



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 233 OF 2011

MUMWANJESYI INVESTMENTS LIMITED.....PLAINTIFF

-VERSUS-

DAVID MUTUA MULII.....DEFENDANT

JUDGEMENT

1. The plaintiff filed this suit vide his plaint dated 9th August 2011. The plaint was amended twice on 4th October 2011 and further amended on 13th March 2013 but the reliefs remained the same as below:

(a) A permanent injunction restraining the defendant by himself, his servant and/or agents from interfering with the plaintiff's quiet possession and occupation and from trespassing on the said piece or parcel of land known as Sub-division No. 7978/1/MN.

(b) Costs of this suit.

(c) Interest on (b) above at Court rates.

(d) Further or other relief as this honourable Court may deem fit or expedient to grant.

2. The plaintiff pleaded that on or about 26th July 2011, the defendant started to unlawfully and illegally excavate the plaintiff's land. That these acts of the defendant may waste and damage the suit property and the same also constitute trespass which deprives the plaintiff of quiet possession. As a result, the plaintiff prays for an order of permanent injunction to restrain the defendant from continuing with the illegal activities and interfering with his occupation of the suit land.

3. The defendant denied the claim vide his statement of defence filed on 25th October 2011, the defendant pleaded that he bought a portion of the land No 624/1/MN measuring 65 feet by 50 feet in November 2004 from Saleh Said. That the agreement was later reduced into writing on 8th July 2006 and he paid the agreed purchase price of Kshs 250,000= . The defendant pleaded that he immediately took possession of his sold portion and built a permanent house. That when he wanted to extend his house, he was served with a demand letter from the plaintiff's advocates on 26th July 2011. The defendant also stated that with threats received from the plaintiff's representative, he filed a suit vide Mombasa SRMCC No 1934 of 2011. Lastly the defendant states that the plaintiff has no cause of action against him.

4. After the pleadings closed and the interlocutory applications determined, the matter was set down for hearing. The plaintiff called one witness while the defendant did not call any evidence. Mr Joseph Wainaina Muraya testified on 16th June 2015 as PW 1. He said that he is one of the director of the plaintiff. PW 1 said the defendant started building on their plot No 7978/1/MN in 2011. That they had bought the large plot from No 624/1/MN from Swaleh Nguru in 1991. The subdivisions were carried out in 1992 and they obtained government approvals of the same. That they processed and obtained title for the suit plot in 2004. He produced a copy of the title as Pex 1.

5. PW 1 continued that in July 2011 they noticed some developments on this plot and carried out investigations to find out the offender. The witness said their investigations revealed it was the defendant. They reported to the D. C, the police and their advocate. That the plaintiff's advocate wrote to the defendant on 26.7.2011(Pex 2) but the defendant did not stop. PW 1 stated that they also engaged the A.P.s to guard the plot. That their advocate wrote another letter dated 4.8.2011 which he produced as Pex 3. He also produced a search done on the plot on 4.3.2009 as Pex 4. The search showed the land was still in their name. He urged the Court to grant the reliefs sought.

6. In cross – examination, PW 1 confirmed the sale agreement filed by the defendant as the one they used to purchase their land. That the purchaser is indicated as Mwamjesyi Investments Ltd not Mwamjesyi Development Ltd. That the plaintiff was registered around 19th June

1991. That the plaintiff did not buy the plots that were already occupied but the defendant was not one of those in occupation at the time of their purchase. PW 1 admitted that he did not file a layout of their plan. That he did not sell the disputed plot to anyone. In re – examination, PW 1 said they have not incorporated a company called Mwamjesyi Investments Ltd. That the name Mwamjesyi Investments appearing in the agreement was a mistake of their advocate as all the titles read the plaintiff’s name. That all plots that had structures on them were returned after subdivisions to Swaleh Ngunu. This marked the close of the plaintiff’s case.

7. The defendant through counsel sought several adjournments from 2015 to September 2018. The last adjournment was refused necessitating the defence case to be closed without adducing any evidence. The parties’ advocates then filed written closing submissions. The plaintiff submitted that it had proved its case on a balance of probabilities thus entitled to the orders sought. That they showed the Court a copy of their title documents (Pex 1 & 4). That the act of trespass has not been denied when the defendant pleaded that he had built on a part of the plot.

8. The defendant attempted to introduce evidence through his submissions when the advocate in page 2 analysed the import of the photograph annexed to the replying affidavit dated 19th October 2017 filed in response to a contempt application as well as the survey report dated 4th March 2018. The submission also referred to an informal village layout plan which he said gave credence to the defendant’s claim that the defendant had bought the land from the original owners yet the said plan was not part of the defendant’s filed documents neither was it produced in evidence. The defendant concluded his submissions that land being equivalent to a commercial asset, the same can be valued and the plaintiff compensated. He urged the Court to dismiss the suit with costs.

9. Under Order 2 of the Civil Procedures, the parties are required to plead facts. It follows then that if any party wishes to have the facts decided in his/her favour, the law imposes an obligation upon him/her to prove the existence of those facts. This rule of evidence is provided for under Order 18 of the Civil Procedure Act and section 107, 108 and 109 of the Evidence Act. Although the defendant filed a defence and a list of documents, the impact of his failure to come and testify leave the facts he pleaded deemed as not proved.

10. Did the plaintiff prove its case? First the plaintiff’s evidence on the existence of the facts are not contested. The plaintiff also produced a title deed and certificate of search showing the same is in its name. The plaintiff further produced demand letters written to the defendant before the filing of this suit (Pex 2 and 3). The defendant did not stop in his actions of trespass necessitating the filing of this suit. Amongst the defendant’s documents contained in the two lists filed, there was no copy of title bearing the defendant’s name for the portion he pleaded that he bought. Secondly the survey report dated 4.3.18 filed by the defendant confirmed the defendant’s structure marked as “**H I**” in the sketch map as falling within the plaintiff’s suit property.

11. The plaintiff stated that it has not sold this plot to anyone. The plot was registered in the plaintiff’s name on 4th March 2004 which is before the defendant “bought” the suit plot in November 2004. The defendant pleaded that he bought a portion from the mother title No 624/1/MN which number the plaintiff said was subdivided by 1992. If the defendant was entitled to this portion, he would have been able to confirm the ownership of the portion by doing a search (due diligence) before paying the money. I am therefore satisfied that the plaintiff has proved its case.

12. On whether the plaintiff can be compensated as submitted by the defendant, the defendant did not offer this in his pleadings. Neither did the plaintiff make an alternative prayer for compensation. Parties are bound by their pleadings. The Court in the circumstances cannot order for a valuation to be done at the stage of writing a judgment. The parties are however at liberty to engage in such negotiations if they so wish. In conclusion I do hereby enter judgment in favour of the plaintiff as contained in prayer (a), (b) and (c) of the further amended plaint.

Dated, signed & delivered at Mombasa this 12th February 2019

A. OMOLLO

JUDGE