



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

E.L.C CASE NO. 46 OF 2017

AHMED ABDIRAHMAN HASSAN.....PLAINTIFF

VS

ABDISHUKRI HAJI ABDI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 15th June, 2017 the plaintiff prays for the following reliefs;

- a) A Declaration that the suit Property comprised in Title Number MANDERA TOWNSHIP BLOCK 2/62 is his lawful property.
- b) A permanent Injunction restraining the defendant whether by himself or through his servants, agents, or other persons acting on his behalf or for his benefit from entering, re-entering, remaining on, carrying out construction work on it, depositing construction materials on, blocking, or doing any other work or activity of whatsoever nature or for whatsoever purpose in or around the residential leasehold property situated within Mandera town being the property comprised in Number **MANDERA TOWNSHIP BLOCK 2/62**.
- c) An interim restraining order injunction restraining the defendant whether by himself or through his servants, agents, or other persons acting on his behalf or for his benefit from re-entering, remaining on, carrying out construction work on, depositing construction materials on, blocking, or doing any other work or activity of whatsoever nature or for whatsoever purpose in or around the residential leasehold property situated within Mandera town being the property comprised in Number **MANDERA TOWNSHIP BLOCK 2/62** until the hearing and determination of this suit or further orders of the court.
- d) An order for eviction of the defendant from the suit premises, the order of the court to be effected by the Officer Commanding Station, Mandera Police Station.
- e) Costs of the suit.

2. The plaintiff case is that he is the registered proprietor of all that undeveloped leasehold residential property measuring 0.0176 hectares or thereabout situated in mandera town for which he holds a certificate of lease dated 12th May, 2013 in respect to title Number **MANDERA TOWNSHIP BLOCK 2/62**, for a term of 99 years from 1st April, 1992.

3. He avers that upon securing ownership of the subject property, he enjoyed quite possession until the year 2015 when upon returning to Mandera from a foreign trip found that the defendant had trespassed into his property and taken possession of the same. The defendant had deposited construction materials and started construction of a perimeter fence around the suit property using permanent materials.

4. The plaintiff avers that he subsequently lodged a complaint with the National Land Commission Office situated at Mandera; however, the defendant failed to produce any document backing his action, but instead continued trespassing on the property necessitating his filing of the instant suit.

5. The defendant was served by advertisement in the Daily Nation Newspaper of 31st October, 2017. Upon request by the plaintiff, interlocutory judgment was entered against the defendants in default of appearance on 22nd November, 2017. The matter proceeded for formal proof on 28th January, 2020 wherein the plaintiff gave his testimony and did not call any witness.

6. The plaintiff adopted his witness statement filed on 5th July, 2017 as his testimony and evidence-in-chief and produced his list of documents dated 15th June, 2017, which were admitted as exhibits. It is his position that he is the registered proprietor of the subject parcel

of land, having been allotted the same in the year 1992 and was subsequently issued with a title in the year 2013. And in the 2015 the defendant trespassed and began putting up a perimeter wall, and in reaction he filed the instant suit and was granted injunction orders stopping the construction. He urged the court to issue the orders sought in the plaint.

Submissions

7. The Plaintiff filed their written submissions dated 4th February, 2020, where they reiterated their case as stated above. They submitted that they have demonstrated that the Plaintiff is the registered owner of the subject property, and that he has been making periodic yearly rent for the same.

8. It is their submissions that section 24(a), 25(1) and 26(1) of the Land Registration Act 2012 protects the registered owners of a parcel of land, and that in this case the plaintiff title has not been challenged and therefore this court should accord him the rights thereof. And since the defendant has failed to file a defence, they urged the court to grant a permanent injunction and an eviction order.

9. In sum, they submitted that they have established their case and urged the court to allow the suit with costs.

Issues and Analysis

10. I have looked at the Plaintiff documents and it is clear that he is the registered owner of the suit property. He has exhibited a title deed evidencing the same. The **Land Registration Act (No 3 of 2012)** at **Section 24 (a)** provides as follows:

"(a) 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;"

11. Additionally, these rights are adequately captured by **Section 25** of the **Land Registration Act**, which provides a registered owner of land is entitled to the rights and privileges thereto and the title deed they hold must be taken by court as prima facie evidence of ownership. Further, **Section 26** captures this point by providing:

"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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

12. **On burden of proof, Section 107** of the **Evidence Act (Cap 80) Laws of Kenya** provides: -

(1)"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.

(2)When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person."

13. In addition, **Section 109** of the same **Act** also provides:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

14. It is trite that in civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in **Kirugi & Another v Kabiya & 3 Others [1987] KLR 347** where the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof, although it becomes much easier to discharge.

Conclusion

15. Therefore considering the instant case in view of the foregoing, the question before this court is as to whether the Plaintiff has proved his case on a balance of probability. In this case the plaintiff has produced letters by the National Land Commission Mandera dated 22nd October, 2015 and another one dated 4th April, 2016 complaining of the defendant's trespass. This in my view would suffice as it shows the genesis of the dispute and that there is likelihood of the said trespass actually occurred.

16. The Defendant despite being served by way of substituted service did not enter appearance to challenge the Plaintiff claim, and consequently it is my finding that the Plaintiff has proved his case on a balance of Probabilities and I allow the suit with cost.

Read, delivered and signed in the Open Court this 28th day of February, 2020.

.....

E. C Cheronno (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Makori holding brief Misati for Plaintiff
2. Plaintiff: Present
3. Defendant/Advocate: Absent
4. Court Assistant: Fardowsa