case. The witness was not re-examined.

17. The plaintiff called his third witness, Joel Odhiambo (PW3). He stated that he is a licensed land surveyor, with a current practicing certificate. He stated that he has worked as a Provincial Surveyor, Coast Province from 2003 to 2005, and in 2008 he resigned as an Assistant director and went to private practice.

18. PW3 stated that he was approached by the plaintiff in 2018 to carry out survey, to ascertain how the suit premises relates to Plot PDP 140/KWL/17/2007K Block 4. He stated that the plaintiff took him to the site where he carried out the survey of that site that is captured on page 13 of the report. He further stated that he based his survey on the old survey of Huduma centre that was done in 1997, and the adjacent plot which is Kenya National Library Services (KNLS) which was surveyed in 1997.

19. PW3 produced (P.exhibit-11). He stated that the edges marked red indicate the site he surveyed on the ground, and that page 12 shows the two plots on the PDPs. That the blue one is for Block 4, while the green one is for Block 5, which both were plotted by scanning and geo-referencing. He referred to page 6 that shows how he scanned the plot on Block 5 while page 8 shows how he scanned and digitalized the one on Block 4. He also stated that page 14 shows how he related all the three portions marked A,B,C. D is the plot that he surveyed from the ground while the green plot is the one on Block 5, while the blue plot is the one on Block 4.

20. The witness made two conclusions from his report. The first conclusion was that the site that was pointed out to him by the plaintiff and the plot No. 140/KWL/17/2007 in Block 5 are one and the same plot. The second conclusion was that plot No. 140/KWL/10/2002K Block 4 is a separate and distinct plot from the other two. He went ahead to confirm that Plot Block 4 and Block 5 are not adjacent to each other as there are three plots in between them.

21. On cross examination, PW3 stated that he conducted the site visit on 16th and 18th June 2018, and the instructions are indicated in the paragraph headed 'assignment', and that under methodology he instructed his assistant to visit the site. He further stated that in the report, he has attached the two PDPs and that survey cannot be done without attaching the old beacons. He also stated that he went to Survey of Kenya offices, while his assistant went to the County Physical Planning offices but couldn't get any help. However the county office still signed the report despite them not having any written communication between them.

22. When asked about the photos, the witness stated that on page 17 of the report, K is on the left while L is on the right, while on page 19 Block 4 is neighboring Block 5 but not the plots, and on page 7 it shows the traverse points. He further sought to clarify that he used both PDPs; the first PDP showed the post office, a road, and across the road to the right, D.A.O residence, which may not be there since PDP is a proposal. On the second PDP is the post office road and D.A.L.E.O, that PDP is for 2002 and has since changed in 2007 as well as the alignment on the ground.

23. PW3 also stated that Block 5 had been surveyed because they found beacons on the ground, and as seen on page 17 of the report the developments are on Block 5. He further stated that he visited both plots but did not survey both plots. The one that he surveyed was approximately 0.027ha. In reference to page 13 is DP1 and DP2, which is a fence that he found on the ground. He stated that the other plot looked bigger than the one he surveyed but they were separate. The witness further stated that there were shrubs on Block 5, as seen on picture 4 on page 16 of the report and the bush on the left is part of that plot, while the blue roof behind is on the neighboring plot. He also stated that picture 6 on page 17 shows the shrubs and cleared areas, while picture 8 on page 18 shows the fence that he surveyed. He stated that he did not do historical aspects of the plot, neither did he see the titles to the plot, and he just compared PDPs, since the neighboring plots had no title.

24. On re-examination PW3 stated that the plaintiff instructed him based on the orders issued by court. He sought to explain that a block in a PDP is a whole land earmarked for subdivision later, and that a plot is what results when blocks are broken down through subdivision and transfer. He further stated that the PDP of 2002, seems not to have been drawn in to the blocks such that what is referred to as Block 4 is only part of Block 4, leaving out some other area, making the alignment not respect the roads on the ground. With that the plaintiff closed his case.

25. The defendant testified on 10th November 2020, and adopted his witness statement dated 28th September 2017, and filed on 2nd October 2017 as his evidence in chief. He also produced his list of documents filed on 4th October 2012 as exhibits 1-5, and documents No 3 and 5 on the supplementary list of documents filed on 2nd October 2017 as exhibits 6 and 7 respectively.

26. He stated that when he was given Plot K by the Town Council of Kwale County Government, it was empty and that he was shown the beacons. He further stated that when he wanted to fence it for developments, someone else claimed it. He later brought stones to construct a

perimeter wall, which he didn't construct but he used to inspect it. He stated that he was allocated the plot in 2005, and that the plaintiff wants to grab the plot from him yet he has all the documents to it. He stated that he has filed a counterclaim against the plaintiff, and prays to court to declare that the plot is his so that he can develop it.

28. On cross examination, he stated that the application he made to Town Council of Kwale for allocation was lost, however on his (D.exhibit-1) he was allocated Plot No K vide an allocation letter dated 22nd February 2005, which makes reference to PDP NO. 140 KWL.10.2002/K which is (D.exhibit 3). That the plot K is shaded and above it are plots H, I, J and below are Plot L, M then there is a road.

28. He also stated that he had taken possession of his plot and even deposited stones within 1-2 years to construct a perimeter wall which he did not need an approval to construct. However he could not recall if he submitted building plans within six months as required by the special conditions. He also stated that he has not seen the surveyor's report submitted by the plaintiff, and he denied its report that there are two different plots. He made reference to another surveyor's report that he prepared but he could not remember where it was. DW1 testified that Rachel Taabu Kauli is a stranger to her, and that he was allocated the plot by the Town Council of Kwale who have all the records and that they can change those records if need be.

29. On reexamination, he stated that he was allocated plot K long ago and he did not know the plaintiff's plot, and that there was no time that the Kwale County Council has written to him to say that the plot was not his. He stated that neither he nor the plaintiff have sued the County Government, and that he has not seen any surveyor from the County Government of Kwale. He concluded by stating that the second PDP, has more plots than the first one so the second one must be fake. With that the defendant closed his case.

SUBMISSIONS

30. The plaintiff herein filed his submissions on 15th January 2021 and stated that he has proved his case beyond reasonable doubt that he acquired the suit premises rightfully, and which were transferred to him by the Kwale Town Council after making all the necessary payments. The plaintiff submitted that as much as the defendant denied trespassing on the plaintiff's suit premises, he did not state that Plot No. 140/KWL/10/2002K Block 4 is different from the plaintiff's Plot No. 140/KWL/17/2007K Block 5, and insisted that there was no 2K's plots despite the Surveyor's report which detailed and differentiated the two plots of the plaintiff and the defendant. The plaintiff insisted that there was no fraud on his part as alleged by the defendant in his statement of defence and counterclaim.

31. The plaintiff stated that the defendant was in trespass of his parcel of land and that the suit having dragged for the past eight years, its only just for court to award him Kshs 2,000,000/= as damages for the loss incurred when he was not using the suit premises.

32. The defendant filed his submission on 11th March 2021 and stated that he is the rightful owner of the suit property as per his letter of allotment for Plot No. K from the Town Council of Kwale. That after he paid the requisite fees as seen from the receipt dated 1st March 2005 of Kshs 12,000/= and 3,500/= effectively accepting the offer. That after that, the plot became unavailable to anyone else including the plaintiff and one Rachel Kauli who was allegedly allocated the Plot nine months later and who is said to have sold it to the plaintiff.

33. The defendant sought to explain that at the time of allocation of Plot No. K to the defendant, there were no Blocks involved as alleged by the plaintiff, even on the PDP plans produced by both parties. That the alleged allocation to one Rachel Kauli and later to the plaintiff was fraudulent that was perpetuated by people at the Town Council of Kwale. That even if Rachel Kauli was allocated the plot, she did not pay premiums within 30 days as required as she only paid 4 years and 4 months later on 6th July 2010. The defendant further submitted that he had proved all the requirements for an injunction against the plaintiff and that the court should allow the counterclaim.

ANALYSIS AND DETERMINATION

34. I have considered the pleadings, the evidence tendered and the submissions made. The court finds that the issues for determination are as follows:-

i. Who between the plaintiff and the defendant is the rightful owner of the suit property?

ii. Whether the plaintiff is entitled to the orders sought in his plead.

iii. Whether the defendant is entitled to the orders sought in the counter-claim.

iv. Who is to bear the costs of the suit?

35. The bone of contention between the plaintiff and the defendant is the property which the plaintiff has described as Plot No. K KDP 140 KWL 17.2007 while the defendant has described the same as Plot No. 140.KWL.10.200K. The plaintiff's case is that he purchased the suit plot on 3rd July, 2010 from one Rachel Tabu Kauli. The plaintiff produced the sale agreement dated 3rd July, 2010 as P.Exhibit 1. The plaintiff also produced a copy of a letter dated 29th December, 2005 from the Town Clerk, Town Council of Kwale addressed to the said Rachel Tabu Kauli, a transfer and receipt for the transfer among other documents.

36. On his part, the defendant produced inter alia, a letter of allotment and receipts confirming that the plot was allocated to him by the Town Council of Kwale on 22nd February, 2005, and has been paying rent and rates. Both the plaintiff and defendant are claiming to be the rightful allottee of the suit property. Although the plaintiff's evidence is that his plot is different from that of the defendant, my assessment of the documents presented and the evidence adduced shows that this is an issue of double allocation. This is so because either of the parties is accusing the other of encroachment. The issue therefore is who between the defendant and Rachel Tabu Kauli obtained lawful allocation of the property.

37. I have perused the documents produced by both the plaintiff and the defendant. The court has observed that the letter of offer to Rachel Tabu Kauli is dated 29th December, 2005. The defendant on the other hand has produced a letter of offer dated 22nd February, 2005. Going by these documents, it is clear that the letter of offer to Rachel Tabu Kauli and which the plaintiff later purchased came about nine (9) months after the defendant had paid for the property. Therefore in my view, the property ceased to be available for allocation to Rachel Tabu Kauli once the same was paid for by the defendant. Further, there is also something curious about the purported allocation to Rachel Tabu Kauli. The letter offering her the property is dated 29th December, 2005 and she was to accept the offer by making some payments within 30 days, that is by about 29th January, 2006. Instead payment was made 4 years and 4 months later on 6th July, 2010. This was about five years after the defendant had paid for the property. No attempt has been made to present evidence from Rachel Tabu Kauli and the Town Council of Kwale to explain and clarify this obvious double allocation.

38. It is evident from the material on record that there was double allocation of the suit property. However, the defendant is holding documents which have been produced as exhibits showing that he was the first one to be allocated the plot and paid for it. Although the plaintiff has also produced documents showing the allocation to the person who he later purchased the Plot from, it is evident that the Plot had already been allocated to the defendant and therefore it is doubtful whether the same was still available for allocation to another person. Having explained the evidence on record, the court is not satisfied that the plaintiff has proven his case against the defendant on a balance of probabilities. On the other hand, this court is satisfied that the defendant has proven his counter-claim against the plaintiff. However the court is not satisfied that damages should be awarded in the circumstances of this case.

39. Accordingly, and in light of the above I hereby enter judgement as follows:-

a. The plaintiff's suit is dismissed.

b. Judgement is entered for the defendant in terms of Prayer (a) of the amended defence and counter-claim dated 10th March 2014.

c. Costs of the suit together with interest therein are awarded to the defendant against the plaintiff.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS, 2ND DAY OF JUNE 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE