



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 424 OF 1996

1. SAIFUDEEN ABDULLA BHAI

2. HUSSEIN ABDULLA BHAI.....PLAINTIFFS

VERSUS

ZAINAB MWINYI.....DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit by way of a Plaint dated 7th August 1996 and filed on 8th August 1996. A re-amended plaint dated 10th February 2017 was filed on 16th February 2017. The Plaintiffs are seeking for judgment against the defendant for:

a) A declaration that the interest purchased in the agreement of 26th November, 1991 was a house without land built on wattle and daub with corrugated iron sheet roof and the walls were cement plastered and floor cement screed, the ceilings was mud on Boriti Poles with wooden doors and wooden windows.

b) A declaration that the house without land purchased by the defendant in 1991 was built on a portion of land on PLOT NO. MOMBASA/XVI/27 belonging to the Plaintiffs

c) That the defendant in order to demolish the house built on wattle and duab with corrugated iron sheets with a ceiling made of mud and Boriti Poles and construct a fresh structure on the said portion of land, she required the consent and authority of the Plaintiffs the land owners and hence the landlords.

d) That having failed to seek for and obtain due consent of the Plaintiffs to demolish the interest she purchased in 1991 and put a different structure, she immediately on demolition became a trespasser and any structure or structures put up thereafter were illegal.

e) An injunction to restrain the defendant (by herself, her servants, or agents or otherwise howsoever) from continuing constructing the illegal structures on the said PLOT NO. 27/XVI/MOMBASA.

f) A mandatory injunction directed at the defendant, her agents and/or servants to demolish and remove all of the structures erected and standing on PLOT NO.MOMBASA/XVI/27 and in default the Plaintiffs to undertake the same at the cost and expenses of the defendant.

g) Delivery of the suit premises in vacant possession by the defendant to the plaintiffs.

h) Damages

i) Costs of this suit.

j) Any other or further relief as this Honourable Court may seem fit to grant in the circumstances.

2. The Plaintiffs' case is that at all material times, the Plaintiffs are the executors of the will of the late Abdulla Suleimnji Essajee who is the registered proprietor of all that plot known as **PLOT NO.27/SECTION XVI/MOMBASA** situated at Guraya, Mombasa and are hence entitled to possession of the said plot. The Plaintiffs aver that by an agreement dated 26th November 1991, the defendant purchased from one Mohamed Said Ahmed a house without land built on the suit plot. That the said Mohamed Said Ahmed had bought the said house without land at an auction conducted by M/s G.A. Dato & Co. Ltd on 16th April 1988 at an alleged figure of Kshs.140,000/=

3. It is the Plaintiffs' contention that the interest purchased by the defendant was a house without land built of wattle and daub with corrugated iron sheets, cement plastered walls and cement screed floor. That the ceiling was of mud on Boriti Poles with wooden doors and windows.
4. The Plaintiffs further contend that the said plot was not among those to be subdivided under the so called presidential embargo and has today not been subdivided and therefore remains one single plot. The Plaintiffs state that the defendants needed to regularize her relationship with the Plaintiffs as a tenant but did not do so.
5. It is the Plaintiffs' case that on or about 26th November 1991 the defendant wrongly entered the said plot and commenced construction of a storey building without the Plaintiffs' consent nor the approval of the Municipal Council of Mombasa and that notwithstanding repeated requests by the Plaintiffs to cease the said construction and vacate and deliver up possession, the defendant has wrongfully failed and refused to do so. It is further the Plaintiffs' case that the defendant has extended and expanded the previous boundaries occupied by the house without land which she purchased in 1991 and has erected an extended foundation and is building therewith a fresh storeyed extension. The Plaintiffs contend that the defendant threatens and intends unless restrained by the court, to remain in wrongful occupation of the said plot and building and to continue to expand and to trespass thereon.
6. The Plaintiffs aver that the defendant has not paid ground rent since the wrongful occupation and trespass and the Plaintiffs claim to have suffered loss and damage and claim mesne profits and damages.
7. In his evidence, PW1 who is the 1st Plaintiff stated that the 2nd Plaintiff is his brother and that they are both the executors of the will of their late father Abdulla Suleiman Essajee who died in 1989. He further stated that they are five (5) siblings.
8. PW1 stated that the suit property is **PLOT NO.27 SECTION XVI, MOMBASA**, where there is a house without land built of wattle and daub with corrugated iron roof, walls cement plastered and floor screed which belonged to a tenant. It is the evidence of PW1 that in 1988 the house without land was sold on auction and was purchased by one Mohamed Said Ahmed for Kshs.140,000/=. PW1 further stated that the new owner made no attempts to regularize his relationship with them as the owners of the plot. That the purchaser only acquired the house without land.
9. It is the evidence of PW1 that the said Mohamed Said Ahmed sold the house without land to the defendant for Kshs.100,000/=. He stated that after purchasing the house without land, the defendant did not recognize the Plaintiffs as the owners of the plot and therefore did not come to them. That later, the defendant demolished the house without land and constructed another house. PW1 stated that they informed the defendant that she had only purchased the house without land and notified her to vacate but she ignored the notice and continued constructing hence the filing of this suit.
10. It is the evidence of PW1 that the moment the defendant demolished the house without land, her interest was extinguished. PW1 stated that the defendant constructed the new building which is two storeyed using blocks, metal bars without the plaintiffs' consent as the landlords. PW1 further stated that the defendant had no claim whatsoever over the suit plot and is a trespasser. The plaintiffs' are therefore seeking an order directing the defendant to demolish the storeyed premises and to pay rent of Kshs.4,000/= as mesne profits.
11. The Plaintiff produced the Title Deed for **TITLE NUMBER MOMBAS/BLOCK XVI/27**, certificate of official search dated 15th February, 2017, Notice of Auction Sale to take place on 16th April 1988, sale agreement dated 26th November 1991 between Mohamed Said Ahmed and the defendant, demand letter dated 28th November, 1995, photographs of the house without land bought by the defendant, photographs for the house demolished and new constructions, property rates payment request dated 18th November 2015 as P.exhibits 1-9 respectively.
12. PW1 stated that the suit plot was not among the ones put on presidential embargo and that they have never sub-divided it. He further stated that they instructed a surveyor to prepare a report.
13. On being cross-examined by Ms.Wambani, advocate for the defendant, PW1 stated that he got the agreement (p.exhibit 4) from his advocate and the agreement showed the consideration was kshs.100,000/=. He admitted that Clause (b) of the agreement allowed the defendant to carryout development. He however added that the defendant went beyond the boundary of the original house without land and that ever since entering the plot in 1991 the defendant has never paid ground rent and the plaintiffs never demanded for payment. PW1 reiterated that the plot was not in the list of the ones which had a presidential embargo.
14. PW2 James Nduti, a principal surveyor with coast surveys, is the surveyor who was instructed by the plaintiffs to ascertain the boundaries of the suit plot and mainly to ascertain whether the house thereon was inside or outside the plot. He stated that after purchasing the survey plans from the survey of Kenya, he visited the site of **PLOT NUMBER MOMBASA/XVI/27** where he confirmed the beacons were in place. He stated that the house was pointed out to them and confirmed that the said house was occupying 150 square metres. In the findings in the report which was produced as p.exhibit 13, he found that the house was within the suit plot.
15. In her re-amended defence filed on 21st February 2017, the defendant pleaded that she is not a trespasser on the suit property and that she has not encroached onto the plaintiffs' plot, adding that she was only developing that house without land which she bought from the previous owner of the house with consent of the plaintiffs' parents. The defendant further stated that her interest in the suit property were not extinguished by the mere fact that the house she bought was demolished. The defendant contended that the suit property was subdivided under presidential embargo and was given to residents, including her.
16. In her evidence, DW1, the defendant stated that she purchased the house on **PLOT NO.MOMBASA/XVI/27** and the same was a mud Swahili type house. She stated that there was a presidential embargo to the effect that those people who were living on the plot in Majengo would be sold the houses.

17. DW1 stated that she bought the house in 1991 and went to the Municipal Council with a plan which was approved and she constructed a building according to the said plan. She denied trespassing onto the plaintiffs' plot. She further denied being a tenant to the Plaintiffs. She stated that she was not required to pay any rent and none was demanded from her by the Plaintiffs.

18. When cross-examined by Mr. Anyanzwa, counsel for the plaintiffs DW1 stated that when she bought the house it was a mud house and the agreement between her and Mohamed Said Ahmed described the property sold as house without land, which however she stated that she does not agree with. DW1 added that she has lived in the house since 1991 and has not paid any rates. She further stated that she had documents showing there was a presidential embargo and receipt. She admitted that the receipt for rates for 2015 shows the same was paid by the Plaintiffs. DW1 stated that they paid money to the District Commissioner's office which the plaintiffs have refused to go and collect. She denied receiving the demand letter from the Plaintiffs' advocates but admitted receiving a court injunction. DW1 stated that upon purchasing the mud house she put up a stone house which has now reached two storeys.

19. During re-examination by Mr. Khatib, the defendant stated that the houses were in the same plot. She never paid rates to the county because he did not have title deed, adding that the plaintiffs should collect their money from the DC's office so that she can be issued with a title deed.

20. At the close of both the plaintiffs' and the defendant's case, parties filed written submissions which mainly summarized their respective cases as pleaded and the evidence relied on.

21. I have considered the pleadings, the evidence tendered and the submissions made. The defendant listed the issues for determination as follows:

i. Whether the defendant's interest on the house without land on PLOT NO.27/XVI/MOMBASA was extinguished when she demolished the house sold and commenced or reconstructed another house.

ii. Whether the defendant has trespassed on the plaintiffs' PLOT NO.27/XVI/MOMBASA.

iii. Whether the plaintiff is entitled to the prayers sought.

In my considered view these are the issues that call for determination in this case.

22. This case arises because of the peculiar phenomenon of houses without land only known in the coastal region. Because of its notoriety the courts have been forced to give it some measure of judicial notice. It has thus been recognized in various decisions that one may legitimately own a house temporary or permanent, constructed on land owned by another person. The issue as in this case is whether the defendant's interest became extinguished when the house without land was demolished.

23. From the material placed before me, there is no dispute that the plaintiffs are the registered proprietors as executors and beneficiaries together with others of **PLOT NO. 27/XVI/MOMBASA**. It is also not in dispute that the defendant via an agreement dated 26th November, 1991 bought a house without land built on the suit property from one Mohamed Said Ahmed who had in turn bought the said house without land at an auction.

24. In the auction sale (p.exhibit 3), the said house is described as "house without land on **PLOT NO.27/XVI/GURAYA**, Mombasa built of wattle and daub with C.I. Sheet roof walls cement plastered and floor cement creed. Ceiling of mud on boriti poles. Wooden doors and windows. Accommodation consist of 5 rooms and usual conveniences."

25. In the agreement of 26th November 1991 (P.exhibit 4), the property sold is described as the "House without land built on **PLOT NO.27/XVI** situated at Guraya – Mombasa."

26. From the foregoing, there is no doubt that the defendant's interest was the house without land on **PLOT NO.27/XVI/MOMBASA**. The said house without land was clearly described in both the Auction sale and the sale agreement dated 26th November, 1991. The said description was detailed and included the type of materials used to put up the said house.

27. In my view, the moment the defendant demolished the said house, she no longer had any interest to claim in **PLOT NO.27/XVI/MOMBASA**. The defendant certainly had no interest in the land other than house without land which was clearly defined. I find and hold that the right and interest of the defendant in respect of the suit property was extinguished when she demolished the house.

28. It is also my view that under the arrangement known as "house without land" the defendant's right to build another house on the plaintiffs' land was only possible with the consent and agreement of the plaintiffs' as the rightful owners of the land. In the absence of such agreement and/or consent, the constructions which were undertaken by the defendants, and which did not constitute development or renovation of the original house was illegal. I therefore find and hold that the defendant trespassed on the plaintiffs' **PLOT NO.27/XVI/MOMBASA** when she commenced developments thereon without the Plaintiffs consent and or permission.

29. The defendant had claimed that the suit property was subdivided under presidential embargo and that she was given the same as a resident on the parcel of land. There was however no evidence adduced to support this contention. On the contrary, the evidence on record and in particular the title deed for **TITLE NO.MOMBASA/XVI.27** (P.exhibit 1) shows that the property has not been subdivided and it is still in the Plaintiffs; name as one undivided plot.

30. From the material on record, I am satisfied that the plaintiffs have proved their case on balance of probabilities. I do find that the defendant's actions of entering upon the suit property after demolition of the house without land to which she had an interest without the

plaintiffs' consent or permission amounted to trespass. Even though trespass is actionable per se, it is clear from the evidence adduced by the Plaintiffs that they suffered damage as a result of the defendant's actions. The plaintiffs are therefore entitled to damages for trespass. I will award a nominal sum of Kshs.500,000/= as general damages for trespass.

31. In the result therefore, I enter judgment for the plaintiffs as against the defendant:

- a) In terms of prayers (a), (b), (c), (d), (e), (f) and (g) of the re-amended plaint dated 10th Februray 2017.**
- b) Kshs.500,000/= as general damages for trespass.**
- c) Kshs.3,000/= per month as mesne profits from 26th November 1991 till vacant possession is given.**
- d) The defendant's counter-claim is dismissed with costs.**
- e) Costs of the suit to be borne by the defendant.**

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Mr. Anyanzwa for plaintiff

Ms. Wambani for defendant

Yumna Court Assistant

C.K. YANO

JUDGE

17/1/19