

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 124 OF 2016

BAKARI SAID MAJENI.....PLAINTIFF

-VERSUS-

SHAFI SAID MWANYOTA

MOHAMED SULEIMAN MWADZUNGWE.....DEFENDANTS

JUDGEMENT

1. The plaintiff by way of amended plaint dated 14th January 2016 sued Shafi Said Mwanyota and Mohamed Suleiman Mwadzugwe claiming the land reference No Kwale/Ukunda/4806 and payment of damages for trespass. The plaintiff pleaded that he is the registered owner of the suit land which the defendants trespassed on in the year 2007 by cultivating and erecting structures thereon without his consent and or permission. The plaintiff prays for judgement against the defendants for:

(a) Eviction

(b) Permanent injunction be issued restraining them from trespassing on L.R Kwale/Ukunda/4806.

(c) Costs of the suit and interest.

(d) Any other relief the Court deems just to grant.

2. The defendants entered appearance on 18th September 2015 in person which was before the amendment of the plaint was effected. The 1st defendant later appointed Steve Kithi advocate to act for him vide the notice of appointment dated 26th August 2016 and filed on the same date. The same advocate filed notice of appointment for 2nd defendant on 29th August 2016. However both of them did not file a defence to the claim. The defendants were given time to comply with order 11 on 24th October 2017 and even sought more time on 18th January 2018 when the matter came for hearing but still they did not take steps of filing a defence and or documents. The matter thus proceeded exparte on 12th July 2018.

3. The plaintiff gave his testimony on 12th July 2018. He told the Court that the defendants are living on a portion of his land No 4806. That he got the land by inheritance. That the 1st defendant (who is his brother) was given a plot in Ukunda Settlement Scheme plot No 87 measuring 12 acres. That the distribution was done before the Kadhi's Court vide cause No 36 of 2007. The plaintiff continued that the two defendants have put up 3 houses on the land and also cleared bushes on the plot. He asked the Court to order them to leave the land and also pay him costs of the suit. The witness also produced as exhibits all documents filed with his list dated 7th February 2017 and 12th January 2018. With this evidence the plaintiff's case was marked closed.

4. The defendants not being present in Court had their case closed without calling any. The plaintiff proceeded to file his written submissions which gave the background of his case and summary of the evidence. Relying on the case of **Thomas Maseki Maera vs Kimji Pate, Nairobi HCCC No 330 of 2012** and **Silas Bartonjo Kiptala vs James Kipkemboi Murei, Eldoret ELC Case No 693 of 2012** the plaintiff urged the Court to grant the orders sought.

5. The facts in the latter case were however different as it related to sale of land done without obtaining the Land Control Board consent contrary to the provisions of the Land Control Act Cap 302. In the case before me, the plaintiff has produced a copy of title deed for Kwale/Ukunda/4806 which was issued to him on 30th April 2013 after subdivision of the original title No Kwale/Ukunda/1043. The plaintiff also annexed proceedings that were taken before the Kadhi Court in Cause No 36 of 2007 showing how distribution was done in respect of the estate of Saidi Ali Majeni – deceased. The honourable Kadhi gave a judgement on 10th April 2007 stating how the estate was to be distributed and indeed in the copy of the judgement annexed, the plaintiff was given a share in plot No Ukunda/1043 and the 1st defendant's share was stated to be curved from the plot in Ukunda Settlement Scheme (Ukunda/1191) and a parcel of land located in Kidundumo.

6. The documents presented to Court by the plaintiff have not been controverted by anyone. Consequently as per the provisions of section 24 and 25 of the Land Registration Act, the plaintiff is entitled to exclusive use and occupation of the suit land No Kwale/Ukunda/4806. Any activity being done on the land by anyone including the defendants without his permission amounts to trespass. I am satisfied that the plaintiff has proved his case on a balance of probabilities. Accordingly I enter judgement in his favour as prayed in the amended plaint.

7. The defendants are hereby ordered to remove their structures from the suit land Kwale/Ukunda/4806 within 45 days of the decree being served upon them. In default, the plaintiff is at liberty to remove the defendants on his land at their costs. An order of permanent injunction is also issued against them restraining them from dealing with the suit land. Costs of the suit awarded to the plaintiff.

Dated, signed & delivered at Mombasa this 15th February 2019

A. OMOLLO

JUDGE