



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 3 OF 2017

MALINDI GINNERIES LIMITED.....PLAINTIFF

VERSUS

KAHINDI THOYA CHEA AND 99 OTHERS.....DEFENDANTS

JUDGMENT

Background

1. By its Complaint dated 6th January 2017 the Plaintiff prays for Judgment against the 100 listed Defendants herein for: -

1. An order of permanent injunction restraining the Defendants jointly and severally or any person unlawfully present either by themselves, their agents, servants or otherwise howsoever from interfering with the Plaintiff's quiet possession of Portion No. 1737 (Original No. 290/2) Malindi and Portion No. 300 Malindi situated at Msabaha Area of Malindi District in Kilifi County;

2. An order of permanent injunction restraining the Defendants jointly and severally or any person unlawfully present, either by themselves, their agents, servants or otherwise howsoever from occupying, selling, charging, leasing or in any way alienating and/or disposing of Portion No. 1737 (Original Number 290/2) Malindi and Portion No. 300 Malindi situated at Msabaha Area of Malindi District in Kilifi County;

3. An order of compulsory eviction of the Defendants or any person or structure or development found unlawfully present in the Plaintiff's Portion No. 1737 (Original No. 290/2) Malindi and Portion No. 300 Malindi situated at Msabaha Area of Malindi District in Kilifi County;

4. General and exemplary damages as this Honourable Court may deem fit;

5. The Defendants to bear the costs of this suit; and

6. Any or further relief that this Honourable Court shall deem fit to grant.

2. The basis of those Prayers is the Plaintiff's contention that at all times material to this suit, it was the registered proprietor of the said Portion No. 1737 measuring approximately 136.5 Acres as well as Portion No. 300 measuring 66.49 acres. Sometime in the year 2012, the Plaintiff found some 64 squatters on its parcels of land and following a meeting with the said squatters on 23rd May 2012, the Plaintiff agreed to allot the 64 squatters the portions of land they had occupied.

3. The Plaintiff avers that on learning of its good gesture and intent on taking advantage of its good will and generosity, the Defendants herein in the year 2015 invaded the subject properties, cut down trees and proceeded to put up temporary and permanent shelters thereon. Despite the Plaintiff's protestations and efforts by the Provincial Administration to stop the trespass, the Defendants have remained on the subject properties and have proceeded to deny the Plaintiff access thereto by threatening violence.

4. The 100 Defendants filed a Memorandum of Appearance herein on 17th May 2017 through Michira Messah & Company Advocates. On 10th July 2017, Joseph Owino Omondi (the 32nd Defendant) filed a Notice to Act in person as well as his own Statement of Defence in which he did indicate that he had bought his portion of land from one of the original 64 squatters that had been allotted the land by the Plaintiff. The rest of the Defendants neither filed a Statement of Defence nor did they participate in the proceedings herein.

5. By a consent order dated 30th January 2020 and filed herein on 31st January 2020, the Plaintiff withdrew and discontinued the suit as

against Felix Saha (the 28th Defendant) as well as the 32nd Defendant.

The Plaintiff's Case

6. At the trial herein, the Plaintiff called one witness who testified in support of its case.

7. PW1- Omar Ahmed Ali is a director of the Plaintiff company. He told the Court that the Plaintiff is the registered owner of Land Portion No. 1737 (Original No. 290/2) situated at Msabaha Area in Malindi. The Plaintiff is also the registered owner of Land Portion No. 300 Malindi which is adjacent to the said Portion No. 1737.

8. PW1 testified that in the year 2012, the Plaintiff conducted a manual count of squatters households within the subject properties and established that there were 64 squatters. On 23rd May 2012 in a meeting between the Plaintiff and the said squatters, the Plaintiff agreed to allot the said 64 squatters with the portions of land that they had already occupied.

9. PW1 told the Court that it later turned out that several other individuals learnt of the Plaintiff's goodwill gesture and hoping to take advantage of the Plaintiff's generosity, they invaded the subject properties in the hope of being considered as the earlier squatters.

10. PW1 told the Court that in the year 2015, they established that the Defendants herein had on diverse dates in the course of that year clandestinely and without any colour or right trespassed upon the subject properties, cut down the trees that were thereon and proceeded to put up temporary and permanent shelters with a view to unlawfully settling thereon.

11. PW1 testified that the Defendants' invasions were captured and reported in a letter dated 27th July 2015 by the Area Chief Ganda Location. The Chief's letter provides a list of the masterminds behind the invasion and shows that the Chief tried to dissuade the invasion into private property but the Defendants did not heed the warning.

12. PW1 further told the Court that on 6th January 2016, the National Land Commission notified the Defendants that the invasion of the Plaintiff's properties and those of others in that area was patently unlawful and should cease. He told the Court the Defendants have since denied the Plaintiff access to the subject properties by threatening violence upon the Plaintiffs directors, agents and employees.

Analysis and Determination

13. I have carefully considered the pleadings as filed herein by the Plaintiff, the testimony of the Plaintiff's sole witness as well as the evidence tendered at the trial. I have similarly considered the submissions placed before me by Counsel for the Plaintiff. Despite filing a Memorandum of Appearance, the Defendants neither filed a Statement of Defence nor did they participate in the proceedings herein.

14. The Plaintiff company craves an order of permanent injunction restraining the Defendants jointly and severally from occupying, selling, charging, alienating or in any manner whatsoever interfering with its quiet possession of the subject properties situated at Msabaha area of Malindi. It also prays for an order of compulsory eviction of the Defendants from the subject properties as well as an order for general and exemplary damages.

15. It is the Plaintiff's case that at all material times, it was the registered proprietor of the two adjacent parcels of land identified as Portion No. 1737 (original No. 290/2) Malindi and Portion No. 300 situated at Msabaha Area of Malindi. The Plaintiff asserts that sometime in the year 2012, it did establish a manual count that some 64 households lived on portions of the suit properties as squatters. On 23rd May 2012, the Plaintiff held a meeting with the said 64 squatters and agreed to allot to them the portions that they had already occupied.

16. The Plaintiff told the Court that following this goodwill gesture, the Defendants having learnt of the same invaded the suit properties on different occasions in the year 2015, cut down trees and put up temporary and permanent shelters with a view of settling thereon and in the hope to benefit from the land as per the original 64 squatters. When the Plaintiff declined to extend the same gesture to them, the Defendants have now turned hostile and have denied the Plaintiff access to the suit properties by threatening to visit violence upon the Plaintiff's directors and agents.

17. As it turned out the Defendants only filed a Memorandum of Appearance herein. They neither filed a Statement of Defence nor tried in any way to refute the Plaintiff's claim.

18. Testifying at the trial herein, the Plaintiff's director Omar Ahmed Ali produced as exhibits herein the titles for the suit properties. A perusal thereof reveals that the same are in the name of the Plaintiff company. In that respect, Section 26 of the Land Registration Act provides as follows: -

(1) 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, except: -

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

b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

19. It is clear from a perusal of a Copy of the Indenture dated 30th September 1948 and the Certificate of Postal Search dated 8th February 2001 that the Plaintiff is the proprietor of the suit properties. The Plaintiff told the Court that the Defendants had encroached upon the said property without its consent and had proceeded to erect houses thereon while others sold off parts thereof, to third parties. The Plaintiff's testimony remains uncontroverted as the Defendants chose not to file any documents herein and or to take part in the proceedings.

20. As it were the Land Registration Act is very clear on the rights of a registered proprietor to land. Section 24 (a) thereof provides thus: -

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

21. That being the case, the Defendants entry onto the subject properties without the authority and or permission of the Plaintiff cannot be consistent with the Plaintiff's absolute ownership thereof and I am therefore satisfied that the Plaintiff has proved its case on a balance of probabilities.

22. The Plaintiff has also asked for general or exemplary damages. The Plaintiff did not address the Court as to the amount of damages that they seek in compensation. As it were however, where trespass is proved a party need not prove that he has suffered any specific damage or loss to be awarded damages. In the circumstances herein, I think an award of Kshs 3 Million will suffice to compensate the Plaintiff for its loss.

23. Accordingly, I hereby enter Judgment for the Plaintiff as prayed in the Plaint with general damages assessed at Kshs 3 Million.

24. The Plaintiff shall also have the costs of this suit.

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

J.O. OLOLA

JUDGE