



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 280 OF 2015

JOHN MUTHINI KAMIA.....PLAINTIFF

VERSUS

MWARIDZO JUMA ZIRO..... DEFENDANT

JUDGMENT

(Suit by the plaintiff seeking to restrain the defendant from the suit land; plaintiff being owner of the suit land; defendant developing a water tower in it on the basis that the suit land was purchased by his brother and he is acting as caretaker; evidence adduced showing that what the defendant's brother purchased is a different parcel of land; judgment entered for the plaintiff with costs)

1. This suit was commenced through a plaint which was filed on 2 November 2015. In the plaint, the plaintiff has pleaded that he is the owner of the land parcel Kwale/Diani Beach Block/1576 (the suit land) after purchasing it from one Ali Salim Mwakufariwa in July 2015. He has pleaded that on 22 October 2015, he visited the suit land and found the defendant putting up a structure without his permission. In this suit, he wants the defendant permanently restrained from the land and an order of eviction. He also wants the defendant to demolish the structures on the land.
2. The defendant filed a statement of defence where he denied encroaching into the plaintiff's land. He averred that the premises was purchased by his brother, one Nassoro Omar Mguta and he has been acting as caretaker since the year 2003. He stated that his brother purchased the land from Ali Salim Mwakufairwa in the year 2003 and that the plaintiff wants to dispossess him.
3. At the hearing of the suit, only the plaintiff and his witnesses appeared. The defendant and his counsel were absent despite being duly served and I directed the case to proceed.
4. The plaintiff testified and produced his title deed to the suit land. He stated that he purchased the land from Mr. Ali through two sale agreements and the land was thereafter transferred to him. In November 2015, he got a report that some people were digging a water tower on the instructions of the defendant. He confronted them and reported the matter at Diani Police Station. The defendant was asked to bring his title documents but he had none but he nevertheless insisted on continuing to construct. It is then that the plaintiff decided to file this suit.
5. PW-2 was Salim Ali Mwakufairwa. He affirmed that he is the one who sold the suit land to the plaintiff. He had owned the land with one Sally Njeri, who transferred her interest to him. He stated that it is after he had sold the land that the defendant entered it and commenced the construction in issue. He stated that what he sold to the defendant's brother is the Plot No. 1579 and not the suit property and he had showed them the beacons.
6. PW-3 was one Hamisi Ramadhan Chibendo who acted as agent of the plaintiff in the purchase agreement.
7. Mr. Mutugi, learned counsel for the plaintiff, made brief submissions which I have taken into account.
8. The case of the plaintiff is that the defendant is a trespasser on his land and he ought to be restrained. The defendant in his defence insisted that his brother had purchased the suit land and that he is thus entitled to utilise it since he acts as his brother's caretaker. However, the evidence that has been adduced is that the defendant's brother purchased the Plot No. 1579 and not the suit land, which is Plot No. 1576. Both plots, it has emerged were owned previously by Mr. Ali Salim Mwakufairwa and he himself testified that what he sold to the defendant's brother is the plot No. 1579. The defendant did not attend court to elaborate on his defence or justify why he ought to be allowed to continue constructing on the plaintiff's land.
9. I am thus of the view that the plaintiff has proved his case on a balance of probabilities and deserving of the orders sought. I therefore issue an order permanently restraining the defendant from the land parcel Kwale/Diani Beach Block/1576. The defendant should not enter into this land or construct any well or borehole or any water tower, or indeed any structures on it without the express permission of the

plaintiff. The defendant should also proceed to demolish any structures that he has built on the suit land within 30 days of service upon him of this judgment or decree. If he does not do so, the plaintiff is at liberty to demolish the said structures, or keep them as his own, or do whatever he wishes with the same, as the defendant will have lost any right over them. I was informed that the defendant is no longer in the premises and the order of eviction does not now apply, but in the event that the defendant enters the land and fails to vacate, he may be forcibly evicted.

10. The plaintiff will also have the costs of this suit.

11. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 10th day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Mutugi for the plaintiff.

No appearance for the defendant.

Court Assistant; David Koitamet