



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC NO. 388 OF 2016**

**JOSEPH MUTWIRI MAINGI.....PLAINTIFF**

**-VERSUS-**

**SALIM MRUCHE.....DEFENDANT**

**JUDGMENT**

**PLAINTIFF'S CASE**

1. By a Plaint dated and filed on 8<sup>th</sup> December 2016 the Plaintiff claims to be the beneficial owner of the leasehold interest of the land known as LR. NO. MN/V/1990 which he purchased vide an agreement made on 10<sup>th</sup> January 2016.
2. The Plaintiff avers that sometime around June 2016 the defendant did unlawfully and without any colour of right enter the plaintiff's plot and removed all the boundary markings including the beacons and started constructing an illegal structure thereon. That the matter was reported to the police and the Local Administration who unsuccessfully summoned the defendant. The Plaintiff avers that despite demand and service of notice of intention to sue, the defendant has failed, rejected and/or refused to demolish his structures and vacate from the Plaintiff's plot, thus necessitating the filing of this suit.
3. The Plaintiff's claim against the defendant is for orders as follows:
  - a. **A declaration that the Plaintiff is the beneficial owner of the PLOT NO. MN/I/1990 registered as CR.32265.**
  - b. **An order directing the defendant to vacate the plaintiff's plot and demolish his structure standing thereon.**
  - c. **Costs and interest.**

**DEFENDANT'S CASE**

4. The defendant was duly served with summons to enter appearance and he instructed the firm of Martin Tindi & Company Advocates who filed a Notice of Appointment on 14<sup>th</sup> March 2018. However, no defence was filed by the defendant within the stipulated time or at all. The defendant filed an application dated 4<sup>th</sup> July 2018 seeking leave to file defence out of time. The said application was however dismissed for failure to comply with the orders of court made on 10<sup>th</sup> May 2018.

**HEARING**

5. The matter came up for hearing on 19<sup>th</sup> December 2018. PW1, JOSEPH MUTWIRI MAINGI the plaintiff testified that he purchased the suit plot from one Jason Mungania Maingi. He produced the Agreement for sale dated 10<sup>th</sup> January 2013, the Transfer (p.exh 2) and the title as p.exhibit 3. He testified that he was shown the plot. PW1 testified that sometime in 2016, he found the defendant had encroached on the suit plot and removed beacons and put up some structure thereon. The matter was reported to the area provincial administration officials and the correspondences were produced as exhibits. The matter was also reported to the police. The defendant however proceeded with the construction even when the case was pending before court. The plaintiff testified that he sought the services of a private surveyor who confirmed that the said structure was constructed on the plaintiff's plot.
6. PW2 JERUSHA MAINGI is the plaintiff's wife. She reiterated the evidence of PW1, adding that the defendant in the company of goons prevented them and the surveyor to return the beacons.
7. The defendant did not testify and did not call any witness.

## SUBMISSIONS

8. The plaintiff filed his submissions on 7<sup>th</sup> January 2019. However, the defendant did not file any.

## ANALYSIS' AND DETERMINATION

9. I have considered the Plaintiff's case as pleaded and the evidence tendered in support thereof. The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. See clerk & Lindsell on Torts, 18<sup>th</sup> Edition at Page 923. The onus is on the Plaintiff to prove that he is the owner of the suit property and that the defendant has invaded and occupied the same without any justifiable cause.

10. I am satisfied on the material presented before me that the plaintiff is the registered owner of the suit property. The plaintiff tendered in evidence the title for the suit property in his name. Under Section 24 (a) of the Land Registration Act the registration of a person as the proprietor of land vests in that person the absolute ownership of the suit land together with all rights and privileges associated with that status. Section 26 (1) of the said Act provides that the Certificate of Title issued by the Registrar upon registration to a purchaser of land upon transfer 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 thereof and that the said title shall not be challenged save on ground of fraud or misrepresentation to which the holder is shown to be a party or where the title is acquired illegally, unprocedurally or through a corrupt scheme.

11. The defendant did not defend this suit. The Plaintiff's title over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of any such challenge, I am enjoined by law to take the Plaintiff on the basis of the title he holds in his name to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party. The plaintiff has asserted that the defendant entered the suit property forcefully and started utilizing the property as his property and further went ahead to build a house thereon.

12. The plaintiff's evidence has not been challenged and on the basis of the unchallenged evidence, I am satisfied that the plaintiff has proved that the defendant entered the suit property unlawfully and constructed a house thereon. The defendant having unlawfully entered the suit property without the permission of the plaintiff is a trespasser on the suit property and the plaintiff is entitled to judgment against him as prayed in the plaint. Accordingly, I do find that the plaintiff has proved his case on a balance of probabilities. In the end I will enter judgment for the plaintiff against the defendant in the following terms.

**a. A declaration that the plaintiff is the owner of PLOT NO.MN/V/1990 registered as Grant Number cr. 32265.**

**b. The defendant be and is hereby ordered to vacate and deliver vacant possession of PLOT NO. MN/V/1990 registered as Grant Number CR 32265 to the plaintiff within 30 days from the date of service of the decree herein upon him.**

**c. In default of (b) above as aforementioned the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendant, his agents and or servants form and demolition of the structure on PLOT NO. MN/V/1990.**

**d. A permanent injunction be and is hereby issued restraining the defendant whether by himself or his agents or servants or otherwise howsoever from remaining on or continuing in occupation of the suit property.**

**e. The plaintiff shall have costs of the suit.**

DATED, SIGNED and DELIVERED at MOMBASA this 22<sup>nd</sup> day of July 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Gathuku for Plaintiff

Mwandeje holding brief for Tindi for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE