



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO. 61 OF 2017

MAKO ABDI DOLAL.....PLAINTIFF

VERSUS

ALI DUANE.....1ST DEFENDANT

SULEMAN GURRET.....2ND DEFENDANT

AHMED ADEN ISAACK.....3RD DEFENDANT

JUDGEMENT

INTRODUCTION

The Plaintiff Mako Abdi Dolal commenced this suit by a plaint in the Magistrate's Court being CMCC No. 21 of 2014 dated 14th May, 2014. In the said plaint, the Plaintiff sued the Defendants jointly and severally for general and special damages, costs of the suit and interest. The Plaintiff also sought a permanent injunction restraining the Defendants from interfering with the Plaintiff's quiet possession of the suit premises. The Plaintiff averred that she is the registered owner of all that parcel of land comprised in plot Number GSA/B/20273 where the Defendants have, without any colour of trespass into and interfered with her right to quiet possession. The Plaintiff also averred that the Defendants while being trespasser in the suit property demolished her fence on three occasions. She set out particulars of trespass in paragraph 10 of the plaint as follows:

Particulars of trespass

1. Demolishing the Plaintiff's fence on three occasions.
2. Obstructing the Plaintiff from accessing the plot.
3. Entering into the plot without the Plaintiff's permission.

The 1st, 2nd and 3rd Defendants entered Appearance and filed their separate defence denying the Plaintiff's claim and all particulars of trespass. In particular the Defendants averred that they have been in occupation of the suit property since 1994. The Defendants also averred that the suit property is a Community Land and neither the Government of Kenya, the then Municipal Council of Garissa nor any other authority could lawfully allocate, alienate or otherwise confer any shade of title to a third party including Plaintiff, without engaging with the local community in occupation.

PLAINTIFF'S CASE

The Plaintiff who was PW1 gave sworn testimony and stated that she is the owner of the plot No. LND/20/5/ VOL II/2918. She produced a letter of Ownership dated 23/3/2009 as P. Exhibit No. 1. The Plaintiff also referred to the map showing the location of the plot dated 5/3/2009 measuring 0.31 Ha which she also produced as P. Exhibit No. 2. On 25/11/2014 she was issued with a letter by the County Government of Garissa reference No. LND/ 20/5/VOL II/215179 indicating that she was the owner of the suit property. She produced the same as P. Exhibit 3. The Plaintiff has been paying rates for the suit plot. She produced receipts dated 23/3/2009 for Kshs.15,600/= and another dated 14/2/2014 for Kshs.6,000/= as P. Exhibits 4 &5 respectively.

In December 2013, she was on routine check on her plot when she found four men including a lady who were unknown to her. The lady told her that she was being sold the suit property by the four men. The four men threatened to beat her up. The four men also abused her saying

that she was a prostitute. On 20/12/2014, she reported the incident to the Village Elder who summoned the four men but they refused to honour the summons. She reported to the police and the suspects were arrested and charged in court. Ali Duane (1st Defendant) was found guilty. She produced the proceedings and the judgement of the court in the Criminal Case No. 36 of 2014 as P. Exhibit No. 6. She stated that she fenced her plot using a barbed wire but the accused destroyed the same.

PW2 was Bulula Osman Salat. She recalled that sometime in December 2013, the Plaintiff requested to accompany her to her plot. They went and on arrival they found four men and one woman. The Plaintiff asked them what they were doing in her plot and the lady told them that the four men wanted to sell her a plot. The four men started abusing the Plaintiff saying she was a prostitute. They went with the Plaintiff to the Village Elder where they made a report. The Village Elder gave them the green light to proceed to the police station where they also reported the incident.

PW3 was Ahmed Abdullahi Fatuma. He recalled that in January 2014, he was sent by the Plaintiff to fence her plot situated in Bula Medina. He went and did the assignment after clearing bushes in the plot. While he was doing the fencing four men came (identified the 1st and 3rd Defendants in court). The four men started quarrelling with Mako. They destroyed the fence which he had put up. He was later called to restore the fence but the four men destroyed it the second time. He was also called to put up but the four men destroyed the third time. The Plaintiff showed him the boundaries. He stated that it was only the first round when the Defendants fought them.

PW4 was Khalif Mohamed Ali. He works for the County Government of Garissa, Directorate of Urban Planning as a Chief Town Administrator. He previously worked for the County Council of Garissa as the County Council Clerk. He was shown a letter issued by the Municipal Council of Garissa dated 23/03/2009. The letter of was issued to the Plaintiff Mako Abdi Dolal. The said letter was produced as P. Exhibit No. 1. The witness also identified a location plan of the suit property. It is dated 5/3/2009. The same was also produced as P. Exhibit No. 2. The witness also identified a letter of ownership dated 25/11/2014. It originates from the Directorate of Urban Service, County Government of Garissa. He produced the same as P. Exhibit No. 3. The witness was also shown a Miscellaneous receipt for Kshs. 15,600/= dated 23/3/2009 and a rates payment request from the Municipal Council of Garissa also dated 14/2/2014 for the sum of Kshs.6,000/=. The two documents were produced as P. Exhibits No. 4 & 5 respectively. The witness stated that according to their records, the plot belongs to the Plaintiff, Mako Abdi Dolal.

1ST DEFENDANT'S CASE

The 1st Defendant Ali Duane gave sworn testimony and stated that he is a resident of Bur- Buris which is about two (2) kilometres from the Ring Road. He is a businessman and also a farmer. He stated that he was in his own plot and not for the Plaintiff. He also stated that he did not demolish or destroy the Plaintiff's fence. He stated that he does not live in Bulla Medina but he lives behind the Ring Road (Bur- Buris). He stated that he has lived in that plot for more than 14 years.

The 1st Defendant called Maryan Omar as her first witness. Maryan stated that she lives in "Buri -Buris" in Garissa. She stated that her neighbor is Ali Duane (1st Defendant) and that she has known him as a neighbor for over 15 years. She stated that she has not plot number. She said that plots in that area have not been allocated by the Government to anybody. She said that her other neighbours in that area include Amina Ahmed, Ubah Jelle and Adan Ali. The first Defendant called his second witness named Daud Sigat Dahir who is a herder and a businessman. He lives in Bulla Medina. He said that his neighbours include Ibrahim Adan and Hussein Abdi. The 1st Defendant is also his neighbor though not close.

3RD DEFENDANT'S CASE

The third Defendant on his part gave sworn testimony and stated that he lives in Bulla Medina within Garissa County. He stated that he knew the Plaintiff when she once came with her brother one Ismail to his farm and asked if there was a plot for sale. He answered in the negative. The 3rd defendant stated that she does not know where the Plaintiff resides and that she has not trespassed into her plot. The 3rd Defendant also stated that the Government has not allocated the farm he is living in and that when the time comes, he will apply as he lives in the plot.

The 3rd Defendant's first witness was Abdifatah Hussein Aden. He stated that he knows the 3rd Defendant who is his neighbor. He said that the 3rd Defendant has been his neighbor from the year 1997. The witness also stated that he does not know the Plaintiff as he has just seen her in court for the first time.

The 3rd Defendant's third witness was Adan Warsame Ali who stated that he has known the 3rd Defendant since 1994 as a neighbor. He said that the land in dispute is situated in Bur- Buris road within Garissa County and that the suit property has not been surveyed.

The 4th witness called by the 3rd Defendant was Ali Abdi Ibrahim. He said that on 9/2/2013, he witnesses some people who had destroyed the house of Ahmed Adan Isaack. The people also destroyed his food crops such as pawpaws.

DECISION

The dispute between the Plaintiff and the Defendants is in relation to a plot described as Plot No. GSA/B/20273. According to the Plaintiff, the plot belongs to her having been allocated to her by the Municipal Council of Garissa as confirmed in a letter dated 23rd March 2009 produced as P. Exhibit No. 1 and a subsequent letter dated 25th November, 2014 respectively. The Plaintiff also produced a sketch map showing the location of the plot as P. Exhibit No. 2. The Plaintiff also produced an income receipt and a payment request as P. Exhibits No. 3 and 4 respectively. It was common practice before the promulgation of the new Constitution of 2010, that disposition of Government Lands was guided by the Government Lands Act Cap. 280 Laws of Kenya. Under Section 3 of the said Act, the President was authorized to make grants of any estate, interest or right over unalienated Government Land. The President's powers would be delegated to the Commissioner of Lands. Any grants of government land was to be made in accordance with the provisions of the Government Land Act. The practice by then

was that applications for land grants were made by applicants stating the purpose for which the land was intended.

Where an application has been made for the grant of a town plot, the Act requires the President or the Commissioner to specify conditions for the grant. That requirement is necessary especially in respect of land located within an urban area.

In practice where a grant of land is made, the following steps were necessary:

a. Valuation of land

The land subject of grant was necessary to be valued for purposes of determining the rent payable.

b. Issuance of letter of allotment

The Government Lands Act authorizes the Commissioner of Land to issue a letter of allotment in favour of the allottee and

(c) The Act requires that all transactions with respect to Government Lands be executed by both parties before registration. The Commissioner of Lands to sign on behalf of the Government and the grantee on the other hand.

The Plaintiff in this case is seeking five prayers as shown in the plaint dated 14th May, 2014. Since the Defendants have not filed a counterclaim, those in my view are the issues for determination in this case which I now reduce into writing as follows:

- 1. Whether the Plaintiff has proved his claim for general and special damages for trespass to land parcel No. GSA/B/20273.**
- 2. Whether the Plaintiff has established the principles for the grant of permanent injunction orders?**
- 3. Who will bear the costs of this suit?**

To begin my analysis of the evidence, the Plaintiff has produced two letters from the Municipal Council of Garissa (defunct) dated 23rd March, 2009 and another from the County Government of Garissa dated 25th November, 2014.

The letter by the defunct Municipal Council of Garissa reads in part as follows:

“TO WHOM IT MAY CONCERN

RE: PLOT GSA/B/20273

The above mentioned plot is registered in the name MAKO ABDI DOLALI of ID No. 8672493 as per the Council Records. The plot is situated at Bulla Medina. The size of the plot is 0.31 Ha as per the attached location plan. She had cleared all the rents upto and including December, 2009.

Any assistance accorded to her will be highly appreciated.”

In the subsequent letter dated 25th November, 2014, the same reads:

“TO WHOM IT MAY CONCERN

GSA/B/20273

This is to confirm to you that the above named plot is registered in the name of MAKO ABDI DOLALI of ID No. 8672493 as per the Urban Services Records. The plot is situated at Bulla Medina.....”.

The land is said to have been alienated in or about the year 2009. Being a Government Land, the law required that a letter of allotment be issued to the grantee. The Plaintiff has not produced a letter of allotment from the President or the Commissioner of Lands alienating the suit property to her in accordance with Section 3 of the Government Land Act Chapter 280 Laws of Kenya.

The two letters produced by the Plaintiff as P. Exhibits 1 and 3 are not letters of allotment issued by the Commissioner of lands. The two letters in my view are of no evidentiary value. I also note from the documents produced and the testimony of the witnesses that the plot in question is situated within the County of Garissa. Under Section 3 of the Government Lands Act (repealed), Letters of Allotment for alienation of Government Lands prior to the promulgation of the Constitution of Kenya 2010, used to be accompanied by the physical Development Plan of the area. In this case, there is no Physical Development Plan attached or produced by the Plaintiff. I also note that before Government Land is alienated prior to the 2010 Constitution, the County Council concerned must recommend approval of such decision in a full council meeting before sending the minutes to the Commissioner of Lands who was to prepare a letter of allotment. The Municipal Council of Garissa (defunct) in the letter dated 23rd March 2009 have not made any reference to a full Council Meeting recommending the approval of any application by the applicant for the Issuance of a Government Land.

Being the subject of alienation of a Government Land, the provisions of the Government Lands Act (Cap. 280) Laws of Kenya (repealed) should have been observed. Under that Act, only the President or the Commissioner of Lands could sign documents for the alienation of Government Land. The same Act gave the President authority to delegate his powers to the Commissioner of Lands. Part III of the Government Lands Act (repealed) provides as follows:

“...The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner”

Again, section 7 of the same Act provides as follows:

“7. The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, Execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government Lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act.....”

The Plaintiff in his case has not produced any letter of allotment from the President or the Commissioner of Lands or any Officer attached to the Lands Office authorized by the President to execute documents on his behalf. The two letters produced by the Plaintiff dated 23rd March, 2009 and 25th November, 2014 does not disclose how the Plaintiff acquired the suit property. The Plaintiff does not even reside in the suit property unlike the Defendants who have stated that they live and reside in the suit land with their families. The location plan which was produced as P. Exhibit No. 2 does not indicate who drew it. The purported document is not from the survey of Kenya or lands office. The Plaintiff did not even disclose the source of the document. The payment receipts produced as P. Exhibits 4 & 5 have no evidentiary value. The same cannot confer the Plaintiff a right of ownership over Government Land unless the alienation was done in accordance with the law.

The Plaintiff has not also produced the Physical Development Plan of the area concerned. Under Section 5 (1) and (2) of the Physical Planning Act (Cap. 286), the Law provides as follows:

“5 (1) The director shall

- a. Formulate national, regional, and local physical development policies, guidelines, and strategies.**
- b. Be responsible for the preparation of all regional and local physical development plans;**
- c. From time to time initiate, undertake, or direct studies and research into matters concerning physical planning.**
- d. Advise the Commissioner of Lands on matters concerning alienation of land under the Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288) respectively.**
- e. Advise the Commissioner of Lands and local authorities on the most appropriate use of land including land management such as change of user, extension of leases, sub-division of land and amalgamation of land; and**
- f. Require local authorities to ensure the proper execution of physical development control and preservation orders.....”**

The general practice prior to the promulgation of the Constitution in 2010 which I hereby take Judicial Notice was that when the Commissioner of Lands was issuing letters of allotment in respect of town plots, he attached a copy of the physical development plan of the area concerned. No such physical development plan has been produced by the Plaintiff indicating the purposes for which the area has been set aside pursuant to Section 29 of the said Act.

The Plaintiff has sought an order for damages for trespass into her suit property described as GSA/B/20273. The Plaintiff is also seeking an order of permanent injunction against the Defendant. As I have shown in my analysis above, the Plaintiff has not proved that he acquired the suit property in accordance with the law.

Section 107 of the evidence Act Cap. 80 Laws of Kenya provides as follows:

“ 107 (1) whoever desires any court to give judgement to any legal right or liability depended on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

He has not attached a letter of allotment from the Commissioner of Land who was vested with powers to alienate Government Land prior to the promulgation of the Constitution of Kenya, 2010. The Plaintiff has not also shown that the defunct County Council of Garissa sat in a full Council where they approved the recommendation for allocation of the suit property to the Plaintiff. It is therefore clear from the evidence adduced that the Plaintiff did not discharge his burden of prove that he acquired the suit property in accordance with the Law.

In the upshot, this suit must fail and the same is hereby dismissed. I order each party to bear his own costs.

Read and delivered in the Open Court this 31st day of January, 2019.

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E. C. Cheronno (Mr.)

ELC JUDGE

In the presence of:

1. Plaintiff

2. 1st Defendant

3. 3rd Defendant