



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 59 OF 2017

1. MOHAMED HASSAN ALI.....1ST PLAINTIFF
2. REHEMA HASSAN.....2ND PLAINTIFF
3. ALI KHAMISI JUMA.....3RD PLAINTIFF
4. JUMAA ABDALLA NGUZO.....4TH PLAINTIFF
5. SULEIMAN NGWARE.....5TH PLAINTIFF

VERSUS

1. RUKIA HASSAN.....1ST DEFENDANT
2. MOHAMED KHERI.....2ND DEFENDANT
3. SELF LAMIR.....3RD DEFENDANT
4. SWALEH HASSAN.....4TH DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit by way of a plaint dated 24th February 2017 which was amended on 17th March, 2017. The plaintiffs are seeking for judgment against the defendants jointly and severally for:

a. A permanent injunction restraining the defendants either by themselves, their employees, servants and agents from trespassing into or entering into or entering into the suit property thereby committing acts of wastage, alienating and/or interfering with the plaintiffs' quiet and peaceful occupation of plot sub-division No.6827 (original No. 172/2) Section II Mainland North and Plot Number 172/1 Section II Mainland North.

b. A mandatory order of injunction do issue compelling the Defendants, their servants, either agents, employees or any other person whatsoever to bring down the illegal and unlawful structures and walls erected on Plot sub-division No. 6827 (Original No. 172/2) Section II Mainland North.

c. Costs of and incidental to this suit; and

d. That this Honourable court do issue any other order it deems just and convenient to meet the ends of Justice.

2. The plaintiffs' case is that they were duly appointed as trustees of the estate of the late Ali Nguma by the Principal Kadhi on 24th April 2014 in Mombasa Succession Cause No. 158 of 2007 and are now administering the estate comprising plot no. 172 of Section II Mainland North in respect of which a provisional certificate of title was issued on 28th November, 2013. The plaintiffs aver that all the heirs and beneficiaries have since been allocated an equitable just share as per the judgment of the Kadhi's Court in the said Succession Cause which judgment has never been set aside to date. The plaintiffs further aver that since the distribution of the estate, the 1st and 4th defendants have since disposed off part of the portion of land sub-division No.6827 (original No. 172/2) Section Mainland North. That upon distribution and allocation of each individual heir's share and portion, the 1st and 4th defendants herein have unlawfully and without any right trespassed onto the suit property and thereby interfering with appropriate administration of the Estate and quiet possession of the appropriate portions

by heirs to the suit property. The plaintiffs aver that the 1st and 4th defendant have unlawfully erected structures on the 1st plaintiff's demarcated portion in plot sub-division no.6827 (original No.172/2) Section II Mainland North and erected a wall through the said plot in a manner calculate to deny the plaintiffs free access to their house.

3. The plaintiffs state that the 2nd and 3rd defendants herein who are strangers to the family of the late Ali Nguma have without colour of authority of the plaintiffs trespassed onto plot subdivision No. 172/1 Section II Mainland North and erected a house, temporary structures and a perimeter wall thereon and running an open garage on the suit property.

The plaintiffs aver that unless the defendants' are ordered by this court to demolish the illegal structures and walls and restrained from trespassing on the suit property, the plaintiffs' right to own property and execute their administrative duties to the estate of the late Ali Bin Nguma and for the protection of the heirs right to enjoy quiet possession of their property may never be achieved but rather be adversely prejudiced.

4. Mohamed Hassan Ali, the 1st plaintiff testified on behalf of the plaintiffs and adopted his witness statement dated 15th January, 2019 as his evidence-in-chief. His evidence mainly reiterated the facts as outlined in the amended plaint. The plaintiffs produced as exhibits the certificate of ownership of Title for Plot No. 172 Section II Mainland North issued on 26th September 1921; provisional certificate of title issued on 28th November, 2013; certified copy of judgment in the Kadhi's Succession Cause No. 158 of 2007; Deed plan Nos. 210860, 210861, 210862, 210863 and 210864; and copies of photographs.

5. The defendants filed a joint statement of defence dated 31st March 2017 in which they deny ever having trespassed or encroached onto the suit property. The defendants, however did not tender any evidence in support of their case as they did not attend court during the hearing despite having been duly served with a hearing notice.

6. I have considered the pleadings and the evidence tendered. The issues for determination are

i. Whether the defendants have encroached on the suit property

ii. Whether the plaintiffs are entitled to the reliefs sought.

7. From the material place before me, it is apparent that the suit property was to devolve to the family of the late Hassan Bin Ali for which the plaintiffs and the 1st and 4th defendants are heirs and beneficiaries. Whereas it is clear from the judgment in succession cause No. 158 of 2007 that the Kadhi's Court has since distributed the estate to the beneficiaries, the plaintiffs aver that the 1st and 4th defendants have disposed off their portions and together with the 2nd and 3rd defendants have unlawfully encroached and trespassed onto the portions that belong to other heirs and specifically the portion belonging to the 1st plaintiff. The plaintiffs produced documentary evidence as well as well as photographs in support of their case. Whereas the defendants have filed a defence in which they have denied the plaintiffs' claim, the defendants failed to adduce any evidence to challenge the plaintiffs' evidence. The plaintiffs' evidence therefore has not been challenged and remain uncontroverted.

8. I find the evidence on record sufficient to prove that the plaintiffs have proved their claim regarding encroachment of the suit property by the defendants. The defendants having been proved to have entered and encroached on the suit property without the plaintiffs' permission and/or authority or any lawful cause, the defendants are trespassers. Article 40 of the constitution protects ownership of property. The plaintiffs are therefore entitled to the reliefs sought herein.

9. The upshot of this is that this court is satisfied that the plaintiffs have proved their case against the defendants on a balance of probabilities. Judgment is entered for the plaintiffs against the defendants jointly and severally in the following terms:

a. A mandatory order of injunction is hereby issued compelling the defendants, either by themselves, their agents, employees or any other person claiming through them to vacate from or otherwise howsoever and do demolish and/or pull down to ground level the illegal structures and wall standing on and deliver vacant possession of plot sub-division No.6827 (original No. 172/2) Section II Mainland North and Plot No. 172/1 Section II Mainland North within sixty (60) days from the date of service of the decree herein upon them.

b. In default of (a) above as aforementioned the plaintiffs shall be entitled to an order of eviction for forcible removal of the defendants whether by themselves, their agents, employees or otherwise howsoever from remaining on or continuing in occupation of the suit property and demolition of the illegal structures and walls standing thereon under supervision of an authorized police officer from the nearest police station.

c. A permanent injunction be and is hereby issued restraining the defendants whether by themselves, their employees, servants and/or agents or otherwise howsoever from encroaching, trespassing onto, remaining on or interfering with the plaintiffs' quiet and peaceful possession and occupation of the suit property.

d. The plaintiffs shall have costs of the suit.

DATED, SIGNED and DELIVERED at MOMBASA this 9TH day of July 2020.

C. K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant