



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 85 OF 2017

JILANI MONGO MADZAYO.....PLAINTIFF

VERSUS

JOHN NYAGAKA OSORO.....DEFENDANT

JUDGMENT

Background

1. By his Complaint dated and filed herein on 11th April 2017, Jilani Mongo Madzayo prays for Judgment against the Defendant for: -

- a) Vacant possession of the suit property by demolishing any wall or structures built by the Defendant on the suit property;***
- b) A permanent injunction restraining the Defendant by himself, his servants and/or agents or any person claiming through him from erecting the boundary wall round the suit property, from encroaching, trespassing, developing or otherwise from dealing with the suit property in any manner; and***
- c) Costs of this suit and interest thereon at Court rates.***

2. Those prayers arise from the Plaintiff's contention that some time in the year 2009, he bought a portion of land measuring 50ft by 80ft from all that parcel of land known as Plot No. 885/III/MN and situated at Mtwapa within Kilifi County from Mtwapa Jumba Self-Help Group.

3. The Plaintiff avers that the said Mtwapa Jumba Self-Help Group is in the process of acquiring the said Plot No. 885/III/MN and that it has now sub-divided the same including the portion bought by the Plaintiff which is now designated as Plot No. 18. The Plaintiff asserts that some time in the year 2010, the Defendant who owns an adjacent parcel now designated as Plot No. 19 trespassed onto the Plaintiff's property and started erecting a boundary wall around the same.

4. The Plaintiff further avers that he proceeded to remove the wall but again in March 2017 the Defendant started erecting another wall despite the Plaintiff's protestations and has since refused to remove the same.

5. But in his Statement of Defence dated 24th April 2017, John Nyagaka Osoro (the Defendant) avers that no cause of action either in tort or contract has accrued to the Plaintiff and that he has no capacity to sue for the reasons that: -

- a) The Plaintiff is not in physical possession and control of the suit land which in any event is not properly described;***
- b) The plan relied upon is not authenticated by the Director of Surveys as required under the Survey Act and the Land Registration Act;***
- c) The Letter of Allotment relied upon by the Plaintiff does not, and is incapable of conferring any interest in land;***
- d) The Plaintiff is neither a purchaser, nor an allottee of any land, let alone the suit land;***
- e) The Defendant is in actual, physical possession and control of the land, where he has erected two buildings since the year 2010.***

6. The Defendant avers that the Plaintiff has concealed the fact that he is the Assistant Chief Kijipwa Sub-Location while the suitland is in Shimo La Tewa Sub-Location and that he cannot be a squatter in the land situated outside his jurisdiction.

7. The Defendant further avers that the claim contravenes Section (3) of the Law of Contract as the Sale Agreement pursuant to which the Plaintiff allegedly purchased the land has not been exhibited. It is further his case that the cause of action accrued in the year 2009 or 2010 and that the claim being based on a tort of trespass to land is stale and time-barred by reasons of Section 4 of the Limitation of Actions Act.

The Plaintiff's Case

8. In support of his case, the Plaintiff called two witnesses at the trial.

9. PW1- Jilani Mongo Madzayo is the Plaintiff and a Senior Assistant Chief, Kijipwa Sub-Location. He testified that he bought the property now known as Plot No. 18 in the year 2009 from Mtwapa Jumba Self-Help Group at the price of Kshs 120,000/- and that pursuant to the purchase, he took possession of the land measuring 50ft by 80ft.

10. PW1 further told the Court he is a registered member of the said Mtwapa Jumba Self-Help Group and that the Group is in the process of acquiring the larger Plot No. 885/III/MN within which the suit property is situated. The Group has since sub-divided the larger parcel of land and designated the Plaintiff's land as Plot No. 18 while that of the Defendant is an adjacent Plot No. 19.

11. PW1 testified that some time in the year 2010, the Defendant trespassed onto the suit property and started to erect a boundary wall thereon. The Plaintiff removed the wall as a result whereof the Defendant lodged a complaint at Mtwapa Police Station for malicious damage. After some discussion, the Plaintiff agreed to reimburse the Defendant for the costs of the destroyed wall in the sum of Kshs 20,000/-. It was also agreed that the building stones that had been used in building the wall would remain to be the Plaintiff's property.

12. The Plaintiff further told the Court that once again in March 2017, the Defendant started erecting another boundary wall over the property and has now built a house thereon despite protestations by both the Plaintiff and the Mtwapa Jumba Self-Help Group. He told the Court that by the said actions, the Defendant had clearly shown his intention to permanently deprive him of his property and hence the institution of this suit.

13. On cross-examination, PW1 told the Court he bought the land from the Group at Kshs 7,000/- although the Sale Agreement does not mention Plot No. 18 anywhere. PW1 conceded that the Defendant had lodged a complaint against himself for destruction of property. He then agreed to compensate him by paying Kshs 46,000/-. He had not paid the Defendant a balance of Kshs 26,000/0 because he (the Defendant) refused to accept it.

14. PW1 further testified that he was not a member of the Group and that he was not one of those who had filed *Mombasa HCCC 177 of 2013* seeking orders of adverse possession. He further told the Court he was not given a membership Card but was issued with an Allotment Letter.

15. PW2- Victor Kuto Mwarandu is a resident of Mtwapa and the Coordinator of Mtwapa Jumba Self Help Group. He told the Court he could recall that the Plaintiff purchased a portion of land measuring 50ft by 80ft within the parcel of land known as Plot No. 885/III/MN in Mtwapa, from the Group at an agreed purchase price of Kshs 120,000/-. Thereafter, the Plaintiff took possession of the land. PW2, one Wabungu Ngome who was the Chairman of the Group and the Secretary Kapulanga M. Duni signed a Sale Agreement with the Plaintiff dated 24th August 2009.

16. PW2 further testified that he had seen another agreement produced by the Defendant dated 24th April 2009 purporting that the Group sold the land to the Defendant. He denied executing any such agreement and told the Court the Group never sold any land measuring 100ft by 100ft as purported in the Agreement. All the plots measure 50ft by 80ft.

17. On cross-examination, PW2 told the Court that Plot No. 885/III/MN was registered in the name of one Francis Jack Paul. He conceded that as a group they had sued the said Francis Jack Paul and Sossion Ltd in a case filed on 17th July 2020. They are seeking to be declared the owners of the said Plot No. 885/III/MN. He told the Court he had nothing to demonstrate he was an official of the Group which was started in 2004.

18. PW2 conceded that the Agreement between the Plaintiff and the Group had only three signatures of the Group's officials and not four officials. The Agreement does not refer to Plot No. 18. He also told the Court when the Plaintiff came to buy the land in 2009, he was an Assistant Chief in Kikambala which is far from the suitland.

The Defence Case

19. On his part, the Defendant called a total of four (4) witnesses at the trial.

20. DW1- Jonh Nyagaka Osoro is the Defendant and a businessman in Mtwapa. He adopted his Affidavit filed herein on 24th April 2017 in Reply to an application by the Plaintiff for interim relief. DW1 told the Court he is a squatter on the suitland and that he has a portion measuring about ¼ of an acre where he has erected two (2) houses which are occupied with a gated perimeter fence. DW1 further told the Court he has lived on the land for a long time and that he was aware that the squatters in a representative action have filed a suit in Mombasa seeking an order that they are entitled to the land by dint of adverse possession.

21. DW1 told the Court he came to know the Plaintiff in 2010 when the Plaintiff demolished his structures on the same land with the help of

strangers. He made a formal report to the Police and the Plaintiff was arrested. After two days in custody, the Plaintiff agreed that he had entered the land wrongfully and agreed to compensate the Defendant in the tune of Kshs 46,000/- to avoid prosecution for forcible entry and malicious damage. The Plaintiff paid Kshs 20,000/- immediately to secure his release but has since refused to pay the balance.

22. On cross-examination, DW1 told the Court he abandoned the complaint for trespass after the Plaintiff agreed to compensate him. He had acquired the Plot through his membership of the Mtwapa Jumba Self-Help Group. He had paid Kshs 5,000/- to become a member. He did not buy the land but was allocated the same when he became a member. He had been on the land since 2007, although he did not know the exact measurement thereof.

23. DW1 denied having 4 or 5 different plots within the area. He told the Court he lives on the land but has his business elsewhere. He further told the Court that PW2 (Victor Kuto) was present when he was allocated the land.

24. DW2 –Simon Alfred Lewa is a resident of Mtwapa and a member of the Mtwapa Self-help Group. He told the Court he knows all the squatters residing on the land known as Plot No. 885/III/MN. His neighbours are the Defendant and Alexander Mativo.

25. DW2 testified that he does not know the Plaintiff and that the Defendant was one of the squatters on the land. He told the Court the Defendant has erected two residential structures as well as a coral block perimeter fence around the land.

26. DW2 further told the Court that the original squatters had gone to Court to vindicate their title as persons in adverse possession of the suitland. The Plaintiff was not one of the Claimants in the matter in Court as he does not reside on the land.

27. On cross-examination, DW2 told the Court his Plot is 206 ft by 180 ft and that the Defendant's parcel is 100 ft by 100 ft in measurement.

28. DW3- Mtwana Katana Mwaseka is a resident of Mtwapa and the Secretary of the Mtwapa Jumba Self-Help Group. He told the Court he knows the Plaintiff as an Assistant Chief in Kikambala and that the Plaintiff resides there. He also knew the Defendant as a member of their Group and a resident of one of the plots measuring 100 ft by 100 ft.

29. DW3 told the Court they have no titles for the properties. They have gone to Court to ask that the land be given to them. As a Secretary, he told the Court he has never dealt with the Plaintiff, even though his name was in the Sale Agreement produced by the Plaintiff. He told the Court he never signed the document.

30. In cross-examination, he testified that he is the one who fills-in the gaps in the printed form by hand. It was however his case that the hand-writing in the Sale Agreement to the Plaintiff was not his own. He further told the Court they do not sell the parcels of land to the squatters but they are given to their members.

31. DW4- Kaplanga Mwala Duni is a small-scale businessman and the Organizing Secretary of Mtwapa Jumba Self –Help Group. He told the Court he knows the Plaintiff as an Assistant Chief Kijipwa Sub-Location. He came to know the Plaintiff when he demolished the Defendant's house. When the matter was reported to Mtwapa Police Station, the Plaintiff agreed he was at fault in demolishing the house and agreed to pay compensation. An agreement was done to that effect on 22nd February 2010. DW4 also signed the document. He told the Court that the Plaintiff paid Kshs 22,000/- and that he was to pay the balance later. He denied having been party to an agreement which allocated the suit property to the Plaintiff.

Analysis and Determination

32. I have carefully perused and considered the pleadings filed herein, the rival testimonies of the witnesses as well as the evidence adduced at the trial herein. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

33. The Plaintiff has instituted this suit craving to be granted vacant possession of a portion of land measuring 50 feet by 80 feet and more particularly known as Plot No. 18 situated within all that parcel of land known as Plot No. 885/III/MN. In addition, the Plaintiff prays for a permanent injunction restraining the Defendant from erecting a boundary wall over the premises and or in any way developing or dealing with the land.

34. It was the Plaintiff's case that he bought the suit property in the year 2009 as an unregistered portion of land comprised in the bigger parcel of land known as Plot No. 885/III/MN from an entity known as Mtwapa Jumba Self-Help Group. According to the Plaintiff, the said Group was then in the process of acquiring the main Plot No. 885/III/MN and had proceeded to sub-divide the same into various portions which were then allocated to various people.

35. Among those who benefited from the sub-divisions were the Plaintiff and the Defendant whose parcels of land were adjacent to each other. The Plaintiff told the Court that while his own parcel was designated by the Group as Plot No. 18, the Defendant was allocated Plot No. 19.

36. It was further the Plaintiff's case that sometime in the year 2010, the Defendant trespassed onto his portion of the land and started erecting a wall thereon. The Plaintiff proceeded to demolish the wall as a consequence whereof he was summoned to Mtwapa Police Station and was compelled to compensate the Defendant for the damaged wall. The Plaintiff produced a Copy of the compensation agreement executed at the Police Station on 22nd February 2010.

37. The Plaintiff told the Court that later on in March 2017, the Defendant did once again trespass onto the suit property after which he

hurriedly started construction of the same boundary wall. The Defendant had since erected houses on the land thereby compelling the Plaintiff to come to Court for redress.

38. On his part, the Defendant told the Court that he has been a Squatter on Plot No. 885/III/MN and that on 24th April 2009, he was allocated a portion thereof measuring 100 ft by 100 ft by the same Mtwapa Jumba Self-Help Group. He denies occupying any plot adjacent to any owned by the Plaintiff. According to the Defendant, the Plaintiff is an Assistant Chief in far away Kijipwa where he resides and he has never been a squatter on the said Plot No. 885/III/MN.

39. The Defendant told the Court that when in the year 2010 he had built a wall around the disputed property, the Plaintiff demolished the wall with the help of some strangers. The Defendant then lodged a formal complaint with Mtwapa Police Station leading to the Plaintiff's arrest. After two days in custody, the Plaintiff agreed to pay him compensation for the demolished wall.

40. As it were both parties herein traced their ownership of the suit property to the entity known as Mtwapa Jumba Self-Help Group. While the Plaintiff's case was that he had purchased the suit property from the said entity vide an agreement dated 24th August 2009, the Defendant took the position that it had been allocated the land by the very same entity vide a Letter of Allotment upon becoming a member thereof on 24th April 2009.

41. Interestingly, the records of the said entity and/or its constitution or charter were not produced by either of the disputants. That made it possible for the officials of the entity to take opposing views as to which party herein was the rightful owner of the suit property. While the Group's Coordinator Victor Kuto Mwarandu took the Plaintiff's side, its Secretary Mtwana Katana Mwatseka (DW3) and Committee Member Kaplanga Mwalaa Duni (DW4) took the side of the Defendant.

42. Arising from the testimonies of the witnesses who were officials of the Group herein, the sticking point appeared to be whether the Group was selling the land or allocating it to its members. In this respect, the Defendants witnesses who testified herein as DW2, DW3 and DW4 went out of their way to demonstrate that the Group was not selling the land but was allocating the same to its members such as the Defendant. They denied having allocated any of the land to the Plaintiff and disputed the validity of his letter of allotment on the ground that it had not been signed by all the five (5) authorized officials of the Group and further that it did not show the names of the owners of the adjacent parcels of land.

43. As it turned out, the Letter of Allotment issued to the Defendant was equally not signed by five Officials. And while they denied that the Group was selling the land, the Defendant himself produced in his List of Documents, documents that clearly traced his acquisition of the land to a purchase thereof. By his letter dated 11th March 2017 addressed to the Plaintiff herein, the Defendant's Advocate wrote as follows in the relevant portion: -

"I act for Mr. John Nyagaka Osoro, the initial owner by allotment and purchase of a portion of land measuring 1/8 of an acre, being part of the Original Plot No. 885 of Section III Mainland North.

My Client was allocated the aforesaid plot by the Committee which superintended the sub-division of the larger plots amongst the squatters, who have since gone to Court, claiming the land under adverse possession in ELC Case No. 177 of 2013."

44. The contents of the above letter are interesting as the same does not make any claim that the Defendant was a squatter and or that he had been on the land for a long period of time to warrant his claim to ownership thereof. While the letter talks of the Defendant purchasing the land and being given a letter of allotment, at the trial herein, the Defendant and his witnesses laboured to point out that the Defendant had been a squatter on the same property long before the Plaintiff arrived on the scene.

45. From the evidence of the witnesses before the Court, the Mtwapa Jumba Self Help Group was formed in the year 2004. According to DW3 and DW4, it is this Group that gave the Defendant an unregistered parcel of land measuring 100ft by 100 ft on 24th April 2009. Prior to that date, there is nothing to show that the Defendant was in occupation of any portion of the parcel of land known as Plot No. 885/III/MN. There would indeed be no reason for him to purchase the land from the Group if indeed he was living thereon.

46. When the Defendant made his initial entry on the land in 2010, the Plaintiff who already laid a claim to the land had rebuffed his attempts by demolishing the perimeter wall he had built thereon. Upon the Plaintiff's arrest and brief incarceration, the parties signed an agreement on 22nd February 2010 in the presence of the Police and the Officials of the Group.

47. A perusal of that agreement reveals that it not only allowed the Plaintiff to avoid being prosecuted for malicious damage but also, curiously kept the Defendant off the land. While the Plaintiff was to pay compensation for the stones used by the Defendant in the sum of Kshs 46,000/-, the Plaintiff was allowed to retain the stones on the suitland.

48. In accordance with that Agreement, the Defendant kept off the land until March 2017 when he returned thereto and started building houses thereon. In my mind, the only reason the Defendant had kept off the land for that long period was the tacit acknowledgment on his part that the land belonged to the Plaintiff.

49. While at the trial herein the Defendant traced his ownership of the land to an allocation of the Group, it was clear from a perusal of paragraph 8 of the Affidavit on which he relied as his statement herein filed on 24th April 2017 that he considered the Group as an amorphous body with no capacity to confer any rights to the land.

50. In the premises, I am persuaded that the Defendant had trespassed onto the suit property not in the year 2009 as he purports but in March 2017 when he re-entered the land and started erecting buildings thereon. That act of trespass did not confer any proprietary rights on

himself over the property. A party cannot invade the land of another and then contend that he is now in possession and that therefore the owner of the land should not be allowed to maintain an action founded in trespass.

51. The developments done by the Defendant on the suitland were clearly done at his own peril. He was aware of the Plaintiff's claim on the suitland as far back as the year 2010. Their presence cannot give him any protection against the Plaintiff's claim for trespass.

52. Accordingly, I am satisfied that there is merit in the Plaintiff's claim and that he has proved his case on a balance of probabilities. The result is that Judgment is hereby entered for the Plaintiff as prayed against the Defendant with costs.

53. The Defendant shall have 45 days from today within which to hand over vacant possession and remove his structures from the suitland failure to which he shall be evicted forthwith therefrom.

54. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER, 2021.

J.O. OLOLA

JUDGE