



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 261 OF 2016

EDWARD FURAHA NZARO.....PLAINTIFF

VERSUS

JAMAL SALAD ABDILLE.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 15th September, 2016. The plaintiff is seeking for judgment against the defendant for:

- 1. A declaration that the plaintiff is the legal and rightful lessee of portion of land measuring 30 ft by 70 ft of property known as Plot No. 228/V/MN JOMVU (MAJENGO MAPYA).**
- 2. An order compelling the defendant to give vacant possession of portion of land measuring 30 ft by 70ft property known as PLOT NO. 228/V/MN JOMVU (MAJENGO MAPYA).**
- 3. A permanent injunction restraining the defendant from interfering with the plaintiff's quiet possession and occupation of portion of land measuring 30 ft by 70 ft on property known as PLOT NO. 228/V/MN JOMVU (MAJENGO MAPYA).**
- 4. Costs and interest of the suit.**
- 5. Any other relief that this court deems fit to grant.**

2. The plaintiff's case is that at all material times relevant to this suit, the plaintiff and one Maurine Awuor Okuon have been the legitimate and rightful lessee of a portion of land measuring 30 ft by 70 ft on a property known as PLOT NO. 228/V/MN JOMVU(MAJENGO MAPYA) (hereinafter referred to as "the suit property"). The plaintiff averred that he leased the said plot on 9th August, 2014 from the Estate of Zahran Mohamed Omar Al-Aufy and subsequently took possession and paid ground rent thereof. The plaintiff stated that on or about 17th August, 2016 the defendant trespassed onto the suit property and started laying down foundation for a permanent house without the plaintiff's notification, consultation, authorization and/or consent. That the defendant disregarded the plaintiff's complaint that the suit property was rightfully leased to the plaintiff and should stop the construction until the ownership is settled with the lessor of the plot but the defendant did not stop. The plaintiff averred that the matter was reported to the lessors and the area chief to resolve the dispute but the defendant continued with construction. The plaintiff's claim against the defendant is to give vacant possession of the suit property, demolitions of the house built thereon and a permanent injunction restraining the defendant from interfering with the plaintiff's quiet possession of the suit property. The plaintiff averred that despite demand and notice of intention to sue having been issued the defendant has continued with the construction and possession of the suit property making this suit necessary.

3. The plaintiff, Edward Furaha Nzaro testified before Komingoi, J on 16th November, 2017 and did not call any other witness. His evidence was that together with his wife Maurine Awuor Okuon, they leased the suit property on 9th August 2014 from the Estate of Zahran Mohammed Omar Al-Aufy. The plaintiff produced the lease agreement dated 9th August 2014 as p.exhibit 1.

4. The plaintiff testified that he has sued the defendant because he started construction on the suit property on 17th August, 2016. He stated that the defendant entered the suit property without the plaintiff's permission and started putting up a boundary feature made of concrete. He testified that he tried to talk to the defendant who refused to listen. That they went to the village elder but still could not agree. The plaintiff testified that he paid the ground rent for the suit property and produced the receipt as P.exhibit 2.

5. The plaintiff testified that he later went to his advocate who issued a demand letter which he produced as P.exhibit 3. He stated that he paid the sum of Kshs.520,000 for the plot and produced the RTGS dated 11/8/2014 in the sum of Kshs.400,000/- as P.exhibit 4, the receipt

dated 2.11.2015 for Kshs.20,000/- as P.exhibit 5 and the acknowledgment dated 21/3/2016 for the balance of Kshs.100,000/- as p.exhibit 6.

6. When cross-examined by Mr. Nyongesa, learned counsel for the defendant, the plaintiff stated inter alia that he leased land being a portion measuring 30ft by 70ft and was paying ground rent of Kshs.700/- per month. The plaintiff stated that the land belonged to the family whose father was already dead by the time the agreement was executed. The plaintiff stated that he knew two sons of the family who owned the land, and he named the two as Swaleh and Hamza. He stated that the one who signed the agreement is Hamza Abdallah on behalf of the family, though he did not know if he had authority from the other family members. The plaintiff also did not know if they had done succession. He stated that the lease agreement did not contain a sketch of the portion he was buying, adding that Hamza was to show the portion. The plaintiff stated that he sued the defendant for trespassing on his portion, although the defendant claimed that he had bought the portion in 2009.

7. In his statement of defence dated 19th October, 2016, the defendant denied that the plaintiff was the owner of the suit property. The defendant stated that there was not certificate of lease issued to confer any specific and defined interests in the suit property in favour of the plaintiff and that the landlord has a vast parcel of land from which similar portions of land are available for let to the plaintiff and/or any third party. The defendant averred that the suit property was let to the defendant's wife, Hawa Dere Mohamed on 2nd July 2009 and that she subsequently took over possession thereof and paid the agreed monthly ground rent of Kshs.500/-.

8. The defendant stated that on 7th May 2016, the dispute over the suit property was at the instance of the plaintiff referred to a local council of Elders for determination and it was their finding that the defendant acquired interest in the suit property through letting much earlier than the plaintiff. The defendant stated that the construction on the suit property was complete as at the time the suit herein was instituted and stated that the plaintiff was guilty of laches in the commencement of the action herein. The defendant contended that the plaintiff has not suffered any damage and is unlikely to suffer any substantial loss or grave prejudice as the plaintiff has a remedy as against the lessor for the possible let and/or re-allocation of an alternative plot measuring the same size and on similar terms and conditions. The defendant further stated that the plaintiff did not at any material time take possession of the suit property and that the plaintiff has no actionable claim as against either the defendant or the defendant's wife who he stated is the actual tenant in possession of the suit premises. The defendant stated and maintained that the suit is incompetent for the reason that the plaintiff entered a contractual relationship with a third party who is not even a party to this suit.

9. The defendant adopted his witness statement dated 20th September 2017 and filed in court on 22nd September, 2017. It was the defendant's evidence that the suit property was let to his wife, Hawa Dere Mohamed on 2nd July, 2009 and that she started paying an agreed ground rent of Kshs.500/- upon taking over possession. The defendant reiterated the facts as contained in the statement of defence, maintaining that at the time of commencement of this suit, the construction of the building on the suit property was already complete. It was the defendant's evidence that the plaintiff has the option of being let an alternative piece of land for his use and/or development because he has no certificate of lease issued yet to confer specific and defined interests in the suit property in his favour by the landlord. The defendant stated that the plaintiff has never taken possession of the suit property at any time. The defendant wants the plaintiff's suit dismissed with costs. The defendant did not call any other witness.

10. Directions were given that parties file written submissions but only the defendant did so. Despite being granted several opportunities to file his submission, the plaintiff failed to do so.

11. In his submissions dated 27th July, 2020 and filed on 29th July 2020, the defendant submitted that based on the pleadings filed and the evidence tendered, the issues that arise for determination are whether the plaintiff's lease agreement is valid; whether the plaintiff has locus standi, and whether the plaintiff is entitled to the orders sought in the plaint.

12. The defendant submitted that Mr. Hamza Abdallah who entered into the lease agreement with the plaintiff not being the absolute and indefeasible holder of title to the suit property, and not being the legal representative of the estate of Zahran Omar (deceased) could not legally lease the suit property to the plaintiff. It is the defendant's submission that the lease Agreement dated 9th August 2014 is null and void. The defendant's counsel cited Section 24 and 26(1) of the Land Registration Act and relied on the case of **Felistas Njeri Mukoma –v- Catherine Wanjiru Mwaura & 3 Others (2018)eKLR**.

13. The defendant further submitted that the plaintiff does not have locus standi to sue against the defendant in respect of the suit property arguing that the right person to sue is the registered owner or the person holding the title to the land. The defendant submitted that he was not privy to the contract entered into by the plaintiff and relied on the case of **Aineah Lihyani Njirah –v- Agha Khan Health Services (2013)eKLR**. The defendant added that he has been wrongly sued as his wife is the true and legal lessee of the suit property having a valid tenancy agreement which has not been challenged by the registered owner of the plot. It was submitted that failure to enjoin both the registered owner of the suit property and the defendant's wife in itself makes the suit a non-starter and legally unsustainable as against the defendant. It is the defendant's submission that he plaintiff has not proved his case on a balance of probabilities.

14. I have considered the pleadings, the evidence tendered and submissions filed. In my view, the issues for determination are i) Whether the plaintiff is the legal and rightful lessee of the suit property, ii) whether the defendant trespassed into the suit property, iii) whether the plaintiff is entitled to the reliefs sought in the plaint, and iv) who should bear the cost of the suit.

15. As relates to the first issue, it is evident from the evidence and material on record that the plaintiff entered into a lease agreement with the family of Zahran Omar Al-Aufy, represented by one Mr. Hamza Abdallah. The plaintiff produced the lease agreement dated 9th August, 2014 which indicates that the plaintiff was leased a portion of land measuring 30 feet by 70 feet out of the parcel of land known as PLOT NO. 228/V/MN JOMVU (MAJENGO MAPYA). The defendant has submitted that the lease agreement that was produced by the plaintiff is null and void because there was no evidence proving that the said Hamza Abdallah was a legal representative of Zahran Omar family. However, in my view, the issue of the validity of the plaintiff's lease is an issue between the plaintiff and the said Hamza Abdallah and the family of Zahran Omar. The said lease has not been challenged by any of the concerned parties to agreement and therefore is not an issue for determination in this suit. Therefore unless the plaintiff's lease is properly challenged, the court will take it the plaintiff is the lessee of a

portion measuring 30 feet by 70 feet out of the PLOT NO.228/V/MN JOMVU (MAJENGO MAPYA).

16. The second issue for consideration is whether the defendant trespassed into the suit property. The defendant’s case was that the suit property was leased to his wife, Hawa Dere Mohamed on 2nd July, 2009. It was the defendant’s evidence that his wife took possession and constructed a building on the said plot and that the construction was in fact complete by the time the suit herein was filed. The defendant produced the agreement notes dated 2nd July, 2016.

17. In this case, it is evident that both the plaintiff and the defendant’s wife are claiming the suit property as lessees. From the pleadings and the evidence on record, it is not clear where the suit property claimed by either of the parties is located vis a vis the larger parcel of land. From the documents produced by both the plaintiff and the defendant, the court cannot tell the exact locations of the property that was leased to the plaintiff and the portion that was leased to the defendant’s wife. None of the parties produced a sketch map or a map or other credible documents that show the exact location of the portion each party is claiming. The portion claimed by each of the parties is not clearly defined.

18. In this case, the defendant denied trespassing into the plaintiff’s plot. It was the defendant’s evidence that the actions complained of took place in a portion leased by his wife. It was therefore incumbent upon the plaintiff to avail sufficient evidence to prove that there was trespass on his plot. Sections 107 and 109 of the Evidence Act places a mandate upon a party that asserts certain existing facts to prove them. Section 107 of the said Act provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

19. Further, Section 109 of the Evidence Act stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In the instant case, it is my view that the plaintiff did not discharge the burden of proof. In the absence of a document that confirms the location and boundaries of the plot claimed by the plaintiff, it is quite difficult for the court to arrive at a finding that there was trespass by the defendant. Moreover, the plaintiff could have called as a witness the person (s) who leased the suit property to the plaintiff to confirm if indeed the portion occupied by the defendant was the one leased to the plaintiff. Such evidence would have been necessary because the lease agreement produced by the plaintiff only described the size, but not the exact location out of the larger parcel of land. In the absence of such evidence, the plaintiff failed to discharge his duty of proving that there was trespass. It is therefore my finding that trespass has not been proved.

20. The next issue to consider is whether the plaintiff is entitled to the orders sought. The court has already found that the plaintiff has failed to prove that the defendant trespassed on the plaintiff’s portion of land measuring 30 feet by 70 feet on PLOT NO. 228/V/MN JOMVU (MAJENGO MAPYA). It follows therefore that the plaintiff is not entitled to any of the reliefs sought.

21. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the plaintiff has not proved his case against the defendant on a balance of probabilities. Accordingly, the plaintiff’s suit is dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 16th day of November 2020

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE