



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

ELC CASE NO. 37 OF 2017

ABDI MOHAMED KAHIYA.....PLAINTIFF

VERSUS

FATUMA HAJI KASIM.....DEFENDANT

JUDGEMENT

BACKGROUND

1. The Plaintiff, Abdi Mohamed Kahiya commenced this suit vide a plaint dated 9th January, 2016 seeking *interlia* the following prayers:

- 1. An order for eviction of the defendant from the suit property known as Plot No. A1 LOW DENSITY MANDERA together with her servants and/or her agents from the suit property.**
- 2. An order of demolition of all structures illegally erected by the defendant on the suit property known as Plot No. A1 LOW DENSITY MANDERA.**
- 3. Costs of the suit together with interest at court rates.**

2. On 31st January, 2018, the plaintiff made a request for interlocutory judgement in default of appearance and defence, and the Deputy Registrar entered accordingly. When this matter came up for hearing and upon being satisfied that the defendant was properly served, the court allowed the case to proceed *Exparte*.

3. It is important to note that this suit was initially filed in the ELC Registry at Milimani Nairobi as ELC Case No. 19 of 2017 and on 25/5/2017 the case was transferred by the court *suo moto* from ELC Nairobi to ELC Garissa where it was registered under the current ELC Case No. 37 of 2017.

PLAINTIFF CASE

4. The plaintiff testified and stated that he is the proprietor and owner of plot No. A1 LOW DENSITY MANDERA within Mandera County. He testified that he has been paying rent for the said plot from 1997 to date. He produced miscellaneous receipts dated 23/1/2012, 31/12/2008 and 18/8/2016. The plaintiff also produced a further rates payment receipt for 2017 for Kshs.2,640/= and a letter from Mandera County Government dated 26/3/2019 confirming that the suit property being plot No. A1 LOW DENSITY MANDERA town is registered in the name of the plaintiff.

DEFENDANTS CASE

5. The defendant did not enter appearance or file defence to the plaintiff's claim. The case therefore proceeded *Exparte* after the court was satisfied that the defendant was properly served with a hearing notice.

ANALYSIS AND DETERMINATION

6. The plaintiff from the plaint is seeking an order of eviction against the defendant. He is also seeking a second order for demolition of structures illegally erected by the defendant sometime in the year 2015 when without any justifiable cause or colour of right invaded, intruded, interfered, trespassed and took possession of the suit property and remain in possession therein.

7. The plaintiff alone testified in this case which proceeded *Exparte*. He produced copies of rent payment receipts and a letter of confirmation of ownership of the suit plot no. A1 LOW DENSITY MANDERA within Mandera town. The land in question is a Government

Land which was previously governed under the Government Land Act Cap.288 Laws of Kenya (repealed). This court takes Judicial Notice that the alienation of land under the said repealed Act was done by the Commissioner of Lands through the Ministry of Lands after an elaborate process has been undertaken by an applicant. These processes include an application addressed to the County Council under which the subject plot is situate.

8. The application then goes through an allocation committee who after sitting and carrying out their independent investigations may or may not recommend the allocation to the applicant depending on the availability of the plot. If the allocation committee recommend the allocation of a plot to an applicant, their recommendation is forwarded to the full Council Meeting where the same is either adopted or rejected. Should the full council adopt the recommendation of the allocation committee, then the minutes are forwarded to Commissioner of Lands for purposes of issuing a letter of allotment. Though a letter of allotment is not a proof of title, the process of allocation of land is nonetheless a vital process of alienation of Government Land. That was the holding in the Court of Appeal Case of **WRECK MOTORS ENTERPRISES –VS- THE COMMISSIONER OF LANDS & 3 OTHERS CA NO. 71 OF 1997 (NAIROBI)** (Unreported) where it was held as follows:

”Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions held.” (Emphasis added)

9. A similar decision was made in the case of **JOSEPH ARAP NGOK –VS- JUSTICE MOYO OLE KEIWA (NAIROBI) HCCA. APPL. NO. 60 OF 1997 (UNREPORTED)** where it was observed as follows:

“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

10. The plaintiff in his evidence has produced rent receipts for the suit property. These are payments of rent/rates pursuant to conditions ordinarily spelt out in a letter of allotment. The plaintiff has not explained who has instructed him to make such payments if not in a letter of allotment. There is also no basis for the letter produced by the plaintiff dated 26/3/2019. The same is not a certificate of search. It is not even addressed to any entity. It has not been explained how the plaintiff got such a letter which is not addressed to him. The said letter in my view is of no evidentiary value. The same is not addressed to the plaintiff or any particular individual. The basis in which the said letter was issued was not laid by the plaintiff. It is not an official letter issued in the ordinary course of duty such as a certificate of official section issued by the Ministry of Lands upon application by a party.

11. The said letter together with the receipts produced by the plaintiff which form the backbone of his claim are not legal documents recognized in law as conferring a right of ownership in a property. A letter of allotment is a transient right or invitation to treat which if accepted by an applicant can translate to a right capable of being protected by law. In the instant case, the plaintiff has not produced any such letter of allotment and his acceptance conferring him the right to the suit property. That was the holding by Kimondo J. in the case of **STEPHEN MBURU & 4 OTHERS –VS- COMAT MERCHANTS LTD & ANOTHER (2012) eKLR** where he stated:

“.....from a legal stand point a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property.”

12. In my view, payment receipts and a letter “to whom it is concerned” addressed to no particular person does not confer a right of ownership in Kenya. It is trite law that the burden of proof in civil cases lies upon the person who desires the court to believe in its existence.

13. The Court of Appeal in the case of **JENIFFER NYAMBURA KAMAU –VS- HUMPHREY MBAKA NANDI (2013) eKLR** considered the applicability of the burden of proof and held thus:

“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act makes the Evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that whoever desires any court to give judgement as to any legal right or liability department on the existence of facts which he asserts must prove that those facts exist. Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in as existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

14. The burden of proving ownership of the suit property lies squarely upon the plaintiff. I am afraid he has fallen short of that expectation.

15. In the final analysis, I find and hold that this suit must fail and the same is hereby dismissed. I make no order as to costs.

Read and delivered in the Open Court this 1st day of August, 2019.

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E. C Cheron (Mr.)

ELC JUDGE

In the presence of:

1. Court Clerk: Taib
2. Plaintiff: absent
3. Defendant: absent.