



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 210 OF 2008

BOAZ REUBEN KISAGI SHUMA.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD & 71 OTHERS....DEFENDANTS

JUDGEMENT

1. The two plaintiffs filed this suit against the 26 defendants on 14th August 2008 and later amended their plaint on 7th May 2013 seeking for judgment as follows;

(a) An injunction to issue against the defendants restraining them from building, sub-dividing, selling or interfering with any portion of Plot No. 216 Section V Main Land North Changamwe.

(b) An eviction order to issue against the defendants from Plot No. 216 Section V Mainland North Changamwe.

(c) That the 1st defendant be compelled to compensate the plaintiffs for the area of land occupied by the electric line on the suit property or remove the entire electric line from the suit property and the 2nd to 72nd defendants be compelled to purchase their respective plots on the suit property at the current market price so that they be issued with their title deeds.

(d) Costs of the suit.

2. They pleaded that they are the administrators of the estate of Laban Tole Shuma. That sometimes in December 1998, the 1st defendant made agreement without authority with the 26th defendant for erecting electric lines through plot no 216 Section V thus damaging the plots economic use. The plaintiffs also pleaded that the 2nd to 72nd defendants have put up houses and other structures on the suit plot without their consent or authority. That the 2nd to 72nd defendants gained access to the plot through illegal acquisition from the 1st defendant.

3. The plaintiffs pleaded further that the 2nd to 72nd defendants have declined to take the offer of buying the sub plots at a market price of Kshs350,000/= to enable them be issued with title deeds. That these defendants have also refused to pay ground rent and should therefore be ordered to vacate the plots.

4. The 1st defendant field a defence through the firm of Kiarie Kariuki & Co. advocates on 9th September 2008 denying the plaintiffs claim. The defence was later amended on 27th May 2013. The 1st defendant pleaded that the suit is fatally defective and discloses no reasonable cause of action against it. The 1st defendant urged the court to dismiss the suit with costs.

5. The 2nd to 25th and 27th to 72nd defendants filed an amended defence on 12th June 2013. The 27th to 72nd defendants applied to and were joined in the suit pursuant to a notice of motion application dated 19th March 2013. The 2nd to 72nd defendants denied the plaintiffs claim and put him to strict proof. They pleaded that they acquired their respective parcels lawfully from the 26th defendant who represented to them that he was rightfully entitled to the suit parcel as his share of family inheritance from his deceased father Laban Tole Shuma, deceased. These defendants further pleaded that they had been paying ground rent and only stopped when they realised that the plaintiffs were not remitting the monies to the Mombasa Municipal Council.

6. That through their self-help group they have managed to raise funds and paid all the land rates. That they are each individually entitled to be issued with title deeds without paying any additional purchase price. That the reliefs sought by the plaintiffs are unavailable to them and prayed that the suit be dismissed with costs.

7. The Parties filed list of agreed issues. Thereafter the matter was set down for hearing with Boaz Reuben Shuma testifying as PW1 on 15th September 2015. He lives in Nairobi and is a brother to Andrew Mlamba and Thomas Shuma (26th defendant). He produced limited letters of grant issued to them on 18th November 1993 as P ex 1. He also produced a copy of the certificate of title of the suit plot as P ex 2. That he became aware that the defendants were on their land about 8 years ago with permission of the 26th defendant. That the 26th defendant sold the land without appropriate prices and also without authority.
8. PW1 continued that the 2nd to 7th defendants paid land rent for a short while but later stopped. He produced a demand letter written by their agent to the defendants as P ex 3. His brother Andrew also wrote to the 1st defendant demanding for payment of the way leaves. He produced these letters as P ex 4, 5 and 6. The witness continued that the way leave agreement (P ex 7) was made after the death of their father. He said that the 26th Defendant also gave him copies of sale agreement of the Suitland which he produced in a bundle as P ex 8. The demand letter for vacant possession produced as P ex 9. He is urging the court to order the people illegally put on the land by the 26th defendant to either pay current market value for their plots or they be removed.
9. In cross examination by Ms Layoo for 1st defendant, PW1 said that when the way leave agreement was signed, probably he was not in the country. That they cannot do any development underneath the power lines. That he could not tell whether the 1st defendant knew the 26th defendant had authority or not.
10. In cross-examination by Gichana learned counsel for the 26th defendant, PW1 could not confirm whether the 26th defendant had been issued with a demand letter. That the 26th defendant is entitled to a share of their father's estate comprised in 1/8th. That they have not rendered accounts of the estate or distributed it. That they recognize the people who purchased the land. That they can refund what the defendants paid if asked to do so.
11. In re-examination, PW1 said they complained to the 1st defendant later but they have not been compensated. That because people have put up permanent structures it may be difficult to evict them. That the ones who refuse to pay market price should be evicted.
12. Andrew Mlamba Shuma testified as PW2 on 9th May 2017. He is a retired civil servant and brother to PW1 and the 26th defendant. He said that Kenya Power directed high voltage power lines across their plot. He adopted his statement dated 14th November 2016 and filed on 17th January 2017 as part of his evidence. He also referred to the valuation report dated 1st October 2013 as MFIP10. He prayed for orders that if the people living on the land can pay, they will subdivide the land and give them titles. That as per the valuation report, plot of 40 by 80 is Kshs750,000/=. If they refuse to pay, they should be evicted.
13. Edwin Mutwiri testified as PW3. He is a registered valuer. He did a valuation on plot no MN/V/216 and prepared a report which he produced as P ex 10. In cross-examination by the 26th defendant, he stated that the entire land is valued at Kshs66,000,000/=. In cross-examination by Ms Layoo counsel for 1st defendant, PW3 said the report gave the value of the land as at the time of preparing the report. That he did not indicate the size occupied by the power line. That way leaves do not affect value of the land as the owners are usually compensated. During cross-examination by Birir for 2nd to 72nd defendants, PW3 said that the purchase price can differ with the value. That there were no comparables on the ground but he used the investment approach in ascertaining the value of the suit land.
14. Teddy Mulutsa, a surveyor gave evidence as PW4. His instructions from the plaintiff was to pick the extent of the land occupied by the 1st defendant. After plotting the area, he found that the power lines occupy approximately 5.9 acres. He produced his report dated 26th May 2017 as P ex 11.
15. Cross-examined by 1st defendant, PW4 said his instructions were limited to the existing power supply lines. That there are houses on that land but he did not include them in his report. PW4 also said he did not include the road passing under the power line. PW4 could not tell whether the existing power lines he described as high voltage could be tapped and used in households. This marked the close of the plaintiff's case.
16. Richard Otaro testified as DW1 on 5th March 2018. He is working with Kenya Power since 1989 as assistant way leaves officer. Regarding the land in dispute, the 1st defendant said he learnt the owner was deceased at the time the power line was to be constructed. He met the son who said he had authority. They got into an agreement with him (26th defendant) on 1st December 1988 which agreement is produced as D ex 1. That the 26th defendant was paid for crop damage and pylon as shown in D ex 2(a) and (b). The way leave agreement was also produced as D ex 3. That the letter dated 5th May 2006 was written and received long after negotiations and construction had been finalized.
17. That request for compensation by Genevive was after compensation had been paid to the 26th defendant. That agreement of 1st December 1988 for only one line. The two subsequent lines were done later. That the survey report (P ex 11) does not show other activities on the land like the squatter settlement. That the area covered by the red broken lines is less than 2.39 acres. That Kenya Power's interest on the land is only access. He denied they are trespassers since they obtained consent.
18. In cross-examination by Mr Gekonde learned counsel for the plaintiffs, DW1 said they did not ask the 26th defendant for letters of administration. That the agreement was prepared by Kenya Power but it does not specify the amount of land taken. That under the line, construction of buildings is not allowed but agriculture is permitted. That the line is very crucial. That compensation to the 26th defendant was done without a valuation report. That D ex 3(b) is compensation where the 1st defendant does not want obstruction. He could not estimate the area covered by the pylon.
19. In re-examination, DW1 said the structures existing under the red line were illegal. That compensation was for where the pylon would stand. That the area assistant chief was present when the 26th defendant was paid. That absence of signature of Kenya Power on the

agreement does not translate to withholding of authority. From the surveyor's report, there is an existing road. This evidence marked the close of the 1st defendant's case.

20. The 26th defendant testified as DW2. He said their father Laban Tole Shuma died in 1993 leaving behind 8 children. That their father owned several pieces of land in Taita (where we lived), Wundanyi and the suit land. That the suit land is approximately 18 acres. He said that the 1st defendant had expressed intention to pass a power line on the suit land before their father died. He later met them, gave consent for way leave and was paid compensation for the crops at Kshs15,000/=. That he was not aware letters of administration were given to Andrew and Boaz on 18th November 1993. That the two have not called a meeting to distribute the estate.

21. DW2 continued that Boaz lived in America while Andrew lived in Tanzania and he did not have their contracts to reach them for the transaction with Kenya Power. That he later met the administrators and informed them that he had sold part of the land to settle the rates that were being demanded. That he was not aware of the meeting which appointed the plaintiffs as the administrators of their father's estate.

22. In cross-examination by Mr Gekonde advocate, DW2 admitted that he did not have authority to give part of the land. That he got to know about the letters of administration when this case was filed. That the land rates are being paid by the people living on the land. That there is no problem if the people he sold the land are given titles. Paragraph 8 of his defence pleaded that he sold the land subject to distribution of the estate. That he signed the agreement with Kenya Power as a representative not as Laban Tole Shuma. That the people below the power line are invaders on the land.

23. Seth Odhiambo Francis the 12th defendant testified as DW3. He adopted his statement filed in court as his evidence. He was sold a portion of the land by the 26th defendant in the year 2005. He paid him and he has developed his portion where he lives. That most of his co-defendants have developed their plots. That they have never discussed anything with the plaintiffs. DW3 continued that the plaintiffs wrote to them demanding for rent which they paid and continue to pay. He asked that an order be made for them to be issued with their titles. That it is unfair to evict them. That the plot is developed with schools, churches and residential houses.

24. During Cross-examination by Gekonde for the plaintiff, DW3 said his plot measures 40 ft by 120ft. That he paid Kshs70,000/= and was given a receipt. That he is paying Kshs200 per month as ground rent and he had lastly paid the rent in the year 2008 because the plaintiffs had refused to continue receiving the rent. DW3 said he has not seen where it is stated that if he paid a certain amount, he would be given his title. That he does not have a title for his portion. They were paying rents to the agents of the administrators.

25. In answering counsel for the 1st defendant, DW3 stated that there are KPLC poles on the side. That there are some people living in areas under the cables. That the whole parcel is occupied by different people some running hotels, schools, churches etc. that they have never agreed to pay additional sums to be given titles. That he paid money equivalent to the value of the land at the time he purchased it.

26. The 17th defendant testified as DW4. He bought his plot in 2002 from the 26th defendant. That the 26th defendant had put up a board on the land that the plot was up for sale. He went to the clan elder who confirmed the land belonged to the family of the 26th defendant. He bought his plot measuring 40 by 80 at Kshs30,000/=. That the 26th defendant also said every year they would pay Kshs200/= towards rates to the county council. He denied going to the land illegally.

27. DW4 continued that in 2008 he received a demand letter claiming that they were trespassers and an offer letter to rebuy the plot at Kshs350,000/=. That this price was too high. That they contributed money to pay county council rates in 2010 with the instruction to pay the rates coming from the plaintiffs. He said that he lives on his plot. He asked the court to give them land which they paid for.

28. On cross-examination, DW4 said the people living on the land received demand letters. That at the time he was sold the land, he knew the 26th defendant had capacity to sell it. That he had been paying ground rent until and up to 2008. That there was no problem in the owners asking them to pay rates to the council. That there is no problem on issuance of an order stopping them from selling until they get titles.

29. That when he bought the land, the main KPLC line was already in place. That the presence of the power line did not stop people from purchasing the sub plots. That there are a few houses under the power line. DW4 said there are several businesses on the land. In re-examination, DW4 said it's their houses which has improved the value of the land thus the plaintiffs are not entitled in demanding the market rate of Kshs750,000/= per plot. The 2nd – 71st defendants case was also marked as closed with these evidence.

30. The 2nd – 71st defendants filed 1 ½ page submissions on 22nd February 2019. In brief they have submitted that given the plaintiffs had not confirmed the grant of letters of administration, the 26th defendant as a beneficiary was perfectly in order to sell part of his father's estate. That these defendants legally acquired their plots and should not be drawn into sibling dispute between the 26th defendant and the plaintiffs.

31. The 1st defendant filed her submissions on 12th February 2019. They began by giving a summary of the evidence presented. The 1st defendant denied the acts of trespass submitting that they did all they could in tracing the siblings of Laban Tole. That the 26th defendant gave consent and was paid compensation. That it was never brought to the attention of the 1st defendant that the plaintiffs had letters of administration. The 1st defendant cited the case of **Phylis N. Mbaluto –versus- Kenya Power & Lighting Co. Ltd (2012) eKLR** where it was held that the person who was in actual possession of the land having executed the way leave was treated as sufficient consent.

32. The plaintiffs submissions was filed on 21st January 2019. The plaintiffs submissions also contained a summary of the evidence adduced. The plaintiffs submit that the agreement between the 1st defendant and the 26th defendant does not hold any water as it was done without the consent of the administrators of the registered owner. The plaintiffs submitted further that the 12th and 17th Defendants admitted they are on the ground by confirming that they paid ground rents upto 2014. That they were holding the parcels of the land as tenants thus failure to pay rents allows the plaintiff to evict them. The plaintiffs submitted that these defendants did not even produce sale agreements

they had with the 26th defendant.

33. The plaintiffs maintained that they have proved their case and urged the court to grant the orders sought. They cited several court decision inter alia;

(a) HCC 219 of 2010, Mombasa, Msallam Said Abdalla –versus- Suleiman Lazari Nangela & Another;

(b) Civil Appeal No. 568 of 2000, Nairobi, Wamwea –versus- Catholic Diocese of Murang’a Registered Trustees;

(c) KLR 2006, Civil Appeal No. 194 of 2004, Nairobi, East African development Bank –versus- Hyundai Motors Kenya Ltd.

34. Both parties had filed issues for determination most of which have been resolved by the evidence. For instance it is not in dispute that the plaintiffs are holding letters of administration of the estate of their father Laban Tole Shuma – deceased. It also not in dispute that the suit parcel is registered in the name of Laban Tole – deceased. Further it is not in dispute that all the defendants got onto the land with the permission given by the 26th defendant.

35. The only issue that is for the court’s determination is whether the 26th defendant had capacity to put these defendants in possession of the land MN/V/216. And if the answer is no, what is the status of their possession over the land. The plaintiffs presented limited letters of grant issued to them on 18th November 1998. The letters show that 26th defendant is not one of the administrators. Essentially under Section 45 of the Law of Succession Act, the 26th defendant had no authority to execute any documents in respect of the estate of his father and doing so amounted to intermeddling of the deceased estate.

36. The 26th defendant does not deny signing the way leave agreement for the 1st defendant and receiving compensation of Kshs15,000/= for what was called crop damage. The 26th defendant does also not deny selling sub plots of the suit property to the 2nd to 71st defendants. The 1st and 2nd plaintiffs in their respective evidence stated that they lived and worked in America and Tanzania respectively. It is not clear when they returned to live in Kenya but the evidence suggests they did so after they retired from their employment.

37. After settling in Kenya, the plaintiffs learnt of the actions of their brother the 26th defendant. The plaintiffs produced in exhibit as a bundle the copies of the sale agreement between the 26th defendant and the 2nd to 25th defendants. From the copies of the sale agreements presented, most of them were drawn in the year 2005 except for the 17th plaintiff who said he bought his plot in 2002. What did the plaintiffs do in regard to the transactions undertaken by the 26th defendant? The plaintiffs acquiesced to the sale because instead of demanding for vacant possession as soon as they learnt of the defendants’ presence on the land they appointed an estate agent to collect ground rents on their behalf from the said occupants of the Suitland.

38. The acquiescence is further demonstrated by the evidence of the plaintiffs when both PW1 and PW2 stated that they asked for an order that the defendants do pay the market value for their plots in order that they can be given title deeds and if they fail to pay the defendants be evicted. Secondly from the plaint, the plaintiffs are only seeking for compensation from Kenya Power and not a declaration order to void the document signed by the 26th defendant. The demand letter produced as P ex 6 also made a demand for compensation for the area occupied by 1st defendant.

39. It is my considered opinion that the plaintiffs having acquiesced to their brother’s actions, they have made/represented to the occupants to believe that they were on the and legally. On account of the representation, the plaintiffs are estopped from seeking for eviction orders as against the defendants from plot no MN/V/216.

40. In prayer 3, of the plaint, the plaintiff prayed for compensation at market value for the area occupied by the 1st defendant and that the 2nd to 72nd defendants be compelled to purchase the respective plots at the current market price. They presented a valuation report (P ex 10) to state what they considered as the market price.

41. The valuer who gave evidence as PW3 stated that the valuation he gave was for the plot as at the time he prepared the report. PW3 did not specify who did the improvements on the land such as services connected the property (mains water & electricity). PW3 said the property was also improved with a number of informal settlements but which he said he ignored in his valuation. The report did not give an estimate value of this land at the time the defendants took possession. In my view that was necessary for purposes of confirming that the purchase price or compensation paid to the 26th defendant at the time the transaction took place was an undervalue for which the plaintiffs are entitled to be paid the difference. Whether as compensation by the 1st defendant or as purchase price by the 2nd to 25th and 27th defendant to 72nd defendant.

42. The defendants in their evidence also stated that they have been collecting monies which they use to pay rates owing to the county government. The plaintiffs did not deny this averment. All these are payments that have been expended by the defendants which if any additional monies were to be paid would entitle the defendants to a set off. The valuation report made on 24th October 2013 did not take into account the value when each of the defendants got on to the land; or when the 1st demand was made by the plaintiff in 2007 or when the suit was filed in the year 2008 which dates were key in determination of the question of what is payable if at all to the plaintiffs. For this reason, I find the valuation report (P ex 10) not useful in proving the claim under prayer 3 of the amended plaint. The evidence adduced by the plaintiffs in support of this prayer falls short of the standard required in civil cases. Accordingly I dismiss the prayer for compensation and or that addition sums be made for the purchase price.

43. Since prayer 2 & 3 of the plaint have failed, prayer 1 of the plaint also automatically fails as there is no reason why an order of injunction should be issued against any of the defendants. There was no counter-claim filed by any of the defendants so I shall make no orders as regards issuance of the title deeds. In light of the circumstances of this case, it is in the interest of justice that each party meets their costs of the case. In conclusion, the plaintiffs case is dismissed with no order as to costs.

Dated, Signed and Delivered at Mombasa this 21st day of June 2019.

A. OMOLLO

JUDGE.