



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 425 OF 2017

SAMUEL OTIENO ARIWI.....PLAINTIFF

VERSUS

REMI USHINDI DZOMBO.....DEFENDANT

JUDGMENT

1. The Plaintiff, Samuel Otieno Ariwi instituted this suit by a plaint dated 22nd November 2017. The Plaintiff is seeking for judgment against the defendant for:

- a. A declaration that the Plaintiff is the lawful and absolute owner of the parcel of land known as subdivision Number 190551/1/MN CR.56598 situate at Utange area within Mombasa County;
- b. An order of eviction of the defendant and/or his servants, workmen, agents, heirs, personal representatives or otherwise from the said parcel of land known as subdivision Number 19055/1/MN CR. 56598 situate at Utange area within Mombasa County;
- c. A mandatory injunction compelling the defendant to remove the structure erected on the Plaintiff's parcel of land known as subdivision Number 19055/1/MN CR.56598 situate at Utange area within Mombasa County, failure to which the Plaintiff shall be at liberty to demolish the structure with the assistance from Bamburi Police Station;
- d. An order of permanent injunction do issue to restrain the Defendant by himself and/or his servants, workmen, agents, heirs, personal representatives or otherwise howsoever from dealing with, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon or trespassing into or from in any way whatsoever and howsoever interfering with the Plaintiff's peaceful possession and enjoyment of the parcel of land known as subdivision Number 19055/1/MN CR. 56598 situate at Utange area within Mombasa County;
- e. Costs of the suit and mesne profits.
- f. Any other relief the court deems fit to grant.

2. The Plaintiff's case is that he is registered as the absolute owner of the suit plot which was legally and procedurally purchased and the Plaintiff was issued with title documents. The Plaintiff states that the defendant herein and/or his servants, workmen, agents, or heirs have unlawfully and without any consent and/or permission from the Plaintiff and without any legal justification and/or any reasonable cause entered and trespassed and encroached into the Plaintiff's said parcel of land and illegally taken possession of a portion thereof and build a residential bungalow comprising two (2) housing units and has rented them out to two (2) tenants thereby trespassing and they continue to trespass and encroach thereon thereby disrupting the Plaintiff's exclusive and quiet enjoyment of his property. The Plaintiff avers that in spite of an oral and written notice to vacate, the defendant has deliberately encroached and continued to be in occupation, possession and trespass on the suit property thereby depriving the Plaintiff of the profits and or occupation therein.

3. The Plaintiff further states that unless the defendant is restrained and evicted from the suit land, the defendant is adamant and will continue with such trespass, occupation, possession, erection of structures, encroaching and generally interfering with the said property including the legal boundaries to the detriment of the Plaintiff who is the legal and rightful owner thereof. The Plaintiff avers that he stands to suffer irreparably through a breach of constitutional right to private property if the orders sought herein are not granted. It is the Plaintiff's contention that the defendant's continued illegal occupation and enjoyment of the said property amounts to a criminal act and an infringement of the Plaintiff's constitutional right to property and the sanctity of the title.

4. The defendant was served with summons to enter appearance but failed to do so. Upon request by the Plaintiff, interlocutory judgment was

entered against the defendant on 7th May 2018. The suit proceeded for formal proof on 19th December, 2018 when the Plaintiff testified and did not call any witness.

5. The Plaintiff relied on his witness statement dated 22nd November, 2017 which basically reiterated the facts as contained in the plaint. The Plaintiff produced the documents listed in the Plaintiffs list of documents dated 22nd November 2017 as P.exhibits 1 to 8 respectively. These documents are copy of transfer dated 21st May, 2012, copy of postal search dated 20th November, 2015, copy of rates payment receipt, copy of Certificate of Title Number CR. 56598, photographs, copy of postal search dated 30th October, 2017, copy of OB from Bamburi Police Station and a copy of a demand letter dated 3rd November, 2017.

6. In his evidence, the Plaintiff stated that he purchased the suit property when it was an empty plot. That after obtaining title, he later discovered that someone had encroached on it and put up structures as shown in the photographs marked P.exhibit 5. The Plaintiff further stated that he never consented to the encroachment. He urged the court to grant him the reliefs sought herein.

7. The court has carefully considered the evidence on record. The issue that calls for determination is whether the Plaintiff has established that he is the owner of the suit land and whether the defendant has trespassed on it and also whether the Plaintiff is entitled to the prayers sought.

8. The Plaintiff has tendered documentary evidence that show that the suit property was transferred to him on 30th May 2012. The transfer dated 21st May 2012 was produced and marked as P.exhibit 1. He also produced the certificate of title in his name dated 30th May 2012 (P.exhibit 4). The copies of postal search which were produced as P.exhibits 2 and 6 respectively confirm that the registered owner of the suit property is Samuel Otieno Ariwi, the Plaintiff herein. From the material placed before me, there is no dispute that the Plaintiff is the registered owner of the suit property.

9. Section 24 (a) of the Land Registration Act provides that:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the said Act provides as follows:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ”

10. There was no evidence challenging the Plaintiff's title to the suit land. As the absolute and indefeasible owner of the suit property, the Plaintiff is entitled to enjoy the rights and privileges associated with ownership which includes exclusive use and possession thereof without interference from any other person except with his consent.

11. The Plaintiff has accused the defendant of trespassing encroaching or entering the suit land without his consent and carrying out construction thereon. The Plaintiff produced photographic evidence showing the structures that have been put up by the defendant. The defendant did not defend the suit and therefore the Plaintiff's evidence on this action has not been controverted. In the circumstances, I am satisfied that the Plaintiff has proved that the defendant entered the suit property without the Plaintiff's consent, took possession of it and undertook the acts complained of. I therefore find on a balance of probabilities that the defendant did enter into the Plaintiff's land without his permissions and his action amounted to trespass.

12. I am satisfied that the Plaintiff has proved his case against the defendant on a balance of probabilities. In conclusion therefore, I enter judgment for the Plaintiff against the defendant as follows:

a. A declaration that the Plaintiff is the lawful and absolute owner of the parcel of land known as subdivision Number 19055/1/MN CR.56598 situate at Utange area within Mombasa County.

b. A mandatory injunction compelling the defendant, his servants, workmen, agents, heirs, personal representatives or otherwise to vacate from and remove the structures erected on the Plaintiff's parcel of land known as subdivision Number 19055/1/MN CR. 56598 situate at Utange area within Mombasa County within sixty (60) days failure to which they be forcefully evicted and the Plaintiff shall be at liberty to demolish the said structure with the assistance from Bamburi Police Station.

c. An order of permanent injunction restraining the defendant by himself, his servants, workmen, agents, heirs, personal representatives or otherwise howsoever from dealing with, entering, accessing, remaining on, getting ingress into, erecting any structures or trespassing into or in any way whatsoever and howsoever interfering with Plaintiff's peaceful possession and enjoyment of the parcel of land known as subdivision Number 19055/1/MN CR 56598 situate at Utange within Mombasa County.

d. Costs of the suit.

e. Interest on (d) above.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of March 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

No appearance for Plaintiff

No appearance for defendant

Esther Court Assistant

C.K. YANO

JUDGE