



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 54 OF 2017

ABDALLA MOHAMED ABDISHEIKH.....PLAINTIFF

VERSUS

KISHAN CONSTRUCTION LIMITED.....DEFENDANT

JUDGMENT

Background

1. By his Complaint dated 13th March 2017 as filed herein on 14th March 2017, Abdalla Mohamed Abdisheikh (the Plaintiff) prays for Judgment against the Defendant for: -

a) A permanent injunction restraining the Defendant by itself, its employees, workers, servants or agents from trespassing upon, encroaching or passing through or being on the Plaintiff's piece of land known as land parcel No. Ngomeni Squatter Settlement Scheme/1859;

b) General damages for wrongful trespass and/or encroachment;

c) Kshs 15,000/- survey costs;

d) Costs;

e) Interest at Court rates on (b), (c) and (d) from the date of filing this suit;

f) Any other or further relief this Honourable Court may deem just to grant.

2. The prayers arise from the Plaintiff's contention that he is the absolute registered proprietor of the subject piece of land and that commencing October 2016, the Defendant has been trespassing thereon by using the same as an access road to Plot No. 2099 wherein the Defendant is constructing some buildings.

3. The Plaintiff avers that for purposes of the said access, the Defendant has without his authority or consent cleared up his land and put up a road traversing through it thereby effectively dividing the suit property into two uneconomical portions. The Plaintiff asserts that as a result of the Defendant's said actions, he has been forced to seek the services of a surveyor to determine the extent of encroachment and that he has suffered loss and damage.

4. But in its Statement of Defence dated and filed herein on 18th May 2016, Kishan Construction Limited (the Defendant) denies that it has trespassed or been crossing the Plaintiff's property as alleged or at all. In particular, the Defendant denies that it cleared the Plaintiff's land and/or put up a road thereon without the Plaintiff's authority.

5. On the contrary, the Defendant avers that it was indeed the Plaintiff who granted them permission verbally to put up an access road on the land in the presence of witnesses. It however denies dividing the land into two portions and or that as a result the Plaintiff has suffered the alleged or any loss and damage.

The Plaintiff's Case

6. At the trial herein the Plaintiff called one witness in support of his case.

7. PW1-Abdalla Mohamed Abdisheikh is the Plaintiff himself and a resident of Gongoni in Malindi. He testified that he knows the Defendant company and that they are engaged in construction of houses. PW1 told the Court that he is the proprietor of the parcel of land known as Ngomeni Squatter Settlement Scheme/1859. The Defendant who had an interest in an adjoining parcel of land put up an access road on PW1's land to access that neighbouring parcel wherein they are constructing a building.

8. PW1 testified that he did not authorize the Defendant's actions and that as a result of their activities, his parcel of land has now been divided into two portions that are not economically viable. He urged the Court to restrain the Defendant and to compel them to pay for the loss and damage. He further told the Court he wanted the land for agricultural purposes and that he may have lost upto Kshs 1.5 million due to the Defendant's activities.

9. On cross-examination, the Plaintiff told the Court he does not reside on the land. He conceded that he had not produced any report or any other thing to support his demand for payment of Kshs 1.5 Million.

The Defence Case

10. The Defendant similarly called one witness who testified in support of their case.

11. DW1-Ravji Kalyan Patel is a Director of the Defendant and a resident of Mombasa. He testified that they are engaged in the work of construction and that the owner of Plot No. 2099-Ngomeni Squatter Settlement Scheme had engaged them to carry out some construction on his parcel of land.

12. DW1 testified that as a result, they requested the Plaintiff in 2016 to give them permission to access the said Plot by making a temporary access road through the Plaintiff's Plot No. 1859. DW1 told the Court that the Plaintiff did in fact grant them permission orally to make the said temporary access road-in the presence of two witnesses by the names Samson Kahindi Kithi and Hassan Salim Hassan.

13. On cross-examination, DW1 conceded that he had indeed received a letter from the Plaintiff's Advocates asking them to immediately cease the use of the land. The Defendant's Advocate responded on 1st January 2017 indicating that they had been given permission to use the land.

Analysis and Determination

14. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have also taken into consideration the written submissions as placed before me by the Learned Advocates for the parties.

15. It was not contested that the Plaintiff is the registered proprietor of all that parcel of land known as Ngomeni Squatter Settlement /1859. It is also not contested that the Defendant, a limited liability company engaged in construction works had at the material time in October 2016 been engaged to construct a building in the adjacent Plot No. 2099.

16. From the material placed before me, it is apparent that there was no access road from the main road to the said neighbouring Plot No. 2099. According to the Plaintiff, the Defendant unilaterally created a 9-metre road across the suit property in order to enable its vehicles access the construction site. The Defendant does not deny creating the said access road. It is however their case that prior to creating the same, they obtained the Plaintiff's verbal consent and authority to do so.

17. Given that the Plaintiff denies ever giving such permission, I think it was incumbent upon the Defendant to demonstrate appropriately that such verbal consent was given. As it were, the Defendant's Director (DW1) who testified as its sole witness herein did not point out where and to whom that consent was given. And while he told the Court the consent was given in the presence of the two witnesses, none of those witnesses were called to testify herein.

18. It was however telling that some two months before the Plaintiff instituted this suit, he did through his Advocates write formally to the Defendant asking them to cease the unauthorized use of the land to access the construction site. Rather than immediately cease their operations as requested by the registered owner of the land, the Defendant through their Advocates wrote back insisting that it was agreed in discussions between the parties held in 2016 that a through-way would be made on the Plaintiff's land in order to enable the Defendant access the construction site.

19. Even where it could be assumed that the Defendant had initially obtained the Plaintiff's permission to pass through his land to access the construction site, that permission ceased the moment the Plaintiff protested against the Defendant's use of his land and in particular when the formal demand letter of 23rd January 2017 was made. It was not open for the Defendant to justify its presence on the land and to persist in the use thereof.

20. Such continued use of the Plaintiff's land without his permission constituted an act of trespass. In his testimony before the Court, the Plaintiff told the Court he was compelled to hire the services of a Surveyor at a cost of Kshs 15,000/- to demarcate the extent of the encroachment. The resultant Survey Report produced herein by the Plaintiff confirms the width of the road as 9 metres.

21. As it were, where the Plaintiff proves trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss. However, where the trespass has caused the Plaintiff actual damage, he is entitled to receive such amounts as will compensate him for his loss.

22. In his testimony before the Court, the Plaintiff told the Court that he had intended to use the land for agricultural purposes and that he

was unable to do so due to the Plaintiff's actions. He told the Court that as a result, he estimated to have lost upto Kshs 1.5 Million which he asked for in damages. He was however unable to justify that figure in cross-examination.

23. I have looked at the Survey Report dated 2nd March 2017 from the Malindi District Survey Office. It is clear that the access road was created on the eastern end of the suit property and not half-way through as stated by the Plaintiff. Taking into account the relatively short period of the trespass and in the absence of any evidence that the Plaintiff was hitherto using the land for the said agricultural purpose, I am of the view that an award of Kshs 300,000/- would reasonably compensate the Plaintiff for the wrongful use of his land.

24. Accordingly, I hereby enter Judgment for the Plaintiff as against the Defendant as follows: -

a) A permanent injunction is hereby issued restraining the Defendant by itself, its employees, servants and or agents from trespassing upon, encroaching or passing through or being on the suit property.

b) General damages of Kshs 300,000/- for wrongful trespass and or encroachment

c) Special damages of Kshs 15,000/- as Survey Costs.

d) The Plaintiff shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 2nd day of October, 2020.

J.O. OLOLA

JUDGE