



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 35 OF 2012

MOHAMED ANWAR ADIRAHMAN HAJI ABASS.....PLANTIFF

VERSUS

MEMUM ABDULLAHI MOHAMED.....DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit by a plaint dated 9th January 2012 seeking the following orders:

a. That a declaration for a permanent injunction restraining and prohibiting the defendant from in any manner dealing, interfering and encroaching unto the plaintiff's land known as LR. No. 28290 situate S.E. of Mariakani Trading Centre, Kilifi measuring approximately four decimal nine nought five (4.905) hectares or thereabouts.

b. A mandatory injunction compelling the defendant on own costs to demolish and pull down the structures (wall) constructed on parts/portion of the plaintiff's Land known a LR. No.28290 situate S.E of Mariakani Trading Center, Kilifi within fourteen (14) days from date of order/decree failing which the plaintiff to be at liberty to demolish/pull down the structure/wall.

2. The Plaintiff's suit as pleaded is that at all material time to this suit the plaintiff is the registered proprietor as lessee of all that piece of land situate S. E. Mariakani Trading Centre, Kilifi District (County) known as LR. No. 28290 subject of Grant No. CR. 47091 with the dimensions, abutments and boundaries thereof delineated on the Land Survey Plan No. 302395 which said piece of land is measuring approximately 4.905 hectares for a term of 99 years effective from 1st July 2009 at an annual rent of Kshs.129,450= (revisable). That the plaintiff acquired the suit property as a bona fide purchaser for valuable consideration without notice from the previous owner, one Kesi Ali Mwatsau on 12th January, 2010. The plaintiff state that sometime in October, 2010, the defendant, her agent and servants unlawfully and wrongfully trespassed, encroached and constructed a wall fencing off part or a portion measuring approximately 2 acres of the suit property. The plaintiff avers that the defendant has no interest on the suit property.

3. The plaintiff avers that the evidence emanating from a previous suit that has since been withdrawn being Mombasa SRMCC No. 1003 of 2010, showed that the defendant purported to have acquired an interest through a purchase from the Ngoka Family vide an agreement dated 22nd September, 2009. The plaintiff however states that the Ngoka family has lost a case over the said portion at the land Disputes Tribunal and the plaintiff maintains that the defendant's actions are unlawful and should be restrained.

4. PW1 was Mohamed Anwar Abdirahaman Abbas the plaintiff who testified that he purchased the suit property and was transferred to him on 12th January 2010 from the previous owner, one Kesi Ali Mwatsau. That the defendant trespassed and encroached and constructed a wall in a portion measuring about 2 acres. The plaintiff stated that the defendant's claim over the suit property has no basis as the defendant lost a case at the Land Disputes Tribunal between the defendant and the Ngoka family. The plaintiff maintains that the defendant's actions amount to trespass and wants the orders sought granted. He produced the transfer of lease and certificate of title as exhibits.

5. The defendant responded to the plaintiff's claim by way of defence dated 6th August 2012. The defendant averred that she is the lawful owner of the suit property and averred that she is in actual and physical possession of her property which is part and parcel of land contained in land known as LR. No. 28290 the subject of Grant No. CR. 47091. The defendant states that her property falls in Kawala "A" "B" and Kadzodzo Madzimbani Adjudication Sections which adjudication took place in 2010/2011, unlike the plaintiff's certificate of title which the defendant states is illegal as it did not follow the law and should be expunged. The defendant states that she commenced the construction of a perimeter wall in respect of her property from 2009, something she states the plaintiff could have witnessed if he had exercised due diligence at the time he was purchasing the suit land in 2010. The defendant states that the plaintiff was not a bona fide purchaser for value without notice. It is the defendant's case that she is in lawful occupation of the suit land and urged the court to dismiss the plaintiff's claim.

6. The defendant adopted her witness statement dated 6th August 2012 in which she stated that she purchased a plot at Mariakani Kwa Chikolo measuring 2 acres in 2009 and applied for permission to put up a fence on the property and was granted approval by Town Council of Mariakani. That Mugold Limited instituted a suit against her and Abubakar Salim Mohammed in 2011 regarding the said property and that she contested the same. The defendant stated that the plaintiff herein in this suit is claiming the same parcel of land. It is the defendant's evidence that the suit property is a subject matter that falls within the adjudication area and as such the certificate of title held by the plaintiff is illegal. The defendant urged the court to dismiss the plaintiff's suit. The defendant produced the list of documents filed on 13th July 2018 as exhibits. These include title deed for TITLE NUMBER MARIAKANI/KAWALA 'B'/30 in the name of the defendant.

7. DW2 was Bishar Hussein Alio, the defendant's husband. He adopted his witness statement filed on 13th July 2018 as his evidence-in-chief. He testified that he purchased Plot No. Mariakani/Kawala ;B'/30 but had it registered in his wife's name. He stated that he sought for approval from the Mariakani Town Council Offices to put up perimeter wall and obtained permission upon making the requisite payments. That his plot is measuring 2 acres which he occupies. He stated that both the plaintiff's title and another for Mulgold Limited were cancelled by the National Land Commission.

8. Mr. Hamisi, learned counsel for the Plaintiff submitted that the plaintiff has proved that he is the title lawful registered owner of the suit property which he acquired for value and without defect in the title. It was his submission that the plaintiff has proved his case on a balance of probabilities. It was also the plaintiff's submission that the National Land Commission had no power to revoke the plaintiff's title, arguing that the commission's mandate is limited to reviewing grants and making recommendation to the Land Registrar. Mr. Hamisi further submitted that the National Land Commission proceeded with the hearing and issued a determination as to ownership of the property when this suit was pending before court. He submitted that by doing so, the National Land Commission usurped the powers of the court. That the commission did not give the plaintiff a hearing as no notice was issued to him, hence the Gazette Notice that revoked the title was a nullity. The plaintiff also challenged the legality of the defendant's title and submitted that the process the same was acquired was improper. Counsel for the plaintiff urged the court to grant the plaintiff the reliefs sought.

9. On his part, Mr. Gikandi, learned counsel for the defendant submitted that the plaintiff has completely failed to demonstrate to the court the process through which he acquired ownership of the suit property. That the National Land Commission issued a Gazette Notice No. 5022 of 18/7/14 wherein title No. 282890, among others, were revoked. That the plaintiff's title stands revoked because no court has declared that action a nullity. Mr. Gikandi further submitted that the plaintiff does not even know the boundary dimensions. That the defendant has shown how adjudication was carried out and the suit land adjudicated to her and title issue. That, moreover the defendant has erected a permanent fence on the property and constructed buildings and is in actual occupation. Mr. Gikandi relied on the case of **Munyu Maina-v- Hiram Maina (2013)eKLR** and urged the court to dismiss the plaintiff's suit with costs.

10. I have reviewed and considered the pleadings, the evidence by the parties and the submissions by the advocates for the parties. The issue for determination is whether the plaintiff has proved trespass against the defendant, and whether the plaintiff is entitled to the reliefs sought in the plaint.

11. The plaintiff's case is that he is the registered owner of the property known as LR. No. 28290. The plaintiff avers that sometime in October 2010, the defendant encroached on a portion thereof measuring 2 acres and constructed a perimeter wall. The defendant has denied the plaintiff's claim. It is the defendant's contention that she is the lawful owner of all the property known as Mariakani/Kawala "B"/30 measuring 2 acres. The defendant's case is that the wall is constructed on her land and not on the plaintiff's parcel of land.

12. In this case, both parties produced what they regard as their title documents for their respective parcels of land. The defendant has alleged that the plaintiff's title was acquired unlawfully and that the same was revoked by the National Land Commission through a Gazette Notice. The plaintiff, on the other hand, contended that the action by the National Land Commission was ultra vires.

13. As regards the issue whether the defendant has trespassed on the plaintiff's parcel of Land known as LR. No. 28290, it is evident that both the plaintiff and the defendant hold title to their respective parcels of land. The plaintiff is the holder of title for LR. No. 28290 measuring 4.905 hectares while the defendant holds Title Number Mariakani/Kwawala 'B'/30 measuring 1.5 hectares. From the evidence on record, it is apparent that there was another dispute being Mombasa SRMCC No. 1003 of 2010.

14. Whereas the plaintiff is accusing the defendant of trespass, the material placed before me, and in particular the title documents, indicates that both parties are claiming ownership of their respective parcels. The plaintiff in my view should have availed sufficient evidence by way of a survey report to show that the impugned wall was on his parcel of land. This is so because the evidence on record show that the defendant is categorical that the wall was standing on her parcels of land. In the absence of any maps or plans that show that the impugned wall is on the plaintiff's land, this court is unable to determine whether or not the perimeter was is on the plaintiff's land or on the defendant's land. Section 107 of the Evidence Act, Cap 80 Laws of Kenya is very clear that 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 that those facts exist. The burden of proof therefore lied on the plaintiff. The defendant denied that the wall is on the plaintiff's land and pleaded that it was on her own land. Therefore, it was incumbent upon the plaintiff to avail sufficient evidence that show the actual boundary dimensions of the two plots to disprove the defendant. I would therefore hold and find that the plaintiff has not proved that the defendant has trespassed on his parcel LR. No. 28290.

15. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the plaintiff has not proved his case against the defendant on a balance of probabilities. As a result, the plaintiff's suit is dismissed with costs.

16. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 30th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE