



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 315 OF 2016

SAMSON NZARO.....PLAINTIFF

VERSUS

BONFACE NGARI..... DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated 18th November 2016 as amended on 7th March 2018, Samson Nzaro (the Plaintiff) prays for Judgment against Boniface Ngari (the Defendant) and for orders listed as follows:-

a) A permanent injunction order be issued against the Defendant restraining (him) whether by himself, agents and/or servants howsoever from disposing, selling, leasing and/or interfering with the Plaintiff's property and occupation of the suit property in any manner whatsoever;

b) An order for payment of compensation in respect of the value of the building premises to be determined by the Court;

c) Costs of the suit and interest thereon at Court rates; and

d) Such other or further relief as this Honourable Court may deem fit and just to grant.

2. The Plaintiff's prayers are premised on his contention that sometime in the year 2014 he entered into an oral lease agreement with the Defendant in which the Defendant agreed to lease to him a portion of land situated at Mabirikani/Sokote area in Kilifi for the Plaintiff to build and operate a Posho mill.

3. The Plaintiff avers that pursuant to the said agreement, he paid the agreed rent, took possession of the land and constructed the Posho Mill at a cost of Kshs 220,000/-. However on 26th September 2016, the Defendant unilaterally stopped the Plaintiff from accessing and using the building he had put up for the Posho Mill thereby occasioning loss and damage to the Plaintiff.

4. But in a Statement of Defence dated 27th February 2017, the Defendant denies entering into any oral agreement in respect of his parcel of land with the Plaintiff. The Defendant further asserts that he has no knowledge that the Plaintiff built a Posho Mill on his land and/or that its value was Kshs 220,000/- as stated by the Plaintiff and invites the Plaintiff to strict proof thereof.

The Plaintiff's Case

5. At the trial herein, the Plaintiff testified as the sole witness in his case. He told the Court that the Defendant is his uncle and that sometime in 2014, he entered into an oral lease agreement with him. By the said agreement, the Defendant agreed to lease to the Plaintiff a portion of his parcel of land situated at Mabirikani area measuring 50 x 50 feet at a monthly rent of Kshs 200/-. The Plaintiff was to erect a building on the land in which he would operate a Posho Mill.

6. The Plaintiff testified that pursuant to the said Agreement, he paid the rent, took possession of the land and constructed the building. The two had agreed that they would reduce the oral agreement into writing once the Plaintiff finished the building and commenced the Posho Mill business. In the meantime the Plaintiff would make the monthly payment through the M-pesa mobile money transfer system.

7. According to the Plaintiff, upon completion of the construction, the Defendant kept postponing the issue of reducing the agreement into

writing. Subsequently on 26th September 2016, the Defendant prevented the Plaintiff from accessing the building altogether and evicted the Plaintiff therefrom.

8. The Plaintiff told the Court that he thereafter reported the matter to the area Assistant Chief and after deliberations, the Defendant offered to compensate the Plaintiff for the building. The Plaintiff then engaged a Valuer who assessed the value of the building as Kshs 220,000/-. The Defendant has however since refused to compensate the Plaintiff as agreed.

9. On cross-examination, the Plaintiff conceded that the parcel of land did not belong to him and further that he had not produced any receipts to show how much he bought the building materials. He denied that he was merely supervising the construction on behalf of his uncle-the Defendant.

The Defence Case

10. The Defendant similarly testified at the trial as his sole witness. He told the Court that the Plaintiff who is his relative at one time went to his house and requested to be allowed to establish a Posho Mill on his land. The Defendant allowed him to do so. It was a verbal agreement and the parties never agreed on the rent to be paid.

11. The Defendant told the Court that it was only one day that he met the Plaintiff in Kilifi and because he was in some need for money, the Plaintiff agreed to give him Kshs 4,000/-. The money was given to him in installments.

12. The Defendant told the Court that contrary to the Plaintiff's assertions, he had never agreed to compensate him. It is the Plaintiff who went with a Valuer and started demanding payment. The Plaintiff later changed the amount of compensation he was seeking. The Defendant told the Court that the value of the structure the Plaintiff had put up could be about Kshs 70,000/- only.

13. During cross-examination, the Defendant told the Court that the Plaintiff never completely finished the Posho Mill. In September 2016, he had asked someone to plough the land with a tractor and the Plaintiff started complaining that the land had been ploughed without his consent. The Defendant's family then asked the Plaintiff to leave.

14. The Defendant further told the Court that even though the value of the structure was Kshs 70,000/- according to his estimates, he was not willing to compensate the Plaintiff for that figure as there were certain building materials which the Plaintiff could still retrieve.

Analysis and Determination

15. I have perused and considered the pleadings filed herein, the testimony of both the Plaintiff and the Defendant as well as the evidence adduced by both parties. I have equally considered the written submissions as filed before me by the Learned Advocates for the parties.

16. From the material placed before me, it is not in dispute that sometime in the year 2014, the Plaintiff and the Defendant entered into an oral agreement in which the Defendant agreed to allow the Plaintiff to construct a building to be used as a Posho Mill.

17. It is also clear to me the parties had agreed that upon completion of the construction of the building the parties would enter into a lease agreement for the lease of the portion of the land measuring 50 x 50 feet situated at Mabirikani in Konjora location, Bahari Division of Kilifi County on which the building was to be constructed.

18. This can be discerned from the testimony of the Plaintiff herein as well as from paragraph 3 of a Replying Affidavit sworn and filed herein by the Defendant on 28th February 2017 in response to the Plaintiff's application dated 18th November 2016 wherein the Defendant avers as follows:-

“3. That sometime in the (year) 2014, the Plaintiff who is my nephew requested for space in my shamba the suitland herein at Mabirikani Sokoke and I consented. We briefly agreed that we would plan a proper lease arrangement once he puts up a development thereon.”

19. It is also clear to me that while the Plaintiff proceeded to construct the building on the Defendant's parcel of land as agreed, the parties never entered into the proper lease agreement envisaged. Instead, the parties disagreed and according to the Defendant, his family asked the Plaintiff to leave their land.

20. The Plaintiff then proceeded to file this suit seeking orders of injunction to restrain the Defendant from interfering with his property and compensation for the value of the building he constructed on the Defendant's land.

21. From the material presented before me, it is clear that the suitland is owned by the Defendant and not the Plaintiff. Indeed, the Plaintiff does not have a valid lease agreement between him and the Defendant and it was evidently not the intention of the parties that the Plaintiff would own the portion of land measuring 50 x 50 feet once the construction of the Posho Mill was complete. The idea was that it would be leased to him and I therefore find no basis for the Prayer for injunction to restrain the Defendant from disposing the land or interfering with the Plaintiff's occupation of the land in the absence of any binding agreement between them.

22. It was however evident that the Plaintiff relied on the Defendant's permission and conduct to construct the building which was to house the Posho Mill. As a result of the Defendant's assurance, the Plaintiff incurred expenses in erecting the building and now stands to lose the income that he would have earned had the Posho Mill been operational.

23. According to the Defendant, the building put up by his nephew was nothing more than Kshs 70,000/- in terms of its value and worth. Asked during his cross-examination whether he was willing to compensate the Plaintiff at the said sum, the Defendant retorted that he was not willing to do so as according to him some of the building materials can still be salvaged by the Plaintiff. The Defendant did not give the basis for the sum of Kshs 70,000/- nor particulars of the materials that were capable of being salvaged. Nor did he state what the Plaintiff would do with the same now that the purpose for which he acquired them had hit a dead end.

24. In his testimony before the Court, the Plaintiff produced a Valuation Report (Exhibit 2) of the building he constructed on the suit property. The Report by Next Level Valuers and Property Consultants dated 7th November 2016 places the value of the building as at 28th September 2016 when they conducted the valuation at Kshs 220,000/-.

25. In the absence of any other Valuation Report with a contrary value, this Court is persuaded that the building is worth the said Kshs 220,000/- and that the Defendant ought to pay the said amount to the Plaintiff as compensation now that he no longer desires to have the Plaintiff operating the Mosho Mill on his property.

26. In the premises, Judgment is hereby entered for the Plaintiff as prayed at Paragraph 'b' of the Amended Plaint dated 7th March 2018.

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

Dated, signed and delivered at Malindi this 30th day of January, 2020.

J.O. OLOLA

JUDGE