



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 212 OF 2013

PAUL NDUNDA MWILU PLAINTIFF

- V E R S U S -

DOMNIC KIMATHI DEFENDANT

JUDGEMENT

1. The plaintiff filed this suit on 24th September 2013 seeking the following prayers;

a) *A declaration that the property known as Plot No. Kwale/Bumbani "C"/90 is wholly and solely owned by the plaintiff, and that the defendant's action in trespassing on it and planting trees and construction of a pit latrine thereon is unlawful, illegal and an affront to sanctity of ownership.*

b) *Mandatory injunction compelling the defendant to remove the trees complained of, and demolish the pit latrine constructed on Plot no. Kwale/Bumbani "C"/90.*

Alternatively, the plaintiff be granted leave to remove out the same by himself, at a cost to be recovered from the defendant.

c) *A permanent injunction restraining the defendant, by himself, his family, agents, servants and/or employees from going into or in any way whatsoever entering and/or interfering with, or any part, of all that parcel of land known as Plot No Kwale/Bumbani "C"/90.*

d) *Damages*

e) *Costs of the suit.*

f) *Interest on (d) & (e) above at court rate from the date of judgment until payment in full.*

g) *Such other or further orders as court may deem fit and just to grant.*

2. The defendant was served with summons to enter appearance and plead on 9th October 2013 as per the affidavit of service on record. He did not enter appearance or file a defence within the prescribed time. This suit was prosecuted by the plaintiff as undefended. The plaintiff stated in his evidence that he purchased this land Kwale/Bumbani C/90 from a Mr. John Gichohi Mwangi who showed him the boundaries of this plot. He continued that the defendant lives on plot no. 560.

3. According to the plaintiff, the defendant has encroached on his land by planting trees and building toilet/bathrooms on it. He reported the matter to the Area Chief who advised him to visit the lands department. He acted on the Chief's advice and visited the Land Registrar. The Land Registrar and Surveyor visited the site and made a report which he produced as PExh.3. He also produced as PEx.4 the Registrar's letter dated 19th February, 2013. The defendant ignored this report and did not move out.

4. The plaintiff's further evidence is that he again sought the assistance of the County Commissioner to have the defendant move out. The County Commissioner wrote to the defendant on 16th April, 2013 summoning the defendant to his office. The defendant failed to attend. The plaintiff produced this letter as PEx.5. He also had photographs of the trees and toilet which he produced as PEX.7. Later his advocate did a demand letter to the defendant which letter he produced as PEx.8. He urged the court to order the defendant to cut down the trees and demolish the structures. He prayed in the alternative that he be provided with security to remove the trees and the structures at the defendant's costs. He also prayed for the costs of this suit to be awarded to him.

5. The plaintiff through his advocate filed written submissions which I have had occasion to look at. I have also considered the oral and documentary evidence adduced and are on record. The question for this court to answer is whether the plaintiff has proved there has been encroachment on his land parcel Kwale/Bumbani C/90. The plaintiff produced in evidence copy of title deed and certificate of official search (PEx.1 and 2) showing the land is indeed his. Before filing this suit, he also visited various government departments to try to resolve this dispute but which did not bear any fruit.

6. On 1st December, 2011, the District Land Registrar and District Surveyor visited the area. This was after they had written to the owners of neighbouring plot vide their letter dated 10th August, 2011. The Land Registrar prepared a report dated 19th February, 2013 which was produced as PExh. 4. In para 3 of the report, it is recorded;

"By the end of the exercise it was noted that Kwale/Bumbani C/560 had encroached on the parcel Kwale/Bumbani C/90 (as indicated on the map)."

The report by the Land Registrar is not conclusive as the map referred to was not produced. However in the plaintiff's list of documents, he referred to a report by the Surveyor in item 3 of his list of documents. The Surveyor's report is dated 7th December, 2012 in which the Surveyor observed the encroachment on parcel 90 was by about 6 meters. He also observed the person who has encroached a Mr. Dominic Kimanthi is not the registered proprietor of the neighbouring plot C560.

7. The plaintiff admitted the defendant was not present when the Land Registrar and Surveyor visited the land as he had not been invited. Neither did the plaintiff establish that it is the defendant who indeed put up the structures or planted the trees. I agree that the plaintiff has established that his plot has been encroached as per the documents on record but I am not satisfied that he has proved the same was done by the defendant. Consequently, I grant the plaintiff permission to cut down the trees and demolish the structures on the area encroached with security being provided by the local administration or nearby police station. Based on my the finding above, I will not condemn the defendant to pay any costs.

Dated and delivered in open court at Mombasa this 10th day

of February 2015.

A. OMOLLO

JUDGE

10.2.2015