



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO. 120 OF 2013

SAMUEL NGUGI CHEGE & OTHERS..... PLAINTIFFS

= VERSUS =

ALI SAID MOHAMED & ANOTHER.....DEFENDANTS

J U D G E M E N T

1. The 60 plaintiffs commenced this suit vide their plaint dated 4th June 2013 against the two defendants. The plaintiffs pleaded that at all material times, they were lawful occupants of plot numbers 11466/II/MN to 11552 (all inclusive) originally known as plot No. 82/II/MN with the consent of the landlord paying therefore ground rents. That sometimes in 2005, the defendants informed the plaintiffs that they wanted to subdivide the entire land and sell to them in equivalent sizes of houses built by each occupant. That the plaintiffs agreed and did a valuation of their subplots at Kshs.31,305/= and shared the valuation report with the defendants.

2. That the defendants did not communicate to them until 2nd April 2013 when the defendants did a letter stating that the subdivision process was complete and offered the plots for sale to the various plaintiffs at colossal sums without due regard to the plaintiffs well-being. The plaintiffs expressed their displeasure with the high figures demanded and the notices of eviction they were served with.

3. The plaintiffs pleaded that the eviction notices were illegal, null and void as they are not trespassers on the suit land. They filed this suit urging the court to enter judgment against the defendants for:

(a) A permanent injunction against the defendants, their servants and or agents or any other person whosever acting under their instructions be restrained from evicting, selling, or howsoever interfering with the plaintiff's quite occupation of all the properties known as Plot No.11466/II/MN to plot No. 11552/II/MN (Herein after 'the suit properties') or from dealing with the suit properties in any manner whatsoever contrary to rights of the plaintiffs.

(b) A declaration that the plaintiffs are lawfully in occupation of the suit properties as more illustrated in (a) above.

(c) Costs of an incident to this suit.

(d) Any other or further orders as the honourable court may deem just to grant in the interest of justice.

4. The defendants filed a defence to the claim on 16th July 2013. The statement of defence was subsequently amended on 18th May 2017 and filed on 19th May 2017 to include a counter-claim which the defendants pleaded was to align it to the consent order recorded on 2/4/2014 and take into consideration the fact that the 2nd defendant was deceased.

5. The defendant denied the entire claim as presented by the plaintiffs. The defendant admitted issuing notices to illegal occupants on his plots and offering to sell the plots at market rates as the owner of the plots. He pleaded further that the developments on his properties were undertaken without his consent hence it is averred that the illegal developers are the authors of their own misfortune. It is pleaded that the suit is fatally defective because it involves separate and distinct titles occupied by separate illegal occupants with no common contract or agreement. That the suit does not disclose any reasonable cause of action.

6. The defendant counter-claimed that the plaintiffs are illegal trespassers upon his property and have deprived him his constitutional and lawful right to use the land. That the plaintiffs have refused to pay the value of the parcels as set out in the valuation report by the government valuer and filed in court pursuant to the consent of all parties. The defendant's claim is for an order of eviction against the plaintiffs and grant of vacant possession.

7. The defendant sought that the plaintiffs' suit be dismissed with costs and judgment entered in his favour on the counter-claim against the plaintiffs' jointly and severally for;

a) A declaration that the plaintiffs' occupation and or presence on the defendant's 86 parcels of land or plots and known as sub-division No. 11466/II/MN to 11552/II/MN (both inclusive) and being part of all that piece or parcel of land originally known as parcel or plot no. 82/II/MN situated in Kisauni Area of Mombasa is illegal, null and void ab initio.

b) An order of eviction and grant of vacant possession against the plaintiffs, their agents, servants, employees, representatives, or any other person acting for or on behalf of the plaintiffs directing them to pull down to the ground any structures, houses and or developments and to completely remove any debris or waste thereof from the defendant's 86 parcels of land and/or plots known as sub-division No. 11466/II/MN to 11552/II/MN (both inclusive) and being part of all that piece or parcel of land originally known as parcel or plot No. 82/II/MN situated in Kisauni Area of Mombasa.

c) Damages for illegal trespass.

d) Any other and/or further order or relief that this Honourable court may deem fit and or just to grant in favour of the defendant.

8. After the close of the pleadings each side called the evidence of one witness. Raphael Odhiambo Obore testified on 16/10/2018 as the plaintiffs only witness. PW stated that he knew the other plaintiffs as they live on the same plot No. 82 and that they had given him authority to act on their behalf as shown in **Pex 1**. He adopted his witness statement dated 4/6/2013 as his evidence in chief. The witness statement was signed jointly by the 5 representatives of the plaintiffs.

9. It is stated that the plaintiffs since taking occupation and possession of the suit premises by consent of the landlords have been duly and lawfully paying ground rents as and when they are due and which rent has always been received by the defendant. That in the year 2005, the defendants approached the plaintiffs and informed them that they wanted to subdivide the entire property into sub-plots and offer them for sale. That the plaintiffs accepted and did their valuation which stated the sub-plots should be sold at Kshs.31,305/=.

10. The witness further stated that the defendants promised to communicate to them but instead the defendants went underground until 2/4/2013 when the plaintiffs received a letter offering the sub-plots for sale at exaggerated colossal sums without due regard to the plaintiffs well-being. The witness avers that the eviction notice is illegal, null and void as they are not trespassers on the suit premises and are paying ground rent as agreed without any default whatsoever.

11. In cross-examination **PW** said he lives on plot No. 11534/II/MN. He was asking the court to cancel the sub-divisions because they were not consulted. That some plaintiffs got on to the land in the 70s. That the property was not connected to electricity or roads at the time of initial occupation and the owner did not refuse anyone to build permanent houses.

12. The defendant gave his testimony on 24/7/2019. Mr. Ali Said Mohamed stated that he is the administrator of the estate of Nassir Bin Said Bin Rashid who owns the suit land. He adopted his statement dated 16/7/2013 and further statement dated 18/5/2017 as his evidence in chief. **DW** said that the plaintiffs approached his parents to be given a portion to build temporary structures. Instead they have built permanent structures contrary to the agreement. That the plaintiffs were not paying ground rents as agreed for about 16-18 years from now.

13. The witness proceeded further that they decided as a family to take out letters of administration and sub-divide the land as was occupied. Thereafter they did a valuation and asked the plaintiffs to buy their sub-plots but the plaintiffs rejected the offer necessitating that they issue the notices of 2/4/2013 through their advocates for vacant possession. On receipt of the notice, the plaintiffs filed this case. The defendant annexed copies of all the sub-divided titles; that the plaintiffs have refused to buy complaining that the prices were too high. The defendant stated that they accepted the value set by the government valuer.

14. That the 1st plaintiff agreed to pay and had already bought 3 plots. The defendant did not understand why the case was still in court. He urged the court to enter judgement for him for vacant possession putting reliance on the documents in his list dated 16/7/2013. The defendant alleged that the plaintiffs are getting big rents yet as owners of the land he is getting nothing. In cross-examination, **DW** stated that the sub-division was done after all the houses were built and the same were done as per the buildings/houses. That **Pex 2** did not come from there. That before his appointment as the administrator, there was no one with authority to sign a document for sale or development. That their valuation report did not take into account the value of the developments on the land. As at now, he was relying on the report by the government valuer.

15. At the close of the hearing parties were given time to file written submissions which they did by 7th November 2019. Thereafter the file was forwarded to me judgement writing. From the pleadings and the evidence adduced, it is not in dispute that the plaintiffs took occupation of the suit land L.R No. 82/II/MN with permission of the registered land owner. The plaintiffs were paying therefore ground rents for each of the portions they occupied as shown in some of the receipts issued to them filed with their documents. It is also pleaded that sometimes in the year 2005, the defendants offered to sell the portions so occupied to the respective plaintiffs and to have this done the original number had to be sub-divided.

16. The three issues now disputed and which the court is called to determine is;

(a) Whether or not the subdivisions so undertaken by the defendant to create the current suit plots Nos 11466/II/MN to 11552 all-inclusive should be cancelled.

(b) Whether or not this court can set the price to be paid by the plaintiffs for the respective plots they occupied and or;

(c) If the defendant is entitled to orders of vacant possession.

(d) Who meets the costs of this suit?

17. The plaintiffs are not disputing ownership of the suit property as vesting on the defendant. The defendant went ahead to file a list of documents dated 11/12/2013 containing copies of each of the sub-divided titles bearing his name. There was also produced the copy of original title No. 82/II/MN in the name of Ali Bin Said & 2 others one of whose estate the defendant represents. Further the plaintiffs stated that they had a meeting with the defendant in the year 2005 and agreed that the land was to be sub-divided and offered to them for sale. PW stated that they were seeking cancellation of the sub-divisions because it was done without their input and some of the boundaries passed through the existing houses.

18. The plaintiffs in the course of these proceedings moved this court vide a notice of motion application dated 22nd October 2015 wherein they sought two orders as hereunder;

(i) That the sub-divisions done by the defendant from plot Nos MN/II/11465 to MN/II/11552 originally known as plot No. 82/II/MN unilaterally be redone with the input and presence of the plaintiffs.

(ii) That the Mombasa Lands District Officer be ordered to do valuation of each parcel of land at its value when the particular plaintiff entered and built on their particular parcel of land.

19. The court after hearing the parties on the application delivered a ruling on 7th September 2016. I stated thus at paragraphs;

“6. Secondly if the exercise was done before the commencement of this suit then the applicants ought to make it a substantive prayer in their pleading in which it should ask the Court to declare the exercise illegal or unfair. By making the prayer via an interlocutory application to undo what is already done is tantamount to trial through the backdoor. Further the applicants did not disclose to Court how many plots affected them so that the court would weigh the costs implication of re-doing the exercise.

“7. In the plaint filed in Court, prayer (a) reads thus;

“A permanent injunction against the defendants, their agents or agents or any person whosoever acting under their instructions be restrained from eviction or howsoever interfering with the Plaintiffs’ quiet possession of all the properties known as plot No. 11466/II/MN to plot No. 11552/II/MN (hereinafter the suit property) or from dealing with the suit property in any manner contrary to the plaintiffs’ rights”.

Looking at this prayer vis-à-vis the orders sought in the present application. If the plaintiffs’ suit succeeds, then the subdivisions undertaken by the defendants would be of no consequence. In effect the prayers contained in the motion is at variance with the main suit and therefore are unavailable to the applicants as they have no foundation to stand on.

20. The plaintiffs neither filed an appeal against this determination nor applied to amend their plaint to include the prayer for nullification of the subdivisions. The law as it is provides that parties are bound by their pleadings. There is no prayer for cancellation of the subdivisions made in the plaint. The suit was filed after the subdivisions had been done yet even in the body of the plaint filed, there was no mention of the illegality of the sub-divisions pleaded. The contestation is only made in the response to the amended defence and counter-claim filed on 12/6/2017 where the plaintiff without amending their prayers pleaded thus in paragraph 14;

(i) The defendants unilaterally and without consultation with the plaintiffs, went ahead and commissioned a surveyor to sub-divide the main property, originally Plot No. 82/II/MN without the knowledge of the plaintiffs.

(ii) The sub-division and lack of consultation with the plaintiffs resulted in some of the plaintiffs’ plots being cut into two, some parts of the residential houses left out, septic tanks left out of the plot and access road passing in the middle of some plaintiffs’ houses.

21. This line of pleading and allegations placed on the plaintiffs the legal burden to prove that indeed the sub-divisions as carried out by the defendant cut through some of their houses and or left out the septic tanks. This information was within the knowledge of the plaintiffs before they filed this suit. The plots created out of No. 82/II/MN were approximately ninety (90) pieces. The witness did not mention any specific plot that was affected. They also did not engage a surveyor to carry out a similar exercise and prepare a report to prove this fact. It means that they remained mere allegations. Consequently, for the reason that the same was proved, this Court finds no basis to interfere with the sub-divisions as done by the defendant which created the suit titles 11466/II/MN to 11552/II/MN.

22. The 2nd issue is whether the Court has capacity to determine the amounts payable for each of the sub-plots and if so, how much? At paragraph 5 of the plaint, the plaintiff pleaded thus;

“The plaintiffs aver that sometime in 2005 the defendants approached the plaintiffs and informed them that they wanted to sub-divide the entire property into sub-plots and offered to sell them to us the plots equivalent to the size of the houses built by each occupant and which we accepted and did a valuation which stated that the sub-plots should be sold at Kenya Shillings Thirty One Thousand Three Hundred and Five (Kshs.31,305/=) and after giving the defendants our valuation they informed us that they shall communicate to us.”

23. The defendant on their part also pleaded at paragraph 4 of the defence thus;

“Save that the 1st defendant subdivided his property and registered it under separate titles, the 1st defendant denies the contents of paragraph 5 & 6 of the plaint and specifically denies offering to sell the plots at exaggerated colossal sums as alleged or at all and shall call for strict proof.”

24. The parties thus invited the Court to make a determination on how much was to be paid for the plots. I felt it was important to set out the facts as per the pleadings because the Court's role is not to write contracts between parties. See the decision in **National Bank of Kenya Vs Pipelasic Samkolit (K) Ltd & Ano (2001) eKLR**. In the Case before me, when the plaintiffs brought this claim, they had a valuation dated 19/9/2015 done by Maina Chege & Company which gave a valuation of the whole land at Kshs.2,817,450 and value for each sub-plot at Kshs.31,305/=.

25. The defendant filed together with his statement of defence a valuation report by Dominion Valuers Limited dated 12/3/2013 which gave open market values for each of the suit titles to challenge the valuation presented by the plaintiff. According to the defendants' valuer, the plots were assessed depending on their respective sizes ranging from Kshs1,500,000 to 6,000,000. Because of the variance on the value assigned by the two private valuers, the parties herein filed a consent letter dated 10th March 2014 executed by their respective advocates. The consent was recorded and adopted as an order of this Court on the following terms;

(a) The Government Valuer Mombasa to carry out a Valuation in respect to Plot Numbers subdivisions No. 11465/II/MN to subdivision No. 11555/II/MN (both inclusive) situated at Mishomoroni area within Kisauni District of Mombasa County.

(b) The valuer shall file the Report(s) in the Court within Ten (10) Days upon completion of the valuation.

(c) The valuation costs and/or charges shall be borne by the parties equally i.e. the defendant shall pay half the amount while the plaintiffs shall jointly and/or severally pay the other half of the amount.

(d) Each party shall be at liberty to apply.

26. This order was extracted and served on the government valuer Mombasa to carry out the valuation in respect of the suit titles. The plaintiffs tried to stop the exercise once it began by filing the application dated 22/10/2015 which the court disallowed when I rendered myself thus on 7/9/2016.

At paragraph;

“8 The respondent also stated that there is a consent order dated 10/3/2014 which allowed the valuation exercise to be undertaken. I have perused the record and found therein a consent letter dated 10/3/2014 which was adopted as an order of the Court and a Court Order issued on 25/6/2014. No (a) ordered the government valuer to carry out a valuation in respect to plot Nos 11465/II/MN – 11555/II/MN all inclusive.”

“9 As stated correctly by the respondents, if the applicants wish to vary this consent for the valuation to cover the value of the plots before occupation by the plaintiffs then they need to follow the proper procedure for setting aside a consent order. Prayer No. 3 of the motion as presented is res judicata as the issue of valuation has been resolved by a consent.”

27. When the plaintiffs took occupation of the suit premises, they did so as ground tenants. The issue of sale only came up according to the plaintiffs own pleadings in the year 2005 when the defendants approached them and expressed their intention to subdivide the entire property into sub-plots and offer the same for sale. The value in my view that would attach for purposes of sale would be when the offer was made and acceptance done and not on the date when the plaintiff initially took possession of the plot as their initial possession was that of ground tenants and nothing more.

28. The offer the plaintiffs were expected to accept was the sub-division and sale of the sub-plots. In the Case of **Jiwalji Vs Jiwalji (1968) E.A 547**, the Court of Appeal held that; ***“Where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties.”***

29. Therefore, in my view the offer to sell arose after the sub-division of these plots which offer the plaintiff rejected as being highly priced. To reach a middle ground, the parties agreed to engage the services of a government valuer to carry out a fresh valuation and file its report. The report was filed and the defendant chose to rely wholly on it. Since the valuation was done pursuant to a consent, the plaintiffs ought to have led evidence to demonstrate why they still disagreed with this valuation. No such evidence was brought to Court.

30. Consequently, by virtue of the consent order, the parties donated to the court powers to determine the price of the subplots. The Court answers the second question that yes it does determine the amounts payable for each of the sub plots guided by the report of the government valuer. The defendant already agreed to go by the price set by the government valuer. I find that the plaintiff having failed to present evidence why the court should adopt a contrary view, it is my finding that the price for each of the sub plots is as set by the government valuer.

31. Is the defendant entitled to orders of eviction and/or vacant possession as prayed in the counter-claim? The plaintiffs are granted 45 days to take the offer of paying for their plots as set out in the Government Valuer's Report. In default, they are declared as trespassers and the orders of eviction and or vacant possession shall issue against them in favour of the defendant.

32. The damages awarded and payable to the defendant is in terms of outstanding ground rents from the plaintiffs up and until the offer to buy is accepted and or when vacant possession is given. The defendant to calculate the amounts due from each plaintiff and serve notice. In

default to pay after service of the notice, the defendant is at liberty to execute.

33. In conclusion, I find that the plaintiffs have not proved a claim against the defendant and their suit is hereby ordered dismissed. The defendant's counter-claim succeeds as stated herein above. The cost of the suit and counter-claim is awarded to the defendant.

Judgement dated & signed at Busia this

16th Day of September 2020

A. OMOLLO

JUDGE

And delivered electronically via email to the parties' advocates this 21st Day of September 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE