



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 57 Of 2013

ABDULREHMAN MOHAMED AHMED.....PLAINTIFF

VERSUS

SALIM AUNI.....1ST DEFENDANT

METEOR MILINIUM K. LTD.....2ND DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated and filed herein on 5th April 2013, Abdulrehman Mohamed Ahmed(the Plaintiff) prays that Judgment be entered against the two Defendants jointly and severally as follows:-

a) A permanent order of injunction do issue restraining the defendants, their servants and/or agents from continuing to trespass and/or carry out any activity or in any way deal with the Land Parcel L.R. No. 25538/51 situate in Hindi Township in Lamu;

b) A mandatory order of injunction against the defendants, jointly and severally by themselves, their servants, agents and/or anyone claiming under or through them to vacate, uproot and/or remove any structures or plantations on that parcel of land known as LR No. 25538/51 situate in Hindi Township in Lamu;

c) Costs of this suit and interest; and

d) Any other or further relief the Honourable Court may deem fit to grant.

2. It is the Plaintiff's case that while he is the registered owner of the said parcel of land, Salim Auni(the 1st Defendant) has encroached thereon and has been unlawfully carrying out agricultural activities thereon. Similarly, Messrs Meteor Milinium K Ltd (the 2nd Defendant) has also set up and is carrying out business activities on the land. Despite pleas made by the Plaintiff, the Defendants have declined to stop those activities hence necessitating this suit.

3. In a Written Statement of Defence filed herein on 31st March 2016, the 1st Defendant denies that the Plaintiff is the registered owner of the suit property and avers that if that is the case, then the said registration was procured fraudulently and illegally. He further denies trespassing onto the land and states that he is legally and rightfully in possession of Plot No. 194 Hindi Township Phase II.

4. In its Statement of Defence filed much earlier on 4th June 2013, the 2nd Defendant also denies that it has encroached and/or trespassed upon the Plaintiff's land. It accuses the Plaintiff of fraudulently acquiring title to the suit property and calls for an investigation to be carried out to establish the proper ownership of the parcel of land.

The Plaintiff's Case

5. Testifying at the trial herein as PW1, the Plaintiff told the Court that he was issued with a letter of allotment for the disputed parcel of land vide a Government letter dated 15th December 1998. Subsequently, he was issued with a Grant No. CR 57864 on 10th October 2012. He paid for all the processes as required.

6. PW1 further told the Court that being an army officer before he retired, he was involved in travelling out of the country for peace keeping

missions and no one was occupying the land. When he retired and returned to the country, he found that the Defendants had encroached on the land without his consent or authority. PW1 thereafter tried on a number of occasions to have the matter resolved with the Defendants. When all failed, he moved to Court and filed this suit.

The Defence Case

7. The 1st Defendant neither testified nor called any witness.

8. On its part, the 2nd Defendant called one James Gitahi (DW1) an Accountant who had previously worked with one Kamawe Ngugi a director of the 2nd Defendant. DW1 told the Court that the 2nd Defendant was involved in investing in property. One such property was a Plot of land in Hindi, Lamu where they were constructing houses.

9. DW1 told the Court that they visited the property with the said Kamawe Ngugi, 2nd Defendant before the 2nd Defendant purchased the property from Salim Auni (the 1st Defendant). According to DW1, the two Defendants entered into a partnership of sorts after which they commenced the construction of a hotel on the land. The construction however never became a hotel as was intended as due to security concerns the hotel business could not pick up.

10. The self-contained rooms and bungalows constructed according to DW1 are now being used for rental purposes. It was DW1's testimony that the 1st Defendant showed them documents of ownership of the land before his boss- Kamawe Ngugi invested about Kshs 5 Million onto the land.

Analysis and Determination

11. I have perused and considered the pleadings, the testimony of the witnesses who appeared before me and my brother Justice Angote who was previously seized of this matter. I have also considered the evidence adduced by the parties as well as the submissions and authorities placed at my disposal by the Learned Advocates for the parties.

12. The basis for this suit is the Plaintiff's claim that he is the registered owner of the property after the same was allocated to him by the National Government. In his Written Statement of Defence filed herein, the 1st Defendant also claimed that he is the owner of the suit property by dint of a letter of allocation issued to him by the County Council of Lamu dated 25th September 2012 for a parcel of land identified thereon as Plot No. C. 194.

13. The 2nd Defendant on the other hand based their claim to the land on the documents held by the 1st Defendant. It was their case that they had entered into the suit property after executing a Sale Agreement with the 1st Defendant who had shown them the letter of appointment from the now defunct County Council of Lamu and they thereafter proceeded to launch a joint business venture of constructing houses for rent.

14. At the trial herein the Plaintiff produced his title and a current Certificate of Search issued by the Registrar of Tittles and dated 12th April 2013 indicating that the Plaintiff was the registered owner of the land. In addition, he produced a letter of allotment indicating that he was allocated the land on 1st December 1998 by the then Commissioner of Lands. He also produced the Part Development Plan (PDP) and receipts of various payments made for the processing of the title.

15. It was the testimony of the Plaintiff that the said parcel of land was empty when it was allocated to him. Being an Army officer, the Plaintiff worked in peace missions abroad even as he embarked on the process of acquiring title for the land in his name. Upon his retirement and subsequent return to the country, he found the two defendants herein occupying and utilizing his land for various activities.

16. As it turned out, the 1st Defendant failed to turn up and/or testify as to how he acquired the suit property. Through his defence counsel, he urged the Court to rely on his Written Statement of Defence whose contents I have summarized at paragraphs 3 hereof. He denies in that Statement of Defence that the Plaintiff is the owner of the suit property and asserts that if the Plaintiff is so registered as the owner thereof, such registration was procured fraudulently and illegally. He further asserts that he is the owner of Plot No. 194 as allocated to him by the predecessor of the County Government of Lamu.

17. On its part, the 2nd Defendant called one witness (DW1) who produced the Letter of Allotment said to have been issued to the 1st Defendant as aforesaid. As it were, DW1 was neither a director of the 2nd Defendant nor did he have any authority from the 2nd Defendant to testify on its behalf. As he told the Court, he was once an employee of one Kamawe Ngugi who we were made to understand, was a director of the 2nd Defendant. According to DW1, it is the said Kamawe Ngugi who had verbally authorized him to testify on behalf of the 2nd Defendant.

18. Be that as it may, DW1 testified that the 2nd Defendant's entry into the suit property was pursuant to a joint venture lease agreement that the 2nd Defendant executed with the 1st Defendant. As it turned out the lease agreement he relied on in Court was not executed by the 1st Defendant and the claim that the 2nd Defendant entered the premises on the permission of the 1st Defendant was thereupon cast into serious doubt. In addition, his testimony that the 2nd Defendant had spent Kshs 5 Million on the suit property was at best based on speculation and hearsay.

19. As it were, I was satisfied on the basis of the evidence presented before me that this was public land that was allocated to the Plaintiff after he followed the right procedure in acquiring the same. Having been allocated the same on 1st December 1998, the land was unavailable

for any further allocation by the Government. In any event, I did not think that in the year 2012 after the promulgation of the Constitution of Kenya 2010, the County Government of Lamu and/or its predecessor had any role allocating public land as purported by the Defendants. Any such allocation would in my view need to be done with the blessings of and/or through the National Land Commission.

20. At any rate, I did not think that the sole witness called by the 2nd Defendant had any ground to testify on its behalf. His testimony before me was basically hearsay, based on what he had been told by an alleged Director of the 2nd Defendant, who was himself unavailable for unclear reasons, to testify before this Court and to be cross-examined accordingly.

21. The Plaintiff on the other hand has successfully demonstrated how he acquired his title by producing all the documents that were required to be in place before a Grant can be issued and registered in his favour. While the Defendants contended that the Plaintiff was registered as the owner of the suit property through a fraudulent and/or illegal process, no evidence of fraud and/or illegality was tabled in evidence before me.

22. In the result, I find and hold that the Plaintiff has proved his case to the required standard. The Plaintiff's suit is accordingly allowed in the following terms:-

a) A mandatory order of injunction is hereby issued against the defendant jointly and/or severally by themselves, their servants, agents and/or anyone claiming under or through them to vacate, uproot and/or remove any structures or plantations on that parcel of land known as LR No. 25538/51 situate in Hindi Township, Lamu within 45 days from the date hereof and in default the Court Bailiff to evict them forthwith without any further reference to this Court.

b) Upon expiry of the said 45 days, a permanent order of injunction is hereby issued restraining the defendants, their agents and/or servants from trespassing onto, carrying out any activity on, and/or in any way dealing with all that parcel of land known as LR No. 25538/51 situate in Hindi Township, Lamu.

c) The Plaintiff shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE