



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. NO. 1820 OF 2007

RAVINDRA KARSAN VISHRAM AND

NITIN KUMAR GOPAL VISHRAM

Both T/A NIRA ENTERPRISES.....PLAINTIFFS

VERSUS

DR ABDUL WAHAB ABDULRAHMAN NOORWALI

DR. SULAYMAN BASAHAL MUHAMMAD SA'AD AL-QAZI

(Sued in their personal capacities and as Trustees of

WORLD ASSEMBLY OF MUSLIM YOUTH).....DEFENDANTS

JUDGEMENT

1. The Plaintiffs sued the Defendants who are the trustees of World Assembly of Muslim Youth, a Non-Governmental Organisation, over land reference number Nairobi/Block 93/1424 (“the Suit Property”) claiming that the Defendants have unlawfully encroached onto and wrongfully taken possession of the Suit Property which actions amount to trespass. The Plaintiffs claim that despite repeated requests by the Plaintiffs to vacate and deliver up the Suit Property, the Defendants have failed to do so. The Plaintiffs seek a mandatory order to compel the Defendants to remove part of the fence encroaching onto the Plaintiffs’ Suit Property and to deliver vacant possession to the Plaintiffs. The Plaintiffs also seek an injunction to restrain the Defendants from occupying the Suit Property and erecting further structures on it in the plaint dated 24/3/2006.

2. The Defendants filed a defence denying the Plaintiffs’ claim and stated that the land known as L.R. No. 209/10586 is where a community school known as Wamy High School is run. Further, that the school land has always been fenced and its boundaries have never been extended. The Defendants also averred that just like most of the land in the area, the school land is adjacent to a riparian reserve which could not have been allocated to any party. The Defendants denied that the Plaintiffs had suffered any damage as they alleged.

3. Nitin Kumar Gopal Vishram testified for the Plaintiff. He claimed that he is registered as proprietor of the Suit Property jointly with the other Plaintiff while the Defendant is the registered proprietor of L.R. No. 209/14067 which is adjacent to the Plaintiff’s land. Land reference number 10586 was later inserted by hand on Mr. Vishram’s typed witness statement as the Defendants’ land. The Plaintiffs claim that they purchased the Suit Property through a court order and that the Deputy Registrar of the High Court executed the documents in the Plaintiffs’ favour. The Plaintiffs claim that they have been paying rent and rates in respect of the Suit Property and that during a routine visit to their property they found out that the Defendants had fenced off part of the land.

4. The Plaintiffs produced a copy of the official search which shows that Nira Enterprises was registered as the owner of the Suit Property measuring 0.6615 hectares on 30/5/2003 and issued with a certificate of lease, a copy of which the Plaintiff produced. The witness also produced a copy of the grant given to Parkview Academy Limited for L. R. No. 209/10586. The deed plan attached to the title shows that the Defendants’ land was charged to Diamond Trust Bank of Kenya Limited.

5. He also produced a copy of the order issued in **Nairobi HCCC No. 3167 of 1996** which refers to the Plaintiffs as the purchasers of the Suit Property. The order directed the Registrar of Lands to register the transfer without production of the original documents and to issue to the purchasers the certificate of lease. The order states that the purchasers would be placed into possession of parcel numbers Eldoret Municipality Block 15/1870 and Nairobi Block 93/1424 (the Suit Property). The court notes that the Defendant in this case was not a party to that suit.

6. The witness produced a copy of a letter dated 1/7/2003 from Harunani and Associates, a firm of licensed surveyors addressed to Wamy High School. The surveyors stated that they had been tasked to locate and re-establish the beacons of the Suit Property. The letter stated that from the Registry Index Map (RIM) for Nairobi Block 93 and survey plan F/R No. 306/2, the Suit Property had been surveyed and was adjacent to the school land. The letter suggested that Wamy High School had fenced its plot all the way to the river. The letter sought the school's permission for the surveyors to verify the position on the ground. It seems that no response was received for the Plaintiff it instructed its advocates to write to Wamy High School on 16/1/2004 asking them to remove the fence.

7. Harunani and Associates wrote to the Director of Surveys on 9/10/2003 on behalf of the Plaintiffs. The letter made reference to L.R. No. 209/14067 and gave its new number as Nairobi Block 93/parcel number 1424. The letter stated that the parcel of land was situated off Mombasa Road and was adjacent to L.R. No. 209/10586 shown on F/R numbers 182/90 and 195/65. The letter stated that their client's parcel of land was surveyed and shown on F/R Number 306/2 and that the Plaintiffs had requested these surveyors to locate and re-establish the beacons defining the boundaries of the Suit Property but they had been denied access by the directors of Wamy High School which stands on L.R. No. 209/10586. The letter stated that the school appeared to have fenced off the Plaintiffs' plot and enclosed it as part of the school compound. The surveyors sought the intervention of the Director of Surveys in being granted access to the Suit Property.

8. The Defendants instructed Faruk Adam & Co. Advocates who responded to the letter on 12/2/2004 denying that the school had encroached on the Plaintiffs' land. The letter sought evidence in support of the Plaintiffs' claim. The Plaintiffs' lawyers seem to have forwarded a survey plan and RIM to the Defendants' advocate vide the letter dated 16/2/2004 but these were not included among the documents the Plaintiffs filed in court.

9. The Plaintiffs also produced a copy of the receipt which the Kenya Revenue Authority issued to them on payment of land rent in the sum of Kshs. 72,910/= for the year 2016. He also produced the property rates payments requests from the Nairobi City County for the Suit Property dated 17/12/2015 together with the receipt confirming payment dated 12/1/2016.

10. On cross examination, the witness stated that the Plaintiff was not aware that the Defendant had documents in respect of its land since 1993. The witness stated that the Plaintiffs were shown the land when they bought it but that they did not know that Wamy School had fenced it off. The witness stated that the Suit Property borders a river and it would only be incumbent upon the Plaintiffs to take note of the six meters' riparian reserve at the time of developing the Suit Property. The witness stated that no survey of the Suit Property had been done since 2003 because the Defendants had fenced off the land and denied the Plaintiff access.

11. Jeremiah Otieno Muga, a surveyor gave evidence for the defence. He was contracted by Wamy High School in 2008 to establish the Northern boundaries line of the school land and also establish the status of parcel number 1424 which bordered the school land. His investigations established that there was a part development plan (pdp) for parcel number 1424 prepared and approved by the Director of Physical Planning in 1993 in favour of Parkview Academy which is now known as Wamy High School. The pdp bore the title "Proposed Extension to Parkview Academy". The witness stated that parcel number 1424 falls on the sports field being used by Wamy High School and that once this parcel of land was set aside as an extension to Parkview Academy now Wamy High School, it was not available for allocation to any other party.

12. He produced a copy of his report dated 14/5/2008 on the preliminary survey of parcel number 1424 next to Wamy High School. The measurements the surveyor undertook established that parcel number 1424 was on the riparian reserve and was being used by the school as a playground. This land was intended to be an extension to Parkview Academy, now Wamy High School. The report attached sheet 3 of the RIM for Nairobi Block 93 and indicated that L.R. No. 209/10586 did not appear on the RIM because the school's parcel of land and the Plaintiffs' land were registered under the Registration of Titles Act and the Registered Land Act respectively. The report concluded that the Suit Property formed part of Wamy High School, formerly known as Parkview Academy and that the allocation of the Suit Property was irregular.

13. The Defendant's witness produced copies of the amended RIM in respect of Nairobi Block 93 which are not legible. He also produced F/R No. 346/64 which shows that parcel numbers 1434 and 1435 lay adjacent to the Defendants' land on the right hand side. The Defendants produced a copy of the letter from the Commission of Inquiry into the illegal/irregular allocation of public land dated 18/2/2004 which confirmed that a complaint had been lodged with that Commission in respect of the suit land. An undated pdp shows that the Suit Property lies next to the riparian reserve next to Parkview Academy. The Defendants also produced a copy of the certificate of registration for World Assembly of Muslim Youth showing that it is registered under the Non-Governmental Organisations Coordination Act.

14. The issue for determination is whether the court should grant the orders sought in the plaint. Parties filed submissions which the court has considered. The Plaintiffs explained that their attempts to have a survey done on the Suit Property were made impossible by the Defendants' denial of access to the land. The Plaintiffs submitted that they were not seeking entry into the Defendants' land but wanted to access their own property. The Plaintiffs contended that the Government of Kenya could not have allocated land to the Defendants which was private land. The Plaintiffs in their submissions challenged the Defendant arguing that it carries out private business.

15. The Plaintiffs' witness did not produce the survey plans and amended registry index map (RIM) showing how the Suit Property was surveyed. As the Defendant's witness stated in his evidence, the Defendant's land cannot have been in the same amended RIM as the Plaintiffs' land since the two parcels of land are registered under different land law regimes, and only the one registered under the Registered Land Act would appear on the RIM for the area. It is not clear how the Plaintiffs land came into existence. For it to have a parcel number, it should have been surveyed with the beacons placed on the land and registered before the title was issued. The Plaintiffs' witness claimed that they were shown the Suit Property when they purchased it. That would be in 2003 by which time the Defendant's school was running. The Plaintiffs would have noticed back then in 2003 that the land they had bought at the auction was occupied by the Defendants. It is not clear where the auction of the Suit Property was conducted and unlikely that the Plaintiffs carried out due diligence on the Suit Property before they purchased it.

16. The Plaintiffs have failed to prove their claim, it is dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 8th day of February 2019.

K. BOR

JUDGE

In the presence of: -

Ms. L. Koki for the Plaintiffs

Mr. S. Baraza holding brief for Mr. Adan for the Defendants

Mr. V. Owuor- Court Assistant