



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 47 OF 2012

ABDINASIR AHMED MUSE PLAINTIFF

=VERSUS=

GEOFREY MWAIRANGU MWANVONGO DEFENDANT

JUDGEMENT

[1] The Plaintiff filed suit against the Defendant and prayed for the following orders:

“a) *A declaration that the plaintiff is the rightful owner of Plot Number Mombasa/Mwembelegeza/1507.*

b. *A declaration that the defendant is a trespasser on the said suit property.*

c. *An eviction order, evicting the defendant from the suit premises.*

d. *A mandatory injunction compelling the Defendant by himself, his officers, servants and/or agents to demolish all those an authorized structures erected on Plot number Mombasa/Mwembelegeza/1507*

e. *A mandatory injunction compelling the Defendant by himself, his officers, servants and/or agents to desist from encroaching, trespassing, or in any other way interfering with Plot number Mombasa/Mwembelegeza/1507.*

f. *Costs of the suit and interest thereon at 14%.”*

[2] The Plaintiff stated in his plaint that he is the registered owner of the suit land. That the Defendant without the approval of the municipal council of Mombasa and without any color of right consent or authority of the Plaintiff encroached and trespassed and caused to be erected upon the suit property structures on the suit premises preventing the Plaintiff from the use and enjoyment of his property that the Defendant has been given notice to move and vacate out of the suit land and has refused to do so. The Defendant on his part states that he has been on the suit land for 15 years. He states that having squatted on the subject property since 2002 he was issued with a Title Deed No. Mombasa/Mwembelegeza/1609. He averred that the Plaintiff produced registration of the subject portion of land in his name vide title No. Mombasa/Mwembelegeza/1507 and that the said title was obtained fraudulently and irregularly. In his defence he set out the particulars of fraud.

[3] This matter came up for hearing on 3rd October 2013. The Plaintiff Mr. Abdinasir Ahmed Muse gave evidence that he bought the property from one Mwanana Mohamed for Kshs.1,200,000 and the

transfer was registered in the year 2007. He stated that after purchase he was taken to the ground and was shown the site plan. That the plot was an empty plot. He said that he later went and found the Defendant in the premises. He consulted a surveyor one Mwanyungu who indicated that the Defendant was in the Plaintiff's premises. The Plaintiff asked the Defendant to move and vacate out of the land and the Defendant refused to do so. The Plaintiff then went to the chief who wrote a letter to the Defendant to move out of the land. The Defendant wrote a letter through his lawyer Njenga Mwangi and said that this was plot No. 1609. Thereupon the Plaintiff's lawyer did a search in the land office. The search showed the Plaintiff to be the owner of the land and that land parcel Mombasa/Mwembelegeza/1609 does not exist. The Plaintiff denied that he obtained Plot 1507 by fraud.

[4] The Defendant on his part stated that the suit land is his. He said he started construction of his house in 1998. He stopped the construction when it rained and resumed in 1999. He said he got his Title Deed in July 2002. He stated that the land was surveyed and he was shown the boundaries of his land. He said that he started noticing the Defendant in the land in 2007. That the Plaintiff was violent and he was saying that the land is his. He said he had no search certificate but had a letter from the Land Protection Council of Kenya. He averred that the land is his. On cross examination by Mr. Omwenga learned counsel for the Plaintiff, the Defendant said that in the plan of Mwembelegeza there was no plot 1609. He said from his copy of title deed it was issued on 7th August 2002 and that the Plaintiff's title is dated 2nd May 2000. He said he had no search of land and that he does not pay rates and that he is a squatter and was shown the premises by the Government and that the land is his.

[5] After the close of the case of the Plaintiff and the Defendant I ordered the Land Registrar Mombasa District Land Registry to come and give the true picture in regard to title numbers Mombasa/Mwembelegeza/1609 and a copy of title was attached.

[6] On 5th December 2013 Mr. Hashim Got Sat the Land Registrar currently situated at Mombasa land registry gave evidence. He said that Plot No. 1507 is registered in the name of Abdunasir Ahmed Muse of P.O. Box 80941 Mombasa and that it is a freehold property measuring 0.12 hectares. That it was previously registered in the name Mwana Mohammed Salim who transferred her interests to Muse as per entry B2 and B4. He produced a certified copy of the green card. That on 28th May 2012 a restriction was registered under Sec. 136 (b) & (c) of the Registered Land Act (now repealed) upon receiving a complaint from Chief Land Registrar vide letter msa/a/24/VXI/31 of 14th May 2012. He said that he therefore wrote to the District Surveyor to confirm ground position. The surveyor confirmed that within Mwembelegeza, there are six registry index map sheets and in all those sheets Plot No. 1609 does not exist. He stated that according to ministerial task force re PDP/12/511/35 of 16th June 2011 it is indicated that Plot No. 1609 is under Settlement Fund Trustees but was moved in the Registry Map (RM) and not supposed to be where it is. The Land Registrar said that after consulting with the District Land Adjudication Officer there is an embargo of Plot No. 1609 and it is not lifted by letter. He referred to letter Delaso/Msa/208 VIB/80 of 17th July 2012. He therefore said that for Plot 1609 he has no record and he needs documents from the registered proprietor. He said plot 1507 exists. That he has records on allocation, the original title original transfer to the Plaintiff and an allocation from settlement to Mwana Mohammed Salim who sold her interests to the Plaintiff. He produced his report and green cards and surveyors letter and Delasso's letter.

[7] From the foregoing it is clear that the Defendant thought he has taken occupation on the ground of what he genuinely thinks is plot 1609 he is in the wrong plot that is 1507. His plot does not appear anywhere in the Registry Index Map. The District Land Registrar Mombasa is unaware of Plot 1509. The Defendant shall be well advised to follow up his plot with the settlement and the authorities that put an embargo on his plot. The Plaintiff should not be hindered from the enjoyment of his plot due to the unfortunate circumstance the Defendant finds himself in. I have no doubt that what the Mombasa District Land Registrar said is the true position.

[7] I do allow the plaint as prayed. However the Defendant shall be granted 60 days to move and vacate out of the suit land failing which he shall be evicted therefrom at his own costs. Each party to this case shall bear their own cost.

Dated and delivered in open Court at Mombasa this 14th day of March, 2014.

S MUKUNYA

JUDGE

In the presence of:

Mr. Chamusanda Advocate for Mr.Mogaka Advocate for the plaintiff.

Defendant not present.