



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 78 OF 2016

JOSEPH PETER MBUGUA.....PLAINTIFF

VERSUS

JOSHUA WAMBUA MUSYOKI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By his Complaint dated 4th April 2016 as amended on 13th June 2017, Joseph Peter Mbugua (hereafter the Plaintiff) prays for:-

i. A declaration that the Plaintiff is the absolute registered owner of all that parcel of land known as CR No. 63758 situated North of Mtwapa Creek in the Kilifi District containing by measurement 0.0168 Ha or thereabout and being Plot No. 6151(Original No. 5535/282) Section III Mainland North –Kilifi.

ii. A mandatory injunction to compel the Defendant, his relatives, agents, servants and/or any other person under instructions(of) the Defendant to give vacant possession of (the suit) property and to demolish the structures constructed thereon and to remove all the materials and/or in the alternative the structures be demolished and removed at their costs.

iii. An order of permanent injunction restraining the persons mentioned in (i) above from trespassing and encroaching upon and/or interfering in any way with the suit property.

iv. Upon issuance of Prayer (i), (ii) and (iii) the Honourable Court be pleased to issue an eviction order against the Defendant.

v. Eviction of the Defendant from the suit property be done with the assistance of the OCS Mtwapa Police Station.

vi. General damages for loss of use of the suit property from 2015 to date and interest at prevailing Court rates.

vii. Mesne profits arising out of the illegal occupation of the suit property from the year 2015 to the time the Defendant, his relatives, agents or tenants vacate the land.

viii. Costs of this suit and interest at Court rates.

2. The Plaintiff's suit is anchored on his contention that at all times material, he was the registered proprietor of all that parcel of land known as CR No. 63758 situated North of Mtwapa Creek in Kilifi District containing by measurement 0.0168 Ha being Section No. 6151(Original No. 5535/282) Section III Mainland North (the suit property).

3. It is the Plaintiff's case that he has always been desirous of developing the suit property. Sometimes in 2015, the Defendant by himself, his agents, servants and/or employees illegally and without any colour of right or reason trespassed and encroached upon the suit property and started putting up structures thereon. Despite demand made and notice of intention to sue, the Defendant continues to occupy the suit property to-date as a result whereof the Plaintiff has suffered massive damage and loss.

4. In a Statement of Defence dated 20th May 2016 and filed herein on 25th May 2016, Joshua Wambua Musyoki(the Defendant) denies encroaching and/or trespassing on the Plaintiff's parcel of land as alleged or at all and asserts:-

i. That the Plaintiff does not know where his (parcel of) land is situated on the ground.

ii. That the defendant is the bonafide owner of Plot No. 6152 vide a transfer dated 7th September 2011.

iii. That the beacons certificate issues to the defendant dated 03/05/2010 is full proof of ownership by the Defendant.

5. It is further the Defendant's case that he owns Plot No. 6152 and has nothing to do with the Plaintiff's parcel of land No. 6151. The Plaintiff asserts that the two Plots are separated by a road and are not one and the same parcel of land.

The Plaintiff's Case

6. On the date fixed for hearing herein, Defendant was not present in Court. Being satisfied that the Defendants had been duly served with a hearing notice, this Court allowed the Plaintiff's case to proceed ex-parte.

7. Testifying as PW1, the Plaintiff told this Court that he is the registered proprietor of the suit property. He intended to develop the same but he has always been hindered by the Defendant who trespassed upon the same and constructed semi-permanent structures thereon.

8. The Plaintiff further told the Court that since the year 2015, he has on numerous occasions requested the Defendant to vacate the suit property but he has refused and/or neglected to do so. He further testified that the invasion of his parcel of land has caused him massive damages and loss and hence the claim for general damages and mesne profits.

9. In support of his case, the Plaintiff produced a number of documents including the title deed for the said parcel of land the transfer form and a Beacon Certificate.

10. I have considered the pleadings filed, the testimony of the Plaintiff's sole witness and the evidence placed before the Court.

11. It was the Plaintiff's case that he is the registered owner of the suit property and that his desire to develop the same has been thwarted by the Defendant who has trespassed upon the land since the year 2015 and put up structures thereon.

12. Even though he did not testify herein, the Defendant denies in his Written Statement of Defence that he has encroached upon and/or trespassed upon the Plaintiff's parcel of land. He asserts that he is the owner of a different parcel of land being Plot No. 6152 which parcel of land he states is separate and distinct from the suit property herein.

13. From the material placed before me, it is evident that the disputed property is a sub-division of LR No. MN/III/515(Mtwapa Creek). The original parcel of land belonged to one Philemon Mwaisaka who it would appear, at some point in time decided to donate the same to the squatters who had moved into the land.

14. It is also apparent that upon the land being donated to them, the said squatters formed a Committee for purposes of distribution of the land. The evidence placed before me indicates that the Original Plot No. MN/III/6151 was registered in the name of Jane Wainaina some time back in 2012.

15. In a Replying Affidavit sworn by the Defendant on 20th May 2016 and filed herein on 25th May 2016 in response to an application for injunction by the Plaintiff, the Defendant has annexed a copy of a Charge Sheet before the SRM's Court at Shanzu indicating that he was charged with the offence of Forcible Entry into the same property in Criminal Case No. 887 of 2012. The complainant in the said case is shown as the said Jane Njeri Wainaina.

16. At the trial herein, the Plaintiff told the Court that the said Jane Wainaina was his wife and that she was the one shown the beacons given that he himself was unable to access the land due to hostility from those on the ground.

17. It would appear to me that there is quite some confusion as to the proper ownership and measurements of the plots in dispute. In the absence of a Survey Report showing the boundaries and measurements of Plot Nos. 6151 and 6152, I am unable to conclusively determine that the Defendant has encroached upon the Plaintiff's land and if so by what margin.

18. It would have also been important to hear from those who originally donated the land and the Land Registrar's Office on the correct beneficiaries and the ownership of the parcels of land so far registered. Otherwise I was not persuaded that the Defendant was a recent trespasser to the Plaintiff's land.

19. In the circumstances of this case, I was not persuaded that the Plaintiff had established the case to the required standard. The suit is accordingly struck out with no order as to costs.

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

J.O. OLOLA

JUDGE