



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 120 OF 2018**

**SILAS KASIWA KONDE.....PLAINTIFF**

**VERSUS**

**SAMMY KASIWA KONDE.....DEFENDANT**

**JUDGMENT**

1. By a Complaint dated and filed herein on 30<sup>th</sup> May 2018 Silas Kasiwa Konde (the Plaintiff) prays for Judgment against Sammy Kasiwa Konde (the Defendant) for:-

**a. A declaration that the entry by the defendant upon Portion Kilifi/Gongoni Settlement Scheme/146 is wrongful trespass for which ejection is issued to pull down, vacate and remove, at his expense, the defendant and his structure(s) and any other person claiming under or through him, from the suit land;**

**b. A permanent injunction to restrain the defendant by himself, his servants, family members, workmen or agents, or otherwise howsoever, (from) re-entering, remaining or otherwise again trespassing upon the said land; and**

**c. Damages and Costs of this suit.**

2. Those prayers arise from the Plaintiff's averments that he is the proprietor of the suit property measuring approximately 2.067 Ha. In or about 2018, the Defendant broke into and wrongfully entered upon the property whereupon he built a semi-permanent shelter which he occupies with his family despite the Plaintiff's protests.

3. The Plaintiff avers further that on 12<sup>th</sup> April 2018, he entered into an agreement for sale of the suit property with a third party, one Andrew Kibe Kang'ethe. When the said third party attempted to fence off the land, he was menacingly and violently stopped by the Defendant. It is the Plaintiff's case that the Defendant's threats of violence on the third party is intended to induce a breach of the contract for the sale of the land.

4. Upon being served with the Summons, the Defendant filed a Memorandum of Appearance through Ms Tonia Mwanja & Associates Advocates but neither filed a Statement of Defence nor participated in the trial herein. This matter accordingly proceeded by way of formal proof.

5. Testifying as the sole witness in his case, the Plaintiff told the Court that he is the registered proprietor of the suit property situated at Bora Bora Village in Gongoni, Kilifi County.

6. The Plaintiff told the Court that the Defendant is his son with his second wife and that he has established for his family a homestead at Gongoni Market. Sometime in 2018 however, the defendant declined to stay with the rest of the family at the homestead and proceeded instead to invade the suit property at Bora Bora Village where he now stakes a claim over a portion of the Plaintiff's property.

7. The Plaintiff told the Court that the Defendant's entry onto the suit property is wrongful, selfish and actuated by malice. He told the Court that he has been unwell and that he had initially agreed with the family that he sells the land to enable him to finance his treatment in hospital in Malindi or elsewhere as may be recommended by his doctors.

8. The Plaintiff further testified that the Defendant was aware that he had entered into a sale agreement for sale of the land and that he had received a deposit from the buyer which he used to get treatment but the Defendant proceeded to the land and stopped the buyer's workmen from erecting a perimeter fence on the suit land in order to frustrate the purchaser and scare him away from the sale transaction.

9. The Plaintiff testified that he had already given his son a plot of land on which the son had started building but he had now unilaterally taken the suit land without his consent and or the rest of his family
10. I have considered the Plaintiff's pleadings and his oral testimony at the trial herein. I have equally considered the evidence adduced herein and the closing submissions by Mr. S.M Kimani, Learned Counsel for the Plaintiff.
11. The Plaintiff brought this suit seeking a declaration that the Defendant's entry into the suit property is wrongful and an act of trespass. He prays for orders of ejectment of the Defendant and a permanent injunction restraining the Defendant from re-entering and/or remaining on the land.
12. From the material placed before me, the Plaintiff is the registered owner of the suit property. He does not reside therein but lives with his family on a separate parcel of land at Gongoni. He told the Court that he has established a homestead for his family at Gongoni and that for purposes of settling his medical bills, he had decided to dispose of the suit property.
13. The Plaintiff further testified that the Defendant who is his son was not happy with the arrangements. Accordingly the Defendant unilaterally proceeded to the suit property situated at Bora Bora Village and proceeded to construct a semi-permanent house thereon. As at that time the Plaintiff had sold the suit property to one Andrew Kibe Kang'ethe and had received a deposit which he told the Court he used for his treatment.
14. When the said purchaser tried to build a perimeter wall around the suit property, the Defendant violently prevented him and his workers from erecting the fence. It is the Plaintiff's case that he had already given his son a separate piece of land and that his actions were merely actuated by malice and aimed at frustrating the sale agreement the Plaintiff had entered into with the purchaser of the land.
15. The Defendant entered appearance but did not file any form of denial to the claim. He did not testify and/or tender any evidence at the trial and the Plaintiff's testimony under oath stands uncontroverted.
16. In the circumstances herein, it was clear to me that the suit property belongs to and is registered in the Plaintiff's name. The title deed produced as Pexh 2 shows that it was issued in the Plaintiff's name on 25<sup>th</sup> August 2011. It was also clear to me that the Plaintiff had actual physical possession of the land prior to the year 2018 when the Defendant trespassed thereon and constructed the single semi-permanent house whose photo was produced herein as Pexh 5.
17. In my view, in spite of the filial relationship between the Plaintiff and the Defendant, the acts of the Defendant abandoning his father's homestead in Gongoni and unilaterally moving into and occupying the suit property in Bora Bora Village amounted to an act of trespass. While the Defendant son may have felt aggrieved that the old man was disposing off the suit property and thereby disinheriting him of the same, he had no better title or authority to enter upon his father's land and to proceed to treat the same as his.
18. The law does not offer better treatment to a son who is a wrongdoer. Since it is his father's testimony that he has refused to relinquish his unilateral claim to the property belonging to his father, this Court has no otherwise but to declare the Defendant a trespasser to the suit property.
19. In the premises, this Court was satisfied that the Plaintiff had proved his case to the required standard. Judgment is accordingly entered for the Plaintiff as against the Defendant as prayed in the Plaintiff.
20. The Plaintiff shall also have the costs of this suit.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of March, 2020.**

**J.O. OLOLA**

**JUDGE**