



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 516 OF 2011(FAST TRACK)

DEVENSON MORANGA ONYIEGO.....PLAINTIFF

VERSUS

HAMISI BAKARI MATATA.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 20th September, 2011 which was amended on 4th July, 2014. The plaintiff is seeking for judgment against the defendants for:-

1. A permanent injunction restraining the defendant by himself his agents and/or servants or otherwise howsoever from entering onto or interfering with the plaintiff's quiet possession, use and enjoyment of L.R. NO. KWALE/DIANI/150.

(a) A declaration that the plaintiff is the Legal and rightful owner of PLOT L.R. NO. KWALE/DIANI/150

2. Special and general damages for trespass to land.

3. Costs

4. Interest on 2 and 3 above

5. Any other relief that this honourable court deem just to grant.

2. The plaintiff's case is that at all material times the plaintiff is the registered owner and entitled to possession of all that parcel of land known as L.R. NO. KWALE/DIANI/150. The plaintiff averred that on or about 12th September 2011, the defendant, without the consent of the plaintiff wrongfully entered upon the suit property, depastured livestock thereon and damaged the plaintiff's properties on the land. The plaintiff stated that the said acts amounted to trespass on the plaintiff's land by the defendant and the trespass is continuing. That by reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of his property and has thereby suffered loss and damage. The plaintiff claims general damages as well as special damages of Kshs.140,000/- for hiring a surveyor, security and travelling. It is the plaintiff's contention that the defendant threatens and intends to repeat the acts complained of unless restrained by this court.

3. The plaintiff testified before this court and informed the court that he purchased the suit property in May 2010 from Tiribe Contractor and supplier subsequent to which he was registered as the owner thereof. The plaintiff produced the title deed as P.exhibit 1. The plaintiff also produced an application for consent of land control board dated 10th May, 2010, Letter of consent dated 12.5.2010, Certificate of Official Search dated 7.5.2010, Receipt No. 2449360 for re-establishment of beacons, photographs, certificate of official search dated 1.3.2017, Receipt No. 4587673, and copy of TITLE NO. KWALE/DIANI/150 in the name of Tiribe Contractors & Supplier as P.exhibit 2-8 respectively.

4. The plaintiff further testified that before purchasing the suit property, he carried out due diligence and established that the property was registered in the name of Tiribe Contractor & Supplier. The plaintiff stated that when he wanted to fence the land, the defendant stopped him and claimed that he was the owner of the property and had documents, though he did not show them to the plaintiff.

5. When cross-examined by Mr. Asige, learned counsel for the defendant, the plaintiff stated that he was the third owner of the suit land. That according to the green card, the first owner was Maur Abdallah while the second owner was Tiribe Contractor and Supplier. That the land is KWALE/DIANI SETTLEMENT SCHEME/150 lying in that scheme. He stated that Tiribe Contractor and Supplier is a business name of ID number 4628866 who bought the land from Maur Abdalla. The plaintiff stated that he did not know if he had been conned. He further stated that he purchased the land for Kshs.6,250,000/-, though the application for consent and the Letter of Consent read

Kshs.500,000/- which he stated was an error. The plaintiff testified that the property he purchased and which is in his name is PLOT NO. KWALE/DIANI/150 and not TITLE NO. KWALE/DIANI SETTLEMENT SCHEME/150.

6. When re-examined by Mr. Mokaya, learned counsel for the plaintiff, the plaintiff stated that he had first gone to see the land in March 2010 and that the same was bushy and that is the reason he went with surveyors to identify the beacons though that exercise failed. He stated that he was shown the land by one Hassan Juma Chitembe who was the proprietor of Tiribe Contractor and Supplier. The plaintiff did not call any witness and therefore closed his case.

7. The defendant filed defence dated 15th October, 2011 and filed in court on 17th October 2011. The defendant denied trespassing on PLOT NO. KWALE/DIANI/150 and asserted that he owns and occupies PLOT NO. KWALE/DIANI SETTLEMENT SCHEME/150. The defendant averred that TITLE NO. KWALE/DIANI/150 is not genuine.

8. The defendant testified that he saw the plaintiff for the first time in September, 2011 when the plaintiff came to the defendant's LAND KWALE/DIANI SETTLEMENT SCHEME/150. He denied that the suit land belongs to the plaintiff. The defendant further denied trespassing on the plaintiff's land and denied knowledge of PLOT NO. KWALE/DIANI/150. The defendant maintained that he occupies PLOT NO. KWALE/DIANI SETTLEMENT SCHEME/150 which he stated was allocated to his late father, Bakari Salim Matata who died in the year 2006, by the Government through the Settlement Fund Trustee in about 1978-1979. The defendant stated that his late father applied for issuance of title, but died before the same was issued. He stated that his father was asked to pay the sum of Kshs.525/- for discharge to be issued by the Settlement Fund Trustee and the same was paid for on 21.1.1987 and a receipt No.991718 issued. The defendant testified that he followed up the discharge and referred to some letters written by the District Land Adjudication and Settlement Officer to the Director, Land Adjudication and Settlement asking him to prepare documents in favour of the late Bakari Salim Matata. He stated that the process was still ongoing. The defendant stated that even in 2011, the County Government of Kwale issued a demand notice for payment of rates to the late Bakari Salim Matata in respect of PLOT NO. KWALE/DIANI SETTLEMENT SCHEME/150. According to the defendant, the scheme was meant to settle landless individuals and stated that Tiribe Contractor and Supplier was not an individual, adding that Tiribe Contractor and Supplier could not have obtained title in the year 2007 when the defendant's late father had paid for the plot. The defendant stated that the plaintiff later offered to pay him Kshs.100,000/- for a portion of the plot. He added that there was a meeting called by the National Land Commission over the dispute but the plaintiff never attended.

9. The defendant produced an order dated 7.3.11, copy of search dated 27.1.2011, copy of demand notice dated 15.1.2018, decree and order in Kwale Kadhi Court Succession Cause No.71 of 2011 and notice dated 9/12/2015 from the National Land Commission as D-exhibits 1-7 respectively.

10. On being cross-examined by Mr. Mokaya, the defendant stated that it appears the plaintiff did not know where his land is. The defendant stated that they filed succession cause no. 71 of 2011 in the Kadhi's court, Kwale where it was agreed between the defendant and his siblings that the defendant be issued with title over PLOT NO. KWALE/DIANI SETTLEMENT SCHEME/150. He stated that none of his siblings is staying on the plot. That previously, there was a house on the plot but now there was none. He named some of the people owning neighbouring plots. The defendant stated that he did not know anyone by the name Abdallah. He further stated that the area is a settlement scheme and has not heard of any adjudication exercise being carried out. He maintained that the plaintiff's title was obtained fraudulently. He further stated that the County Government did not issue demand for rates prior to 2011. The defendant stated that he lives in Ukunda in land with title which was issued to his father. That is plot No. 695 in his brother's name.

11. The defendant called one witness, Kennedy Githunguri Njenga (DW2). He is the Deputy Director of Land Adjudication and Settlement currently serving as County Land Management Coordinator, Kwale County. He was cross-examined by Mokaya and re-examined by Mr. Asige. He testified that they keep files for settlement schemes when they are opened. He stated that he was aware of Kwale/Diani Settlement Scheme which is under his docket and that he knew the owners. That a settlement scheme is owned by the Settlement Fund Trustees. DW2 testified that in June 1977, allocations were made in respect of Kwale/Diani Settlement Scheme and it targeted squatters who were living on Government land. He testified that PLOT NO. KWALE/DIANI SETTLEMENT SCHEME/150 was allocated to Mr. Bakari Salim Matata. That according to the records, Mr. Bakari Salim Matata paid for the plot on 21.1.1987. He stated that the settlement fund trustees have not discharged and transferred the plot to the allottee. He stated that there was no evidence in the file that support the alleged transfer of the plot to Tiribe Contractor and Supplier. DW 2 produced a certified copy of the file in respect of PLOT NO. KWALE/DIANI SETTLEMENT SCHEME/150. He pointed out that there was some discrepancy in the title that was produced by the plaintiff since the front page read KWALE/DIANI/150 while the second page read KWALE/DIANI SETTLEMENT SCHEME/150. He stated that in the file, there was no evidence of any title issued over KWALE/DIANI SETTLEMENT SCHEME/150 because the plot has not been discharged and transferred. The witness stated that his office was not responsible for what is done at the Lands office.

12. Counsel for the plaintiff submitted that the entire process of purchase of the suit property by the plaintiff was legal and sound and that all the necessary procedures were followed, including obtaining of consent from the Land Control Board. It is the plaintiff's submissions that he obtained and has a good title. The plaintiff submitted that the omission to call the Land Registrar should be construed in favour of the plaintiff since it is the defendant who mounted a challenge to the plaintiff's title. The plaintiff's counsel cited section 27 and 28 of the Registered Land Act, Cap 300 (now repealed) and submitted that the plaintiff has proved his case as required by law and therefore urged the court to enter judgment in the plaintiff's favour. The plaintiff's counsel relied on the case of **Mbui Mukangi –v- Gerald Mutwiri Mbui (2004) eKLR**.

13. On his part, the defendant's counsel submitted that no evidence was tendered to show that Tiribe Contractor and Supplier which is a business name and which allegedly sold the land to the plaintiff, was registered under the Business Names Act. That the person carrying on business under that name was not called to testify and is not known. It was further submitted that a business name could not possibly possess an identity card which is only given and registered in favour of natural persons under the Registered of Persons Act. It was submitted by the defendant that Tiribe Contractor and Supplier who the plaintiff alleges he bought PLOT NO. KWALE/DIANI/150 from is a fictitious entity without legal capacity and could therefore not have sold the plot to the plaintiff as pleaded. It is the defendant's submission that the alleged purchase was fraudulent, fictitious, invalid, null and void ab initio. That whereas the plaintiff alleged to have purchased PLOT NO. KWALE/DIANI/150, the application for consent to Msambweni Land Control Board made by the plaintiff was for 0/150. The defendant also pointed out that whereas the Agreement Sale dated 13th December, 2009 indicates that the plaintiff paid Kshs.6, 250, 000/- as purchase

price for the plot, in the application for consent to the Land Control Board dated 10th May, 2010 and the consent show the purchase price as Kshs.500,000/-. The defendant submitted that the plaintiff is not a credible witness and a court of equity will refuse to grant him the orders he seeks and urged the court to dismiss the suit.

14. I have considered the pleadings and evidence on record. The main issues for determination are whether the plaintiff is the lawfully registered proprietor of the SUIT PROPERTY PLOT NO. KWALE/DIANI/150; whether the defendant trespassed onto the suit property; whether the plaintiff is entitled to the reliefs sought in the amended plaint, and who should bear the costs of the suit.

15. It is evident from the evidence and material on record that the plaintiff holds title to the property known as LR. NO. KWALE/DIANI/150. The plaintiff produced title deed in his name. The plaintiff testified that he purchased the said land from an entity known as Tiribe Contractor and Supplier which appears to be a business name. The defendant on the other hand has tendered evidence to show that he is in occupation of L.R NO. KWALE/DIANI SETTLEMENT SCHEME/150 which he said he inherited from his late father, Bakari Salim Matata. The defendant's evidence was corroborated by the evidence of Kennedy Githungi Njenga (DW2) who is the custodian of files of Kwale/Diani settlement scheme. According to DW2, PLOT NO.KWALE/DIANI SETTLEMENT SCHEME/150 was allocated to Mr. Bakari Salim Matata (now deceased) in the year 1977 and that Mr. Matata paid for the plot on 21.1.1987. He stated that the settlement fund trustees, who are the original owners of the scheme, have not discharged and transferred the plot to the allottee. DW 1 produced the file in respect of PLOT NO. KWALE/DIANI SETTLEMENT SCHEME/150 and testified that no title has been issued for the plot since it was yet to be discharged and transferred by the Settlement Fund Trustees.

16. It is evident from the evidence and material on record that the plaintiff's claim is over TITLE NO. KWALE/DIANI/150 and not KWALE/DIANI SETTLEMENT SCHEME/150. Whereas the plaintiff has pleaded that the defendant wrongfully entered upon the plaintiff's land known as LR. NO. KWALE/DIANI/150 on or about 12th September 2011, in his evidence, the plaintiff testified that when he went to fence the plot and to identify the beacons, he was stopped by the defendant who claimed ownership of the land. It is therefore clear that the defendant was already in occupation by the time the plaintiff went on the land. The defendant's evidence was that the plaintiff appears not to know the locality of the plot he purchased. This evidence is given credence by the plaintiff's title which refers to LR. NO. KWALE/DIANI/150 and not KWALE/DIANI SETTLEMENT SCHEME/150. It is also puzzling how the plaintiff purchased the land without first ascertaining the boundary or the location of the beacons.

17. In this case, the plaintiff's title was challenged by the defendant. Indeed the defendant called a witness who testified and produced documents showing that the land which the defendant claims is yet to be discharged and transferred, and therefore has no title. The plaintiff has submitted that the defendant deliberately avoided calling the Land Registrar, Kwale, and that such omission should be construed in favour of the plaintiff. With due respect, I do not agree with the plaintiff's argument. In my humble view, the onus was on the plaintiff to present evidence to prove his case, including calling the Land Registrar especially when the title he holds was put to question. Further the person who was trading as or carrying on business under the name Tiribe Contractor and Supplier which allegedly sold the plaintiff the plot should have been availed. It is not possible that a mere business name could hold an identity card. Moreover, the plaintiff's evidence was that he purchased PLOT NO.KWALE/DIANI/150 and not KWALE/DIANI SETTLEMENT SCHEME/150. There was no suggestion that the two plots refer to one and the same parcel of land.

18. Having considered and reviewed all the evidence and the 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. In the result, the plaintiff's suit is dismissed with costs to the defendant.

19. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 3rd day of November, 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE