



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 200 OF 2015**

**DOUGHLAS IKUA NDERITU.....PLAINTIFF**

**VERSUS**

**1. OMAR ALI.....1<sup>ST</sup> DEFENDANT**

**2. ABDUL RATIF.....2<sup>ND</sup> DEFENDANT**

**3. COUNTY GOVERNMENT OF KILIFI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated 4<sup>th</sup> November 2015; Douglas Ikua Nderitu (the Plaintiff) prays for Judgment against the three Defendants jointly and severally for:-

***i) A permanent injunction restraining the Defendants, their agents, servants or workmen from demolishing and/or interfering with the Plaintiff's on-going construction and peaceful occupation and possession of his plot Number 4343(1755/4089).***

***ii) Costs of this suit.***

***iii) Interest on (ii) above at Court rates.***

2. These prayers arise from the Plaintiff's contention that at all times material, he was the real and actual owner of Plot No. 4343(1755/4089) Barani where he has been paying ground rent to the registered owner one Mohamed Said Nassor after purchasing the same from one Fatuma Suwed.

3. The Plaintiff avers that recently, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are his neighbours started claiming that he had trespassed into their property following some renovations he did on the land with the approval of the 3<sup>rd</sup> Defendant. The Plaintiff avers that despite the landlord, the said Mohamed Said Nassor declaring the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be on the wrong, the 3<sup>rd</sup> Defendant has now issued an enforcement notice to him to demolish his house alleging that it was not aware of the renovations.

4. But in their Statement of Defence and Counterclaim, Omar Ali and Abdulatiff (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) deny that the Plaintiff is the beneficial owner of the said property as alleged or at all. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant however assert that as their neighbour, the Plaintiff indeed trespassed into their property by carrying out constructions thereon and they did lodge a complaint with the 3<sup>rd</sup> Defendant in regard to the illegal construction.

5. By way of their Counterclaim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants assert that they are the rightful and beneficial owners of Portion No. 4322 (1755/66) and that the Plaintiff wrongfully entered and took possession of the same and have since wrongfully remained thereon. Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pray for:

***i) A declaration that they are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as 4322(1755/66);***

***ii) A declaration that the Plaintiff whether by himself or his servants or agents are wrongfully in occupation of the property***

*known as 4322(1755/66) and is accordingly a trespasser on the same;*

*iii) An injunction restraining the Plaintiff from remaining or continuing in occupation of the property known as 4322(1755/66);*

*iv) Vacant possession;*

*v) General damages for trespass;*

*vi) Costs of this suit and interest.*

6. Similarly, the County Government of Kilifi (the 3<sup>rd</sup> Defendant) is opposed to the Plaintiff's suit herein. The 3<sup>rd</sup> Defendant avers that it is a stranger to the Plaintiff's claim of ownership of the suit property. The 3<sup>rd</sup> Defendant avers that if at all the Plaintiff applied for any consent to renovate the premises, then the same was neither paid for nor approved.

7. The 3<sup>rd</sup> Defendant further avers that following an application for extension by the Plaintiff and the subsequent encroachment claims by the 2<sup>nd</sup> Defendant, it conducted its own investigations and established that the Plaintiff's construction had encroached onto a road reserve and hence an enforcement notice had to be issued to stop the renovations.

### **The Plaintiff's Case**

8. At the trial herein, the Plaintiff (PW1) testified as the sole witness in his case.

9. PW1 told the Court that he bought a house without land in May 2004. Before he bought the land, the seller took him to the Landlord and told him he would be paying ground rent from 1975. He then commenced payment of the same and has done so to-date.

10. PW1 testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were his neighbours and that the seller of the home had given him a building plan from the 3<sup>rd</sup> Defendant. They lived well with his neighbours until he went to the owner and requested for permission to change the house from the mud-house it was to a concrete one in February 2013.

11. PW1 told the Court the Landlord gave him permission in writing on 15<sup>th</sup> February 2013 but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stopped him from carrying on with construction. Before he started building, he obtained a permit from the 3<sup>rd</sup> Defendant Council and paid Kshs 2,000/-. Despite this, the Defendants stopped him using a letter issued by the 3<sup>rd</sup> Defendant claiming his construction was on a road reserve and that it encroached their land.

12. On cross-examination, PW1 testified that he only dug a foundation before building a wall and that he did not demolish the previous wall. He denied encroaching on the Defendant's plots as shown by the Survey Report.

13. PW1 further told the Court that he had sued the 3<sup>rd</sup> Defendant because they stopped him from building. He had paid for approval to build. He however conceded he had nothing from the 3<sup>rd</sup> Defendant that allowed him to build.

### **The Defence Case.**

14. The Defence called a total of four witnesses in support of their respective cases at the trial herein.

15. DW1-Omar Ali Said is the 1<sup>st</sup> Defendant herein and a brother to the 2<sup>nd</sup> Defendant. Relying on his statement filed herein on 11<sup>th</sup> July 2017, DW1 testified that the Plaintiff is their neighbour and that he had trespassed onto their land and occupied the same. DW1 told the Court that he was together with his brother the beneficial owners of Plot No. 4322 (1755/66).

16. DW1 told the Court that the Plaintiff had constructed on their property and a road reserve and that despite an enforcement notice from the 3<sup>rd</sup> Defendant, he had refused to demolish the offending construction.

17. During cross-examination, DW1 told the Court he did not stop the Plaintiff from carrying on with the construction. He further told the Court that they pay rent to a different person and that they did not inform him when they had a dispute with the Plaintiff.

18. DW2-Abdulatif Ali Said is the 2<sup>nd</sup> Defendant. He reiterated the testimony of his brother (DW1) and told the Court there is a road separating their parcel of land Plot No. 4323 from that of the Plaintiff.

19. On cross-examination, DW2 told the Court that the Plaintiff's house was originally small but he had now moved into the Defendants' land.

20. DW3-Salim Tsuma is a Registered Land Surveyor. He told the Court that he was engaged by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to survey their property. He did as instructed and prepared a Report dated 12<sup>th</sup> November 2013. His findings were that an existing house from Plot No. 4342 was 5.3 metres inside 4322. The road reserve could also not be accessed as the Plaintiff's house lies on the existing road.

21. On cross-examinations, DW3 told the Court that as far as he was aware, the Council cannot approve a structure to be constructed on a

road. He conceded that he was instructed by the 2<sup>nd</sup> Defendant to prepare the Report.

22. DW4- Dr. James Kapanga Buso is the Accounting Officer in the 3<sup>rd</sup> Defendant's Department of Lands. He told the Court that their department gives approvals for buildings or construction. In regard to the disputed property, the construction on Plot No. 4342 had encroached on a road reserve and Plot No. 4322.

23. DW4 testified that the application they had received was for development to be done squarely within Plot No. 4342 but the implementation encroached on the road reserve and the next plot. DW4 testified that he learnt about the development due to two complaints that were lodged with them. They went ahead to issue "Stop Orders". They also carried out a survey on the area which confirmed the encroachment. He denied that they had given any formal approval for the developments carried out by the Plaintiff.

24. On cross-examination, DW4 told the Court that no approval can be given for any development when there is encroachment on another parcel or road. The Plaintiff had applied for renovation of his house. The building plan was approved. He conceded that they had not consulted with the overall landowner before they issued the Stop Order.

### **Analysis and Determination**

25. I have perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence placed before me during the trial. I have similarly considered the submissions and authorities placed before me by the Learned Advocates appearing for the respective parties.

26. By his Complaint filed herein on 5<sup>th</sup> November 2015, Douglas Nderitu Ikuu (the Plaintiff) urges this Court to issue an order of permanent injunction restraining his two neighbours-Omar Ali and Abdulatif Ali Said (named in the Complaint as Abdul Ratif) together with the County Government of Kilifi(the 3<sup>rd</sup> Defendant) from demolishing and/or interfering in any manner whatsoever with his on-going construction, peaceful occupation and possession of all that parcel of land known as Plot No. 4343 situated at Barani in Malindi.

27. According to the Plaintiff, he is the real and actual owner of the said Plot No. 4343 (also known as Plot No. 1755/4089) having purchased the same together with a house standing thereon from one Fatuma Suwed and having been paying ground rent therefor to the owner and landlord, one Mohamed Said Nassor.

28. The Plaintiff asserts that he recently renovated the said house with the permission and approval of the 3<sup>rd</sup> Defendant but following a complaint made by his said neighbours, the 3<sup>rd</sup> Defendant has now turned around and given him notice demanding that he demolishes the house on the purport that the same encroaches on the land owned by the said neighbours as well as a nearby road reserve.

29. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are the Plaintiff's neighbours have filed a Defence and Counterclaim herein dated 8<sup>th</sup> April 2016 in which they deny all the Plaintiff's claims and instead urge the Court to declare that they are entitled to the exclusive possession, occupation and use of all that piece of land known as Plot No. 4322 (1755/66). They further urge the Court to find that the Plaintiff has trespassed on their said parcel of land and to restrain him by way of injunction from remaining thereon and or continuing in occupation. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also urge this Court to grant them vacant possession of their parcel of land, award them general damage for trespass and costs of this suit with interest.

30. While the Plaintiff on the one side and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on the other claimed to be the owners of the two plots of land, none of them placed before me any documents of title. What emerged from the trial herein was that both sides of the dispute had purchased what are known in the Coastal region of Kenya as "houses without land". While the Plaintiff purchased a building standing on Plot No. 4343, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are brothers are the owners of a house erected on Plot No. 4322.

31. Apparently, those two plots are sub-divisions of Land Portion No 1755 whose proprietor is one Mohamed Said Nassor referred to by the parties herein as the landlord. While the said Landlord was not called by either party to give evidence herein, the Plaintiff told the Court that when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants started accusing him of exceeding his boundary and trespassing into their portions, the matter was referred to the Landlord who proceeded to determine that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were on the wrong.

32. The concept of owning a house without land is unique to the Kenyan Coast given its peculiar historical land issues but is not an entirely new phenomenon. While it is common knowledge that where a person is the registered proprietor of a parcel of land there is a conclusive presumption that he also owns all the buildings erected thereon, that is not always the case in certain cases in this region. It is therefore not uncommon in this region to find buildings such as the subject matter herein which have been erected by a different person upon the land of another person in consideration of a monthly rent.

33. In the matter before me, while the Plaintiff avers in his pleadings that he purchased the plot with the house standing on it from one Fatuma Suwed, the Sale Agreement he produced herein dated 13<sup>th</sup> May 2004 (Pexh 1) reveals that he bought the same at a consideration of Kshs 450,000/- from one Salima Hamisi Abdalla who had inherited the 5- bed roomed house from the said Fatuma Suwed.

34. According to the Plaintiff, when he bought the house, the seller had given him a building plan from the Municipal Council of Malindi. They then lived well with his neighbours until sometime in February 2013 when he went to the Landlord and asked to change the house from one made of mud to one made of concrete. While the Landlord gave his consent, his neighbours went and stopped him claiming that his construction encroached on their portions of the land.

35. It was further the Plaintiff's case that before he started the construction, he had gone to the 3<sup>rd</sup> Defendant, paid the sum of Kshs 2,000/-

and obtained a building permit. It is only then that he started building on the approved portion but the Defendants herein then colluded and stopped him.

36. However, while the Plaintiff claims to have only been renovating the old house, it was clear from the material placed before me that what he was engaged in was not a mere renovation but an extension of the house he had bought in the year 2004.

37. While the building is described in the sale Agreement dated 13<sup>th</sup> May 2004 as a 5-bedroomed house, the Plaintiff admitted during his cross-examination herein that what he was now putting up was a six-bedroomed house together with some three shops. While he claimed that all he was putting up would fit within his plot, it was clear from the Malindi District Surveyor's Report dated 12<sup>th</sup> November 2013 that the new house had encroached on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' plot by as much as 5.3 metres.

38. It was further clear to me that even though the 3<sup>rd</sup> Defendant acknowledged receipt of Kshs 2,000/- following the Plaintiff's application, the receipts as explained by DW4 did not constitute an approval of the Plaintiff's building plan.

39. Arising from the foregoing, I was not persuaded that the Plaintiff's case against the Defendants herein had any merit. On the contrary, it was clear to me that the Plaintiff's construction had encroached on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' portions of the land and that the same had been put up without the approval of the 3<sup>rd</sup> Defendant.

40. Accordingly the Plaintiff's suit is hereby dismissed. Save for the prayer on general damages for which I found no basis given the unique circumstances of a house without land herein, Judgment is hereby entered for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as prayed in their Counterclaim.

41. The Plaintiff shall bear the costs of his suit and that of the Counterclaim.

**Dated, signed and delivered at Malindi this 10<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**