



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 229 OF 2014

**SALIMU IDDI MWAMGUTA.....PLAINTIFF**

**VERSUS**

**1. JOSEPH OMONDO**

**2. JOHANNES FIELDER OMONDO.....DEFENDANTS**

**JUDGMENT**

1. The plaintiff instituted this suit by way of a plaint dated 8<sup>th</sup> September, 2014. The plaintiff is seeking for judgment against the defendants for:

- a. **A permanent injunction restraining the defendants, whether by themselves or their servants or otherwise howsoever from remaining on or continuing to construct on the suit property.**
- b. **A mandatory injunction compelling the defendants, whether by themselves or their servants or otherwise howsoever, to demolish and remove any structure standing on the suit property.**
- c. **Vacant possession of the suit property.**
- d. **General damages for trespass.**
- e. **Costs of this suit.**
- f. **Any other relief as this Honourable Court may deem appropriate.**

2. The plaintiff's case is that he is and was at material times the lawful proprietor and the duly registered owner of all that parcel of land known as TITLE NUMBER KWALE/UKUNDA/224 situate at Ukunda within Kwale County measuring approximately 0.8 Hectares (hereinafter referred to as "the suit property"). The plaintiff averred that in or about July 2014, the defendants wrongfully entered and took possession of the suit property and started constructing a permanent structure on a portion of the same and have thereafter wrongfully remained in possession thereof and have thereby trespassed and continue to trespass thereon. The plaintiff averred that by virtue of the defendants' actions of trespass, they have misused, damaged, wasted, destroyed and/or degraded the suit property reasons whereof the plaintiff has been deprived of the use and enjoyment of the suit property and the plaintiff has suffered loss and damage.

3. The plaintiff Salimu Iddi Mwanguta testified as PW1 and was cross-examined by Mr. Obara Counsel for the defendants and re-examined by Mr. Mwadzogo counsel for the plaintiff. The plaintiff testified that he is the lawful and registered owner of the suit property. He stated that in or about July, 2014, the defendants encroached on the property. The plaintiff stated that he reported the matter at Diani Police Station but was advised to seek legal advice. He stated that he went to the Lands Registry where he obtained an official search and engaged the services of a surveyor to establish the boundary of his plot. That the survey report confirmed that the defendants had trespassed on the plaintiff's land. The plaintiff testified that the defendants requested for another survey to be carried out which was done and the same further confirmed that the defendants had erected structures on the plaintiffs' plot. The plaintiff denied that the defendants' construction is on plot no. 3716 and maintained that the same is on TITLE NUMBER KWALE/UKUNDA/224. The plaintiff produced a copy of Title Deed for KWALE/UKUNDA/224, copy of official search dated 1<sup>st</sup> August, 2014, demand letter dated 25<sup>th</sup> July 2014, Letter dated 5<sup>th</sup> August, 2014, letter dated 19<sup>th</sup> August 2014, and photographs as P.exhibits 1-6.

4. PW2, was Gabriel Mwangoma, a land surveyor working with the Ministry of Lands Kwale Survey Office. He stated that they received a complaint from the plaintiff over encroachment of his land. He testified that they wrote to the plaintiff and the owners of neighbouring plots.

He stated that on 26<sup>th</sup> August, 2014, he went to the ground in Ukunda, Kwale County. That the plaintiff and the defendants together with other neighbours were present at the site. PW2 stated that the plaintiff and the owner of Plot No. 3716 showed their respective boundaries. He stated that he then carried out survey and noted that there was a problem on the boundaries. That he advised the parties on where the boundaries were correctly supposed to be. He stated that in his findings, he established that there were small differences on the ground. PW2 testified that he found out that there was a house under construction on PARCEL NO. KWALE/UKUNDA/224, yet the construction ought to have been in Plot No. KWALE/UKUNDA/3716. It was his finding that there was encroachment on PARCEL NUMBER KWALE/UKUNDA/224. He stated that he prepared a report on those findings and produced the survey report as p.exhibit no.7 and the sketch map as p.exhibit no.8. He also produced a letter dated 25<sup>th</sup> August 2014 as D.exhibit no.9

5. In their statement of defence dated 7<sup>th</sup> October, 2014, the defendants denied encroaching and constructing on the plaintiff's land. The defendants averred that it was the plaintiff who has encroached into the 2<sup>nd</sup> defendant's land known as plot No. 3716.

6. The defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The defendants defence was unsubstantiated and remained mere statements. In the same vein, failure by the defendants to adduce any evidence meant that the evidence adduced by the plaintiff against the defendants was uncontroverted and therefore unchallenged. I therefore do find that the defence filed is unsubstantiated and further that the plaintiff's evidence against the defendants unchallenged.

7. I have considered the pleadings, the evidence tendered and submissions filed. The plaintiff's case against the defendants is one of trespass. From the material placed before me there is no dispute that the suit property, TITLE NUMBER KWALE/UKUNDA/224 measuring 0.8 hectares or thereabouts is registered in the name of the plaintiff. The plaintiff is the registered owner of the suit property. The plaintiff also produced photographs which he stated show some construction by the defendants on his land. PW2, produced a survey report (p.exhibit no.7) and sketch map (p.exhibits No.8) which confirm that there was encroachment on the plaintiff's TITLE NO.KWALE/UKUNDA/224. The plaintiff's evidence has not been challenged and remains uncontroverted. The defendant's encroachment on the plaintiff's land is no doubt unlawful. I find the evidence on record sufficient to prove that the plaintiff has proved his claim against the defendants on a balance of probabilities. Once trespass is established it is actionable per se, and no proof of damage is necessary for the court to award damages. The plaintiff's advocate has submitted that an award of Kshs.1,000,000/= should be awarded as general damages. In my view, the amount suggested is reasonable and I will award the same.

8. The upshot is that this court is satisfied that the plaintiff has proved his case against the defendants on a balance of probabilities. Accordingly, judgment is entered for the plaintiff against the defendants jointly and severally as follows:-

a) **A permanent injunction restraining the defendants, whether by themselves or their servants or otherwise howsoever, from remaining on or continuing in to construct on parcel of land known as TITLE NO. KWALE/UKUNDA/224.**

b) **A mandatory injunction compelling the defendants whether by themselves or their servants or otherwise howsoever to demolish and remove any structure standing on parcel of land known as TITLE NUMBER KWALE/UKUNDA/224 within ninety (90) days from the date of delivery of this judgment, in default, the plaintiff to demolish and remove the same at the defendants' cost.**

c) **The defendant to give vacant possession of the suit property within ninety (90) days from the date of delivery of this judgment in default, the plaintiff shall be entitled to an order of eviction.**

d) **Kshs. 1,000,000/= as general damages for trespass**

e) **Cost of the suit are awarded to the plaintiff.**

9. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA 30<sup>th</sup> day of September 2020**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**