



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 49 OF 2016

TABITHA WAGANGA MLEKENYI (Suing in capacity as Administrator of the Estate of

BILISHAN MOMBO KILIMO(Deceased).....PLAINTIFF

VERSUS

ELIZABETH OLALO.....DEFENDANT

JUDGMENT

1. By a plaint dated 31st March, 2016, the plaintiff, suing as administrator of the estate of her late husband, Billishan Mombo Kilimo (deceased), claims that the deceased bought land sub-divisions Number 3967 Original Number 907/11 of Section VI Mainland North, CR 30990 from Nazir Mohamed Hussein Noormohamed and Rohit Lalji Shah. That the defendant is a squatter in the said property and has failed and or refused to give vacant possession to the plaintiff and or to pay ground rent of Khss.500/- per month. The plaintiff states that the defendant has trespassed, grabbed and/or encroached onto the said property measuring 0.0308 hectares or thereabouts.

2. The plaintiff's claim against the defendant is for orders as follows:

- a. A permanent order restraining the defendant's Agents, servant, employees, proxies and/or assign from selling, trespassing, encroaching, grabbing or whatsoever dealing with plot Number 3967 Original Number 907/11 Section VI Mainland North.**
- b. An order directing the Defendant to demolish the Swahili house erected on the suit property.**
- c. General and special damages**
- d. Costs of the suit.**

3. The defendant was served with summons to enter appearance and filed memorandum of appearance on 21st June, 2016. The defendant however, failed to file defence within the stipulated time or at all. Upon request by the plaintiff, interlocutory judgment was entered against the defendant on 26th April 2018. The matter proceeded for formal proof on 28th November 2019 when the plaintiff testified and did not call any witness.

4. The plaintiff relied and adopted her witness statement dated 27th November, 2019. The plaintiff produced the Certificate of the confirmation of Grant issued to her in respect of the estate of her late husband as P.exhibit 1, and the Death Certificate as P.exhibit 2, and consent as P.exhibit 3. The plaintiff stated that her deceased husband bought the suit property from Mr. Nazir Mohamed Hussein Noormohamed and Robit Lalji Shah and produced the transfer and certificate of title as P.exhibit 4. The plaintiff stated that since the property was bought, the defendant has been living on the plot as a squatter and has refused, failed and/or neglected to pay the ground rent as per Agreement dated 9th July 2012 and another dated 24th August 2015 which the plaintiff produced as P.exhibit 5 and 6 respectively. The plaintiff wants the defendant evicted and for the demolition of the defendant's house standing on the plaintiff's property. The plaintiff further prayed for damages and costs of the suit. The plaintiff stated that the defendant had occupied the suit property since the year 2004 without paying ground rent.

5. The court has considered the evidence on record. The issue that calls for determination is whether the plaintiff has established that she is the owner of the suit property and whether the defendant has trespassed on it and also whether the plaintiff is entitled to the prayers sought.

6. The plaintiff has tendered documentary evidence that show that the suit property is registered in the name of the plaintiff's deceased husband. The plaintiff produced the transfer and certificate of title as p.exhibit 4. From the material placed before court, there is no dispute that the suit property belong to the plaintiff.

7. Section 24 (a) of the Land Registration Act provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of the suit land together with all rights and privileges associated with that status. Section 26 (1) of the said Act provides that the Certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer 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 thereof and that the said title shall not be challenged save on ground of fraud or misrepresentation to which the holder is shown to be a party or where the title is acquired illegally, unprocedurally or through a corrupt scheme.

8. The defendant did not defend the suit. The plaintiff's title over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of any such challenge, I am enjoined to find the plaintiff on the basis of the title she holds in the deceased's name to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which include exclusive use, possession and enjoyment thereof without interference by any third party.

9. The plaintiff's evidence has not been challenged and on the basis of the uncontroverted evidence, I am satisfied that the plaintiff had proved that the defendant's continued occupation of the suit property without the plaintiff's consent or authority is unlawful and amounts to trespass and the plaintiff is entitled to judgment against her as prayed in the plaint. Accordingly, I do find that the plaintiff has proved her case on a balance of probabilities and I enter judgment for the plaintiff against the defendant in the following terms:

a. The defendant is directed to vacate and deliver vacant possession to the plaintiff and to demolish and/or pull down to the ground the Swahili house erected and standing on PARCEL SUB-DIVISION NUMBER 3967 ORIGINAL NUMBER 907/11 SECTION VI MAINLAND NORTH within sixty (60) days from the date of the service of the decree upon her, in default the plaintiff shall be entitled to an order of eviction for forcible removal of the defendant whether by herself, agents or servants or otherwise howsoever and demolition of the Swahili house standing thereon under supervision of an authorized police officer from the nearest police station.

b. Permanent injunction in terms of paragraph (a) of the plaint.

c. Mesne profits of Kshs.500/= per month from January 2004 until vacant possession is given.

d. Kshs.100,000/= general damages for trespass.

e. Costs of the suit.

Orders accordingly.

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

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Anaya for plaintiff

No appearance for defendant

Yumna Court Assistant

C.K. YANO

JUDGE