



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 159 OF 2010

KENYA AIRWAYS LIMITED.....PLAINTIFF

VERSUS

MARIO BRUSCHI.....1ST DEFENDANT

GLORIA BRUSCHI.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated 15th November 2010 as filed herein on 16th November 2010, Kenya Airways Ltd(the Plaintiff) prays for:-

a) A declaration that the Plaintiff is the registered owner of all that parcel of land known as LR No. 5787 situate in Malindi District;

b) An order of eviction against Mario Bruschi and Gloria Bruschi (the Defendants) from all that parcel of land known as LR No. 5787 situate in Malindi District and an order that the Court Bailiff do restore possession of LR No. 5787 situate in Malindi District to the Plaintiff, Kenya Airways Limited;

c) A permanent injunction restraining the Defendants or their agents and servants from entering upon or trespassing on all that parcel of land known as LR No. 5787 situate in Malindi District or from construction or from interfering in any manner whatsoever with the Plaintiff's legal right to quietly possess and use the said premises;

d) Cost of the suit;

e) Any other relief that the Court may deem fit to grant.

2. The Plaintiff's claims are premised on their contention at paragraphs 4 and 5 of the Plaint that it is the registered owner and is entitled to all that parcel of land known as LR No. 5787 and that in or about the year 2006, the Defendants without the consent or authority of the Plaintiff, wrongfully entered upon the suit property and took possession thereof.

3. In their Written Statement of Defence as filed herein on 14th August 2012 the Defendants who are a husband and wife assert that they are strangers to the contents of Paragraph 4 of the Plaint and further state that they do not know and are not aware of the existence of LR No. 5787 aforesaid.

4. The Defendants further deny the Plaintiff's allegations of trespass and aver that they legally own their own land which is duly registered in their own names with genuine and legal ownership documents. It is therefore the Defendants' case that this suit is misconceived and that the same ought to be dismissed with costs as it does not disclose any cause of action against the Defendants.

The Plaintiff's Case

5. The trial herein commenced before Honourable Justice Angote on 23rd March 2015. PW1 (Winifred Waithanji) was the Plaintiff's Facilities Manager and in-charge of all properties owned and/or leased by the Plaintiff.

6. PW1 testified that by virtue of her office, she was aware that LR No. 5787 was allocated to Kenya Airways Ltd by the Commissioner of Lands vide a Letter of Allotment dated 6th May 1991. The Plaintiff accepted the Offer by a letter dated 10th June 1991 and forwarded a cheque for the sum of Kshs 260,040.00/-. That sum was inclusive of Kshs 62,790/- being the payment required by the Commissioner of Lands for the suit property as well as two other Plots situate within Malindi town.

7. PW1 further stated that on 3rd March 1993, the Commissioner of Lands acknowledged receipt of the cheque but indicated that he could not receipt the same as he could not trace the copies of the Letters of Allotment for the suit property and the two other Plots allotted to the Plaintiff.

8. PW1 told the Court that after a series of correspondence was made between the relevant government agencies, the Commissioner of Lands proceeded on 4th July 1994 to issue a Grant No. CR 25916 over the suit property to the Plaintiff and a Certificate of Title was subsequently issued.

9. It was further PW1's testimony that sometime in the year 2006, the Defendants without the permission, authority or consent of Kenya Airways Ltd entered upon the suit property and took possession thereof by fencing it off and constructing a house thereon. The Defendants have since refused to vacate the land hence the prayers sought herein.

10. At the conclusion of PW1's testimony, the Plaintiff applied for summons to issue to the Land Registrar Mombasa. The Registrar of Titles Samuel Kariuki Mwangi testifying as PW2 confirmed that LR No. 5787(the suit property) was registered in the name of the Plaintiff while LR No. 4484 Malindi was registered in the Defendants' name.

11. PW2 told the Court that the Certificate of Title for the suit property was issued in the name of the Plaintiff on 15th July 1994 while the title for Plot No. 4484 was issued on 26th March 1992 initially in the name of one John Washington Chege before being transferred to the Defendants.

12. PW3 (Priscillah Njeri) was an employee under the Directorate of Survey within the Ministry of Lands. She told the Court that they had received an order on 1st March 2016 directing the Directorate of Survey to investigate the existence of Plot Nos. 4484 and 5787.

13. PW3 testified that on 5th October 2016 their office carried out the survey with the support of two maps. In the process, they found that there was an encroachment on Parcel No. 5787 by 0.3828 Ha. In summary, it was their finding that the boundary of Portion No. 4484 had moved into Portion No. 5787 by about 25.15 metres.

14. PW4 (Emily Njeru) was also a surveyor but in private practice. She told the Court that she received instructions from the Plaintiff on 15th July 2016 to establish the boundaries of the Plots in dispute. She carried out a deskwork review and established the boundaries of the two plots.

15. It was PW4's testimony that upon carrying out a reconnaissance on the ground they established that a brick wall for Portion No. 4484 has encroached into Portion 5787 by about 26.83 metres.

The Defence Case

16. The defence called one witness. Ms Gloria Bruschi (DW1) told the Court that she was the 2nd Defendant herein while the 1st Defendant was her husband. She told the Court that they had together with her husband purchased Plot No. 4484 from one George Washington in 1992. They have since 1993 been living in their portion of the land.

17. DW1 further told the Court that they had built a large house on their plot of land with five rooms, a garage, a servant quarter and a swimming pool. No one had stopped them when they were developing the land and they did not know where the Plaintiff's Plot No. 5787 is located.

Analysis and Determination

18. I have perused and considered the pleadings herein. I have also considered the testimony of all the witnesses plus the evidence produced before the Court.

19. The gist of the Plaintiff's suit is their claim to be registered owners of all that parcel of land known as LR No. 5787 situated at Kibokoni in Malindi. They accuse the Defendants of wrongful entry into the land in or about the year 2006. On their part the Defendants deny that they have anything to do with the Plaintiff's land. It is their position that they lawfully occupy their parcel of land being LR No. 4484 which is registered under the 1st Defendant's name.

20. From the material presented before me, there was no dispute that LR No. 5787 and LR No. 4484 are separate and distinct properties but which are adjoining and abutting each other with a common boundary. While the Plaintiff is registered as the owner of LR No. 5787, the Defendants equally had a valid Certificate of Title for LR No. 4484 which parcel was registered in the name of the 1st Defendant. As it turned out the 1st and 2nd Defendant are husband and wife and the 2nd Defendant testified herein on behalf of herself and the husband.

21. It was the 2nd Defendant's testimony that they purchased the said LR No. 4484 in 1993 from one George Washington Chege at a consideration of Kshs 350,000/-. The property was transferred to her husband's name in 1994 and they have lived on and occupied the same since then. It was her testimony that during the said period they had erected a large house consisting of five rooms on their property, a

Servant Quarter, a Garage and Swimming Pool. It was her case that their Plot No. 4484 measures approximately 0.2418 in size.

22. On their part, the Plaintiff told the Court through PW1 that the Plaintiff company had been allocated their parcel of land through the Commissioner of Lands vide a Grant issued to that effect on 4th July 1994. The said Grant was registered as No. CR 25916/1 on 15th July 1994. The said Grant was issued after the Plaintiff company accepted the offer of allotment and complied with the conditions therein including payment of the stand premium and other fees totaling to Kshs 62,790/-. The Certificate of Grant produced as evidence in Court gives the size of the land as 0.8000 Ha.

23. When he testified before this Court as PW2, Samuel Kariuki Mwangi, the Registrar of Titles Kilifi confirmed the validity and existence of the two titles and the fact that LR No. 5787 was registered in the Plaintiff's name while LR No. 4484 was in the name of the Defendants. As to the exact location of the properties, PW2 indicated that only a surveyor could be able to ascertain the same on the ground.

24. Accordingly and by the concurrence of both parties, on 1st March 2016, the Honourable Justice Angote then seized of this matter directed the Director of Surveys to appoint a Surveyor from his office to investigate the existence and legality of Deed Plans-Number 157999 for Plot No. 4484 and Number 162085 for Plot No. 5787 and to present his report to Court within 60 days. The parties were given the liberty by the Learned Judge to cross-examine the author of the Survey Report and/or to call their own independent surveyors to testify.

25. Pursuant to the said order, the Director of Survey carried out a survey and filed a Report herein dated 7th October 2016 on 10th October 2016. The Report was presented before this Court by Ms Priscillah Njeri (PW3) who told this Court that after conducting their survey, they came to the conclusion that the boundary of Portion No. 4484 had moved into Portion No. 5787 by about 25.15 metres.

26. In the process, and as per the liberties granted by the Court, the Plaintiff also commissioned private surveyors in the name of Terra Gis Africa to conduct a survey. They carried out a deskwork review and their report presented by Ms Emily W. Njeru (PW4) before this Court indicated that a brick wall for Portion No. 4484 has encroached into Portion No. 5787 by about 26.83 metres.

27. As it were the two Survey Reports were more or less accepted by the Defendants. They neither challenged the same nor cross-examined PW3 and PW4 on the contents of their respective reports. In the absence of any other report casting doubt on the two reports, I am persuaded that the Survey Reports were accurate and gave a true reflection of the position on the ground.

28. While DW1 told the Court that the Defendants' parcel of land measures 0.2418 Ha, the topographical survey conducted by PW3 confirms that LR No. 4484 occupies 0.3828 Ha. Both Survey Reports indeed confirm that the Defendants' Portion had encroached onto the Plaintiff's property by at least 25 metres.

29. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another (*see Clerk & Lindsell on Torts 18th Edition at page 923*). In a matter such as this, all the Plaintiff is required to prove is the fact that it is the owner of the suit property and that the defendant has invaded and occupied the same without any justifiable cause. I think the Plaintiff has demonstrated those facts in these circumstances.

30. And as was stated graphically in the *Learned Treatise-Winfield and Jolowic on Tort, 16th edition 2002*, at page 487 paragraph 131:-

"It is no defence that the only reason for...entry was that he (the trespasser) had lost his way or even that he genuinely but erroneously believed that the land was his."

31. In the circumstances herein, I am satisfied that the Plaintiff has proved to the required standard that some buildings built by the Defendants have encroached onto its property by at least 25 metres. Those offending portions ought to be removed.

32. Accordingly I hereby enter Judgment for the Plaintiff as prayed in the Plaint. The Defendant shall have 45 days within which to remove the offending sections as per the Report produced by PW3 herein. In default the Plaintiff shall be at liberty to remove the same at the Defendants' cost.

33. The Plaintiff shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE