



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 220 OF 2017

FREDRICK GIKANDI.....PLAINTIFF

VERSUS

NYAMAWI MWATELA

KESI BORA JIRA

MGOWA CHALE MWAKERA

JOHO CHALE MWAKERA

ANDAZI BAI CHIBURA

MCHARI MOZOMBA ZERO.....DEFENDANTS

JUDGMENT

1. By a Plaintiff dated and filed on 20th June, 2017, the Plaintiff claims to be registered and beneficial owner of all that parcel of land known as KWALE/KIDIMU/460 situated in Kwale within Kwale County (hereinafter referred to as “the suit property”). The plaintiff avers that on or about 28th June 2014, he gave authority to one Wato Kidziwe to be his caretaker of the suit property whereby he would cultivate and harvest any produce in lieu of payment by the plaintiff. The plaintiff states that on visiting the suit property, the caretaker found the defendants therein and the matter was reported to the village elder. It is the plaintiff’s contention that the defendants have refused to vacate the suit property despite the intervention of the village elder, area chief and the provincial administration as well as notice of intentions to sue being served.

2. The plaintiff seeks judgment against the defendants for: -

- a. **A declaration that the plaintiff is the legal and bona fide owner of that parcel of land known as KWALE/KIDIMU/460.**
- b. **An eviction order against the defendants from all that parcel of land known as KWALE/KIDIMU/460.**
- c. **Cost of this suit.**

3. In his evidence, Dr. Fredrick Gikandi, the plaintiff, adopted his witness statement dated 20th June, 2017 and filed on the same date as his evidence-in-chief. His evidence was that he is the duly registered owner of the suit property. He stated that on 28th June, 2014, he authorized one Wato Kidziwe in writing to till the land and take care of it. That when the said caretaker tried to go and occupy the land, he found that there were trespassers therein and those trespassers are the defendants herein. That the caretaker went to the village elder who summoned the defendants and ordered them to vacate the suit property immediately they harvested their crops on the land. The plaintiff stated that the defendants refused to vacate the suit property, instead demanded compensation from the plaintiff, yet they had entered the suit property without the plaintiff’s authority and without any colour of right whatsoever. The plaintiff therefore prayed that the defendants be evicted and the plaintiff granted vacant possession. The plaintiff produced as exhibits the title deed in his name as well as a certificate of official search. He also produced the letter of authority entered into with the caretaker and a letter from the area chief.

4. Wato Kidzime testified as PW2 and stated that he was given authority by the plaintiff to take care of the suit property. He stated that when he went to the suit land, he found about five structures erected thereon. He informed the plaintiff who advised him to report to the village elder. That the village elder wrote to the defendants, asking them to vacate the suit land after harvesting their crops. However, the defendants

harvested their crops and refused to vacate from the land. That the village elder advised them to see the area chief who also asked the defendants to leave but they did not.

5. The defendants were served with summons to enter appearance but failed to do so. Upon request by the plaintiff, interlocutory judgment was entered against them on 25th January, 2019 and the suit proceeded for formal proof hearing on 10th February, 2020.

6. The court has carefully considered the evidence on record. The issues that call for determination are whether the plaintiff has established that he is the owner of the suit property and whether the plaintiff is entitled to the prayers sought.

7. The plaintiff has tendered documentary evidence that show that the suit property is registered in his name. He produced the title deed as P.Exhibit 1. He also produced a certificate of official search which confirms that the plaintiff is the registered proprietor of the suit property. From the material placed before me, there is no dispute that the plaintiff is the registered owner of the property known as TITLE NUMBER KWALE/KIDIMU/460 measuring 5.5.Ha. Section 24(a) of the Land Registration Act provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of the land together with all rights and privileges associated with that status. Section 26 (1) of the said Act provides that the Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon transfer shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof and that the said title shall not be challenged save on ground of fraud or misrepresentation to which the holder is shown to be a party or where the title is acquired illegally, unprocedurally or through a corrupt scheme.

8. The defendants did not defend this suit. The plaintiff's title over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of any such challenge, I am enjoined by law to take the plaintiff on the basis of the title he holds in his name to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party.

9. The plaintiff has asserted that the defendants are on the suit land without his authority. The plaintiff's evidence has not been challenged and on the basis of the unchallenged evidence, I am satisfied that the plaintiff has proved that the defendants entered the suit property and are thereon unlawfully. The defendants having unlawfully entered the suit property without the permission of the plaintiff are trespassers on the suit property and the plaintiff is entitled to judgment against them as prayed in the plaint.

10. Accordingly, I do find that the plaintiff has proved his case on a balance of probabilities. In the end, I will enter judgment for the plaintiff against the defendants in the following terms:

- a. A declaration that the plaintiff is the legal and bona fide owner of all that parcel of land known as KWALE/KIDIMU/460.**
- b. The defendants and/or their agents, servants or other persons claiming through them be and are hereby ordered to vacate and deliver vacant possession to the plaintiff within 30 days from the date of service of the decree herein upon them, in default the plaintiff shall be entitled to an order of eviction for removal of the defendants from the suit property under supervision of an authorized police officer from the nearest police station.**
- c. The plaintiff shall have costs of the suit.**

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 2nd day of November 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE