



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CIVIL SUIT NO. 93 OF 2008**

**JEREMIAH MWEBI .....PLAINTIFF**

**VERSUS**

**SHALI MJAHD .....1<sup>ST</sup> DEFENDANT**

**LALI SWALEH .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff (Jeremiah Mwebi) filed this claim against Shali Mjahid (1<sup>st</sup> defendant) and Lali Swaleh (2<sup>nd</sup> defendant) seeking that judgment be entered in his favour against the defendants for:

- (a) A permanent injunction restraining the defendants by themselves, their servants, agents and/or assignees in any manner from interfering with or dealing with the suit property.
- (b) An order for demolition and removal from the site, of any structure and material therein
- (c) Damages for trespass.

The plaintiff's claim is based on grounds that he is the registered owner of plot No. LR 233 Watamu Township, having been issued with a Grant No. CR 16553 from the Government of Kenya on 27<sup>th</sup> July 1983.

He had constructed a permanent house on the suit property leaving an open space for the parking and other amenities.

In the month of July 2003, the plaintiff learnt that 1<sup>st</sup> defendant had sold the open space to 2<sup>nd</sup> defendant who had commenced construction. Despite demands made to the defendants to rescind the sale and deliver vacant possession of the suit property to the plaintiff, the defendants have failed and/or refused to do so.

The plaintiff's claim to ownership is denied by 1<sup>st</sup> defendant who says he has lived on that parcel together with several other squatters, since 1971, during which time he has had peaceful and quiet enjoyment of plot no. 233 Watamu until the filing of this suit.

In a year which 1<sup>st</sup> defendant cannot remember, he fell sick and was taken to Ngomeni by relatives. When

he eventually returned to Watamu, he found someone by the name John had built a house on the land. 1<sup>st</sup> defendant made a report to the area elders, and a panel of elders including the area chief was constituted. The panel deliberated on the issue and ruled that John had built on the land without express authority from the defendant. Soon thereafter, the said house got burnt and John left the area, never to return.

As far as 1<sup>st</sup> defendant is concerned, the plaintiff has never set foot on the land and is in fact living in Nakuru and has in fact never developed it.

1<sup>st</sup> defendant denies that the burnt house was the one constructed by plaintiff and puts him to strict proof. He also states that having lived on the land for that period, then he is entitled to its ownership by virtue of adverse possession and in the alternative he ought to be compensated as he has developed the land. He pleads that plaintiff be restrained from interfering and dealing in any manner with the suit property.

The 2<sup>nd</sup> defendant's statement of defence indicated that he is an innocent purchase for value without notice of a parcel of land measuring ½ acre which he purchased from the 1<sup>st</sup> defendant who had confirmed to him that the land measuring 3 acres belonged to him. He therefore prays that plaintiff's suit be dismissed.

At the hearing, Mr. Mouko indicated that he was abandoning the claim against 1<sup>st</sup> defendant as he was deceased. The matter proceeded ex parte as 2<sup>nd</sup> defendant did not attend court although he had been served.

The plaintiff told this court that he was issued with a grant in respect of the parcel in 1983 – he produced the document as Exhibi 1.

He also demonstrated the steps he had taken towards acquiring the land, relying on exhibit 2 (a letter dated 5<sup>th</sup> April 1983 from the Lands Office signed by one Mbutia W. Gikuri on behalf of the Commissioner of Lands) informing plaintiff that the plot had been surveyed and he had been assigned a plot number. This allocation has not been challenged.

2<sup>nd</sup> defendant claimed to have bought the property from 1<sup>st</sup> defendant as a bona fide purchaser. However he failed to attend court and demonstrate the purported bona fides.

This is made worse by the fact that 1<sup>st</sup> defendant having died could now not prove the purported adverse possession he had sought to rely on to justify his disposal of part of the land to the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendants are said to have begun construction works thereon although nothing was tendered before this court to support the extent of construction, other than a letter written by the plaintiff's counsel warning them to stop any activities on the land. Plaintiff seeks damages for trespass, yet it would seem that from 1983 he has never really utilized the land, he didn't even know what was going on until someone passed on the information to him. He claims to have erected a permanent house here but had nothing such as a building plan, or photos or even receipts or materials used in the construction, and it may well be that the house he talks about is the one 1<sup>st</sup> defendant stated burnt down. He has failed to demonstrate that he has suffered anything to warrant award damages for the trespass complained of. The only thing he has adequately demonstrated is that he is the legal owner of the parcel in question.

Since 1<sup>st</sup> defendant is now deceased, then I will issue orders of injunction which shall be permanent in nature, as against the 2<sup>nd</sup> defendant, his servants, agents and/or assignee from interfering in any manner or dealing with the suit property.

Secondly if there are any structure erected or material deposited on the property, then these must be removed within 21 (twenty one) days from today.

I award costs of this suit to the plaintiff.

Delivered and dated this 1<sup>st</sup> day of **March 2011** at Malindi.

**H. A. OMONDI**  
**JUDGE**