



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO 30 OF 2017

SAHARA AHMED HILLOW.....APPLICANT

VERSUS

MOHAMED HASSAN JILLO.....1ST RESPONDENT

MUKTAR HASSAN JILLO.....2ND RESPONDENT

ALI HASSAN JILLO.....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

In a plaint dated 18th April 2017 the Plaintiff sought judgment for the following orders:

- (a) A declaration that the estate of AHMED HILLOW OSMAN (deceased) is the legal and/or beneficial owner of all that parcel of land known as Farm Number 23 situate at Malka Punda in Mandera County.
- (b) That this Honourable Court be pleased to issue an order of eviction against the 1st, 2nd, 3rd Defendants, their agents and/or servants and any one under their instructions from all that parcel of land known as Farm Number 23 situate at Malka Punda in Mandera County.
- (c) This Honourable Court do issue a permanent injunction restraining the 1st, 2nd and 3rd Defendants, their agents and/or servants and anyone under their instructions or any other person prohibiting them from dealing with, destroying the crops grown therein, trespassing, taking possession, carrying on any construction or erecting structures, carrying out any operations and/or activities of any nature or doing as such nature of things whatsoever on farm number 23 situate at Malka Punda in Madera County.
- (d) This Honourable Court do issue a permanent injunction requiring the 1st, 2nd and 3rd Defendants, their agents and/or servants,, and anyone under their instructions or any other person to remove all structures erected on Farm Number 23 situate at Malka Punda in Mandera County.
- (e) A permanent injunction do issue restraining the 1st, 2nd and 3rd Defendants by themselves, their servants, agents, employees and anyone under their instructions or any other person from interfering with the Applicants and other beneficiaries quiet enjoyment and use of Farm Number 23 situate at Malka Punda in Mandera County.
- (f) Special damages of Kenya shillings sixty thousand (Kshs.60,000/=)
- (g) General and punitive damages for the wanton destruction of the property and trespass.
- (h) Interest on the (f) and (g) above at courts rate.
- (i) Any other relief the Honourable Court may deem fit to grant.

The Plaintiff filed the suit simultaneously with a Notice of Motion under certificate of urgency dated 19th April 2017. In the said application,

the Plaintiff/Applicant is seeking an eviction and injunction orders against the Defendants/Respondent pending the hearing of the said application interparties and/or the main suit. The original suit was filed in Embu as ELC No. 77/2017 but later transferred to this station where it was given case No. 30 of 2017.

In their joint statement of defence dated 6th July, 2017 and filed on 10th July 2017, the Defendants deny the Plaintiff's claim and put her to strict proof thereof. The Defendants therefore sought to have the suit dismissed with costs.

PLAINTIFF'S CASE

The Plaintiff in her sworn testimony stated that the suit property registered as Farm No. 23 belongs to her late father AHMED HILLOW OSMAN (deceased) and that she is the administrator of his estate. She produced a limited grant (AD LITEM) issued to her on 10th April 2017 vide the Kadhis Court of Nairobi in Succession Cause No. 19 of 2017. The Plaintiff also produced the death certificate of her late father B.956267 as proof of her demise. She stated that her late father owned the suit land and that they have been in occupation since 1964 doing farming and keeping animals. They have planted onions, maize, bananas, pawpaw, mangoes, guavas and other food crops in the land. Her father was given the land vide a letter dated 4th June 1999. Her late father was later issued with a letter by the Town Clerk, Mandera Town Council dated 18/02/2000. Her late father used to pay rates for that farm. She also produced the payment receipts No. 086441, 090070 and 090069. The Plaintiff stated that on 14/12/2016, the Defendants came to the suit farm with a group of people and started destroying food crops. She reported the incident to the police and later to the Agricultural Officer.

On 1/4/2017, the Defendants unlawfully hived off a large portion of her land and started erecting structures thereon. The Agricultural Officer assessed the crop damage at Kshs.60,000/=. She also reported to Mandera Police Station.

The Plaintiff called one witness namely Dahir Hilloo who is working for her in her farm as an employee. He stated that sometime in 2017, the 1st and 2nd Defendants burnt the Plaintiff's farm. He could not remember the date and month. By then he was cultivating the Plaintiff's land with other young men who were assisting him. He produced photographs of the burning farm which he said was taken by his younger brother.

DEFENDANTS CASE

The Defendants were served with a hearing Notice through their advocates on record M/s JAAFAR JELLE & CO. ADVOCATES but neither the Defendants nor their advocate attended court during the hearing. The case proceeded ex parte after the court was satisfied that the Defendants were properly served. Be that as it may, the Defendants through their joint statement of defence dated 6th July 2017, averred that the Plaintiff's case is premature as the dispute between the two unsurveyed/unadjudicated parcels of land which ought to have been placed before the Mandera County Land Management Board first and in accordance with the Community Land Act (2016).

PLAINTIFF'S SUBMISSIONS

The Counsel for the Plaintiff submitted that where a party failed to testify to prove his or her claim in his pleadings, the allegations in their pleadings remain mere allegations and this cannot be relied as evidence. The Plaintiff further submitted that by failing to attend court and offer any evidence, the Defendants defence remain mere allegations which is unsubstantiated and leaves the Plaintiffs case unchallenged. The Plaintiff cited the following cases in support of her claim;

1. *D.T & Company (K) Ltd –Vs- Wanyonyi Wafula Chebukati (2014) eKLR*
2. *Mortex Knitwear Limited –Vs- Bropitex Knitwear Mills Ltd (2009) eKLR.*
3. *Trust Bank Ltd –Vs- Paramount Universal Bank Ltd & 2 Others (2009) eKLR.*
4. *Caroline Awinja Ochieng & Another –Vs- Jane Anne Mbithe Gilan & 2 Others (2015) eKLR.*
5. *Duncan Nderitu Ndegwa – Vs_ KP & LC Ltd & Another (2013) eKLR.*
6. *Titus Gatitu Njau –Vs- Municipal Council of Eldoret (2015) eKLR.*

ANALYSIS AND DECISION

I have considered the evidence given by the Plaintiff and her witness together with the documents produced in support thereof. I have equally considered the submissions by the Learned Counsel and the applicable law. The subject matter of this suit is a parcel of land described as Farm Number 23 situate at Malka Punda within Mandera County. From the pleadings and the evidence tendered, the following in my view are the issues that arise for determination in this suit:

1. **Whether the Plaintiff is registered as the proprietor of the suit property.**
2. **Whether the allocation and/or alienation of the suit property to the Plaintiff was regular and/or lawful?**
3. **Whether the Defendant has any legitimate interest over the suit property capable of being protected in law?**

4. Whether the Plaintiff is entitled to the reliefs sought against the Defendant.

5. Who will bear the costs of this suit?

The Plaintiff has produced a letter dated 4th June 1999 from the Divisional Agricultural Office, Central Division Mandera addressed to the Clerk, County Council of Mandera. The subject of that letter is Farm Ownership of the suit property in favour of the Plaintiff's father (deceased) Ahmed Hillow Osman. The second document is another letter from the Town Council of Mandera to whom it may concern. The letter confirms that the suit property is owned by Ahmed Hillow Osman (deceased). The other documents produced by the Plaintiff are miscellaneous income receipts issued to Ahmed Hillow Osman (deceased).

It is imperative to note that before the enactment of the Constitution of Kenya 2010, the legal regime classified land as Government Land, Trust Land and Private Land. Government Land was regulated under the Government Land Act Cap. 280 Laws of Kenya (now repealed) while the Trust Land was regulated under the Trust Land Act Cap. 288, Laws of Kenya. Under the Government Land Act aforesaid, the President had power or authority to make disposition or grants in respect of any interest or estates in unalienated Government Land (see Section 3 (a) of the Government Lands Act) (repealed). The power of the President to alienate Government Land as delegated to the Commissioner of Lands in specific cases. Such alienation of Government Land by the President through the Commissioner of Lands was subject to specific provisions set out thereunder; with regard to Trust Land, Section 115 (1) of the repealed Constitution of Kenya vested all trust land in County Councils in whose jurisdiction such land was situate.

Section 117 of the repealed Constitution of Kenya empowered the County Councils to set apart an area of trust land within their jurisdiction for use and occupation by any person for a purpose which in the opinion of the County Council is likely to benefit the residents of the area. Section 13 of the Trust Land Act Cap. 288 Laws of Kenya provides for the setting a part of Trust Land by County Councils for private use pursuant to the provisions of Section 117 of the repealed Constitution of Kenya aforesaid. Section 53 of the Trust Land Act gave the Commissioner of Lands power to administer Trust Land as an agent of the County Councils and to execute on behalf of the County Councils grants, leases, licences and other documents relating to trust land. Section 13 (2) thereof provides that the setting apart of land by a County Council must be approved by a resolution passed by a majority of the Members of the Council. Although the Commissioner of Lands had power to administer Trust Land on behalf of the County Councils, he was prohibited under Section 53 (a) from approving the setting apart of trust land on behalf of the County Councils. In discharging his mandate under the Act, the Commissioner was enjoined to act in accordance with the directions of the County Councils. From the evidence by the Plaintiff in support of her claim, there is no evidence that the County Council of Marsabit approved the setting a part of the suit property in favour of the Plaintiff. There is also no letter of allotment issued to the Plaintiff by the President or the Commissioner of Lands in accordance with the legal regime as it then existed. It is not even clear to me whether the suit property was Government Land or Trust Land. The two letters produced by the Plaintiff from the Town Council of Mandera and the Divisional Agricultural Office merely confirm that the suit property belongs to the Plaintiff but do not state how the land was alienated to him and by who. The letter from the Town Council of Mandera dated 8/2/2000 was written and signed by one D.H Hassan on behalf of Town Clerk. The authors of the two letters were not called as witnesses to shed light on how the suit property was alienated.

In my view, the Plaintiff has not proved her case on a balance of probabilities. In the upshot, the Plaintiff's suit fails and the same is hereby dismissed for lack of evidence. I make no order as to costs.

Read and delivered in the Open Court this 4th day of February, 2019.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

- 1. Plaintiff/Advocate – Absent
- 2. Defendant/Advocate – Absent
- 3. Court Clerk: Amina - Present