



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 88 OF 2015

ESHA HILALI JABU (As administrator of the estate of

HILALI JABU SALMIN).....**PLAINTIFF**

VERSUS

NGUMBAO KARISA KONDE.....**1ST DEFENDANT**

KATANA KARISA KONDE.....**2ND DEFENDANT**

KENGA KARISA KONDE.....**3RD DEFENDANT**

JUDGMENT

BACKGROUND

1. By a Complaint dated and filed herein on 8th June 2015, Esha Hilali Jabu suing as the Administrator of the Estate of Hilali Jabu Salmin prays for Judgment to be entered against the three Defendants as follows:-

a) A permanent injunction do issue restraining the Defendants,(their) servant, employees and/or agents or any other party from encroaching, trespassing, constructing, clearing, fencing and/or interfering with the peaceful enjoyment of all that property known as M7TD Folio No. 458/8 Volume No. L.T. XX;

b) Eviction orders to issue against the Defendants from all that property known as M17D Folio No. 458/8 Volume No. L.T.XX;

c) Costs and incidentals to this suit and interest thereof at Court Rates.

2. Those prayers are based on the Plaintiff's position that at all times material, the said Hilali Jabu Salmin(now deceased) one Ali Jabu Salmin and Athman Ali were the joint owners of the said property having acquired the same by virtue of an agreement they entered into on 6th October 1980. However, sometime in 2010, the Defendants encroached thereupon and commenced construction.

3. Despite demand made and notice of intention to sue, the Defendants have ignored, refused and/or neglected to cease their illegal encroachment and construction on the said property thereby necessitating this suit and the prayers sought herein.

4. In their joint Statement of Defence filed herein on 20th October 2015, the three Defendants deny that they have encroached upon the suit property. Instead, it is their case that they occupy a neighbouring unsurveyed parcel of land in which they have lived since the 1960s.

5. The Defendants admit that sometime in 2011, they entered into a Memorandum of Understanding with the Plaintiff to vacate the land after two years. It is however their case that they executed the same under duress after they were arrested and taken to Malindi Police Station where they were threatened with deprivation of their freedom. They urge this Court to dismiss the Plaintiff's suit.

The Plaintiff's Case

6. During the trial herein, the Plaintiff called two witnesses.

7. PW1- Esha Hilali Jabu testified that she is the Administrator of the Estate of her father the late Hilali Jabu Salmin having obtained Letters of Administration ad Litem on 25th May 2015.

8. PW1 told the Court that the suit property was jointly acquired by his late father and her uncles Ali Jabu Salmin and Athmani Ali both of whom are also deceased, on 6th October 1980. Sometime in October 2010, PW1 and family learnt of the Defendants illegal encroachment upon their land. They reported the developments being carried thereon to the Municipal Council of Malindi which proceeded by an Enforcement Notice dated 13th October 2010 to instruct the Defendants to cease any further construction on the property.

9. PW1 further testified that the Defendants refused to take heed of the notice and continued with their illegal developments on the land. On 5th July 2011, PW1's family members and the Defendants entered into a Memorandum of Understanding in which the Defendants were allowed to continue staying on the property for two years after which they would leave and demolish the structures they had built.

10. PW1 told the Court that they took over after the two years but the Defendants again invaded the property and continued with their construction of unauthorized structures thereon.

11. PW2-Luke Omondi Achando is a surveyor based at the District Survey Office. He told the Court that he was commissioned on 28th October 2016 to prepare a Survey Report pursuant to an order of the Court. He carried out a survey on Portion No. 4175 Malindi and filed his Report on 2nd November 2016.

The Defence Case

12. The defence called one witness in support of their case.

13. DW1-Ngumbao Karisa Konde(1st Defendant) told the Court that the 2nd and 3rd Defendants are his brothers. It was his case that he was born on the suit property in 1970 while one of his brothers was born in 1959.

14. DW1 further told the Court that the Plaintiffs were their neighbours. Sometime in 1992, DW1 decided to build his house and the late Mzee Hilali offered him a tree behind the house to use as building material. He told the Court that the Mzee Hilali's brother one Athman Ali was also alive when he built his house and the said Athman never complained.

15. DW1 testified that the Plaintiff has other brothers and DW1 has never been in any dispute with them over the suitland. He further testified that he resides on Plot No. M17D and the land which is about 200 acres has not undergone any sub-division.

16. DW1 testified that they signed the Memorandum of Understanding with the Plaintiff under duress after one of them was arrested following a complaint by the Plaintiff.

Analysis and Determination

17. I have considered the pleadings and the testimonies of the witnesses who testified before me. I have equally considered the evidence placed before me as well as the submissions filed by the Learned Advocates for the parties.

18. The Plaintiff prays for eviction orders against the Defendants as well as an order of injunction to restrain them from trespassing, encroaching upon, constructing and/or in any way whatsoever interfering with the suit property.

19. The Plaintiff who brings the suit as the Administrator of the Estate of her father Hilali Jabu Salmin asserted that at all times material to this suit her deceased father as well as her uncles Ali Jabu Salmin and Athman Ali were the registered proprietors of the suit property the three brothers having acquired the same by an agreement dated 6th October 1980.

20. According to the Plaintiff, her father and uncles enjoyed vacant possession of the suit property until sometime in the year 2010 when the Defendants herein encroached upon the same and commenced the construction of all manner of structures thereon. Her family's efforts to get out the Defendants from the land came to naught hence the institution of this suit.

21. On their part, the Defendants deny that they have encroached upon and/or trespassed into the Plaintiff's parcel of land as alleged or at all. It is their case that they occupy an unsurveyed piece of land neighbouring the Plaintiff's which land they have occupied since the early 1960s.

22. At the trial herein, the Plaintiff testified that she filed the case pursuant to a Limited Grant ad litem issued to her on 25th May 2015(Pexh 1). She told the Court that she knew the Defendants and that sometime in 2010 when they wanted to fence their plot of land the Defendants stopped them. They then reported the matter to the Police after which the Defendants signed an Agreement dated 5th July 2011(Pexh 3) in which they committed themselves to vacate the suitland upon expiry of two years.

23. It was however the Defendant's case that their parents have been in the suitland since the early 1960s. Indeed, according to the 1st Defendant, he was born in 1970 on the suitland and he had always known the place to be home. In 1992 when he decided to build his house, the 1st Defendant told the Court that it was Plaintiff's father who offered him some wood to use in the construction of the house.

24. The 1st Defendant told the Court that the Plaintiff's father and her uncles were indeed alive when he built his house on the land in 1992

and no one raised any objection and/or claimed that he had encroached on their parcel of land. According to him, Plot No. M17D in which he resides measures about 200 acres and the same is yet to undergo any sub-division.

25. While agreeing that they executed an agreement to vacate the land as asserted by the Plaintiff, the 1st Defendant told the Court that they were coerced into signing the Agreement after the Plaintiff took them to the Police Station and they were threatened with deprivation of their liberty.

26. From the material placed before me, it is apparent that both the Plaintiff's family and the Defendants have been neighbours for a considerable period of time. According to the Plaintiff she was 11 years old in 1980 when her father and uncles bought the suit property. Contrary to her assertion that the Defendants invaded the land in 2010, she admitted during cross-examination that at the time her father bought the land, the Defendants were residing, or as she termed it, were squatters on the same parcel of land.

27. That being the case it cannot be entirely true as she asserts in her pleadings that they always had vacant possession of the land after the purchase until the year 2010 when the Defendants allegedly invaded it. According to the 1st Defendant, he built his house in contention on the land in 1992. From the Limited Grant ad Litem (Pexh 1) issued to the Plaintiff, her father Hilali Jabu Salmin passed away on 10th June 1997 meaning he was still alive when the 1st Defendant built the house in contention.

28. It would appear to me that the confusion herein arose due to the fact that when the Plaintiff's father bought the land in question in 1980 as aforesaid, the whole area was unsurveyed. This is clearly discernible from the preamble to the Agreement between one Ebrahim Gulamssein Taihji on the one hand and the Plaintiff's father dated 6th October 1980 (Pexh 2) which clearly states that the piece of land that was being sold had not been surveyed and the exact area thereof was yet to be ascertained.

29. From the evidence of Luke Omondi (PW2) the District Surveyor, it would appear that no such survey was carried out until a number of years later. According to PW2, Portion No. 4175 in which the suit property is located was surveyed in July 1986 and approved in March 1988. The Deed Plan therefor was however not issued until 16th July 1990.

30. As a result of this state of affairs, when PW2 carried out a survey on the disputed property on 16th September 2016, it was his finding that part of the 1st Defendant's house fell on the boundary line between Portion No. 4175 (belonging to the Plaintiff) and a Portion now described as M15. It was also PW2's finding that part of the Plaintiff's house correctly lies on Portion No. 4175 but a part thereof is built on a road reserve.

31. Be that as it may, the Plaintiff's claim was one based on trespass. According to her, the Defendants had encroached and trespassed into their property in 2010. From the facts of this case and the material placed before me, that claim is not true. The parties have been neighbours occupying adjacent parcels of land even before the Plaintiffs father bought his portion of the land.

32. As it were, it was only the 1st Defendant's house which the survey found to have crossed the boundary of the land owned jointly by the Plaintiff's father and her uncles. That house was built during the lifetime of the father of the Plaintiff and her uncles and none had raised an objection.

33. Indeed from the circumstances surrounding the purchase and the subsequent survey, it is not clear if those boundaries had been clearly determined and communicated when the Defendants constructed their houses on the land.

34. In the end, I was not persuaded that the Defendants had trespassed upon the Plaintiff's land as alleged. If there was any trespass, the same must have occurred in 1992, some 23 years before this suit was filed. Such a claim would clearly be out of time by dint of Section 7 of the Limitation of Actions Act and could not be filed without the leave of this Court.

35. Accordingly, I find no merit in the suit before me. The same is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE