



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 255 OF 2014**

**1. SIMEON NYACHAE**

**2. LEON NYACHAE.....PLAINTIFFS**

**VERSUS**

**COUNTY GOVERNMENT OF MOMBASA...DEFENDANT**

**JUDGMENT**

1. By a plaint dated 17<sup>th</sup> October, 2014, the Plaintiffs are seeking for judgment against the Defendant as follows:

**a. A declaration that the Defendant's action amount to trespass to land and a violation of the right to be heard and the right to a fair administrative action.**

**b. A prohibitory injunction defending the Defendant by itself, its servant and/or agents from entering the suit property, demolish it and in any other way further interfering with the Plaintiffs quiet enjoyment of the suit property.**

**c. Damages for trespass to land and violation of Article 47 rights to fair administrative action and the right not to be condemned without a hearing.**

**d. Costs**

**e. Any other relief that this honourable court may deem just, fit and expedient to grant.**

2. The Plaintiffs' case is that the 1<sup>st</sup> Plaintiff is the registered owner of all that parcel of land known as SUBDIVISION NO.3266 OF SECTION 1 MAINLAND NORTH IN THE MUNICIPALITY OF MOMBASA VIDE GRANT NO.CR 15720 and demarcated by the Deed Plan No. 109455 dated 11/11/1980, while the 2<sup>nd</sup> Plaintiff holds possession of the suit property as the property manager of the 1<sup>st</sup> Plaintiff. The Plaintiffs claim that on 7<sup>th</sup> October, 2014, the Defendant's employees and/or agents without any lawful justification or claim of right and without the Plaintiffs' consent entered upon the suit property and demolished a section of the Plaintiffs' perimeter wall fronting the public road. The Plaintiffs' contend that the demolition was done without any prior notice or warning or reasons. Accordingly, the Plaintiffs aver that the demolition violated the rules of natural justice and Article 47 of the Constitution on the right to a fair administrative action requiring the Plaintiffs to be heard before carrying out an execution of a decision that affects their legal rights. That there was no lawful justification for the demolition and that as a consequence the Plaintiffs have suffered loss and damage from the destruction of their structure.

3. The Plaintiffs called two witnesses who testified on 29<sup>th</sup> November, 2018 before Waithaka J. The 2<sup>nd</sup> Plaintiff Leon Nyachae testified that he is an architect and the property Manager for Kabansora Limited. The 1<sup>st</sup> Plaintiff is the father to the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff adopted his witness statement filed on 17<sup>th</sup> October, 2014 as his evidence –in-chief. It was his evidence that on 7<sup>th</sup> October 2014, the Defendant sent a bulldozer to demolish the perimeter wall which was within the suit property. That no notice or reason had been given by the Defendant for demolishing the perimeter wall. PW1 produced the photographs showing the demolition process and a bulldozer. He reiterated that they were never served with any notice. PW1 produced a survey report (p.exhibit 5) which indicated that the Plaintiffs had not encroached on the road reserve as alleged by the Defendant.

4. During cross examination, PW1 stated that he was in Nairobi on 7<sup>th</sup> October, 2014 when the demolition of the perimeter wall took place. He stated that before erecting the perimeter wall after purchasing the property, they engaged the services of a licensed surveyor to carry out the exercise and the perimeter wall was 2 metres from the public road. He could not tell whether the bulldozer from the County Government was rented out to a third party or not.

5. PW2 was David N. Thuo a Land practising surveyor of over 6 years standing. He testified that he was commissioned to visit the suit property and do a survey report. That he visited the site and noted that the perimeter wall had been demolished. He stated that he was able to identify 3 beacons; (H74, H75 and H76) which were intact. He added that beacon H77 had been recorded but the wall was in the correct position. That there is a 7 metres road with a wider opening beyond the demolished wall. He produced the report dated 15<sup>th</sup> October, 2014 and beacon certificate as P.exhibits 5 and 6.

6. In a statement of defence dated 12<sup>th</sup> November, 2016 and filed in court on 20<sup>th</sup> March 2017, the Defendant denied that it was involved in any illegal demolition of the Plaintiffs' premises. That all sanctions by the Defendant are sanctioned by law and within all the tenets of natural justice. The Defendant avers that if any demolition was conducted by it, then all the requisite notices were issued and denied violating the Plaintiffs' right to a fair administrative action. The Defendant asserted that only structures which were within the road reserve were demolished. The Defendant contended that the Plaintiffs' suit is misplaced and misconceived. The Defendant challenged the jurisdiction of this court arguing that the matters complained of are within the purview of the physical planning liaison committee. The Defendant closed their case without calling any witness.

7. Both parties filed written submissions which the court has now carefully read and considered. The issue for determination is whether the Plaintiffs are entitled to the orders sought.

8. As already stated, though the Defendant filed a defence, it did not adduce any evidence in support of their claim and therefore all the averments in the statement of defence remain mere allegation as averments in pleadings are not evidence. In the case of **Shaneebal Limited –v- County Government of Machakos (2018)eKLR**, the court cited the case of Janet **Kaphiphe Ouma & Anor –v- Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007**, and held that:

“In this matter apart from filing its statement of defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”

9. Though the Defendant never called any witness to challenge the Plaintiffs' evidence, the burden on the Plaintiffs to prove their case remains the same and that burden of proof is in no way lessened because the Defendant did not adduce any evidence. (see **Karugi & Another –v- Kabiya & 3 Others (1987)KLR 347**, and **Charterhouse Bank Limited (Under Statutory Management ) –v- Frank N Kamau (2016) eKLR**).

10. From the material placed before me, there is no dispute that the 1<sup>st</sup> Plaintiff is the registered owner of the suit property. The Plaintiffs placed before the court the Grant and Deed Plan in the name of the 1<sup>st</sup> Plaintiff. Section 24 (a) of the Land Registration Act, 2012 provides that *“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”* Section 26 of the said Act provides as follows:

**“The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except : -**

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b. Where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.”**

11. There was no evidence challenging the 1<sup>st</sup> Plaintiff title to the suit land. As the absolute and indefeasible owners of the suit property, the Plaintiffs are entitled to enjoy the rights and privileges associated with ownership which includes exclusive use and possession thereof without interference from any other person except with their consent.

12. The Plaintiffs have accused the Defendant of entering the suit land without their consent and demolished the perimeter wall thereon. The Plaintiffs produced photographic evidence showing the demolished wall. The Plaintiffs also produced a survey report confirming that the demolished perimeter wall was within the 1<sup>st</sup> Plaintiffs' land and has not encroached the road reserve. The Defendant did not adduce any evidence on this action and therefore the Plaintiffs' evidence has not been controverted. In the circumstances, I am satisfied that the Plaintiffs have proved that the Defendant entered the suit property without the Plaintiffs consent and demolished the perimeter wall without any justifiable cause. I therefore find on a balance of probabilities that the Defendant did enter into the Plaintiffs' land without permission and their action of demolishing the perimeter wall thereon amounted to trespass.

13. Even though trespass is actionable per se, it is clear from the evidence adduced by the Plaintiffs that they suffered loss and damage as a result of the Defendants' actions. The Plaintiffs are therefore entitled to general damages for trespass. The Plaintiffs' counsel urged the court to award the Plaintiffs the sum of Kshs.2,000,000.00 as general damages as a form of redress for the Defendant's unlawful action of trespass and demolition. On their part, the Defendant's counsel submitted that the amount of not more than Kshs.500,00.00 would be more than enough to place the Plaintiffs to their initial position. Taking into account all the circumstances of this case I am of the opinion that an award of general damages in the sum of Kshs. 1,500,000.00 would be adequate compensation to the Plaintiffs for the loss suffered as a result of the Defendant's act of trespass and demolition.

14. In conclusion therefore, I enter judgment for Plaintiffs as against the Defendant as follows:

**a. A declaration that the Defendant's actions of entering the Plaintiffs land known as subdivision no.3266 of section 1**

mainland north and the demolition of the perimeter wall thereon amounts to trespass.

b. Kshs. 1,500,000.00 as general damages for trespass.

c. A permanent injunction restraining the Defendant, by itself, its servants and/or agents from entering the suit property.

d. Costs of the suit are awarded to the Plaintiff to be borne by the Defendant.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 9<sup>th</sup> day of December 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**