



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 250 OF 2017**

**ALI ABDALLA AZAN.....PLAINTIFF**

**VERSUS**

**ALI MOHAMED**

**OMAR ROSHI.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By a Complaint dated and filed herein on 18<sup>th</sup> December 2017, Ali Abdalla Azan (the plaintiff) prays for Judgment against the two Defendants for: -

- a) An order of permanent injunction;***
- b) Costs of the suit and interest thereon at Court rates; and***
- c) Any other relief that this Honourable Court may deem just to grant.***

2. The Plaintiff's prayers are premised on his assertion that sometime in the year 2014, he cleared some bush and settled on an unregistered parcel of land measuring 40m by 50m situated at Kipini Village within Tana River County and proceeded to develop it by building a permanent residential house thereon, cultivating the land and planting trees and other crops.

3. It is the plaintiff's case that after sometime, the 1<sup>st</sup> Defendant Ali Mohamed started claiming that the land occupied by the Plaintiff which is next to a Catholic Church in Kipini belonged to him. The 1<sup>st</sup> Defendant then started using the 2<sup>nd</sup> Defendant Omar Roshi who is the Area Assistant Chief to harass the Plaintiff and take over the land from him.

4. Accordingly, the Plaintiff urges this Court to declare that the suit property belongs to him and to issue the orders as listed in the Complaint.

5. But in his Statement of Defence and Counterclaim dated 6<sup>th</sup> July 2019 and filed herein on 9<sup>th</sup> July 2019, the 1<sup>st</sup> Defendant denies that the Plaintiff cleared the suit property and planted trees or crops thereon. He further denies that the Plaintiff has used the property openly and exclusively as stated in the Complaint.

6. The 1<sup>st</sup> Defendant avers that contrary to the Plaintiff's claims, the suit property solely belongs to him and is part of his parcel of land which measures 6 ½ acres in total situated at Kipini.

7. In his Counterclaim the 1<sup>st</sup> Defendant accuses the Plaintiff of trespass to his property and urges the Court to enter Judgment against the Plaintiff for:-

- a) An order of permanent injunction restraining the Plaintiff by himself, servants or agents from trespassing onto the suit property and from constructing, selling, leasing or dealing with the suit property in any manner.**
- b) Costs of this suit and interest thereon at Court rates.**

**c) Any other or further relief as the Court may deem just to grant.**

8. The 2<sup>nd</sup> Defendant has also filed a Statement of Defence in person dated and filed herein on 13<sup>th</sup> September 2018. He denies that he used his office as Assistant Chief Kipini Sub-Location to assist or instigate the 1<sup>st</sup> Defendant to raise a claim against the Plaintiff. It is his case that he only arbitrated over the dispute in the course of his work as the suit property falls within his area of jurisdiction.

**THE PLAINTIFF'S CASE**

9. At the trial herein the Plaintiff testified as his sole witness. He told the Court that the 1<sup>st</sup> Defendant is his father-in-law and that the 1<sup>st</sup> Defendant not only chased him away from the land but also destroyed his house.

10. The Plaintiff testified that all those who stay in the land in Kipini are squatters and the Defendants had no right to chase him away from the land. He told the Court that he had no issue with the 2<sup>nd</sup> Defendant as it is only the 1<sup>st</sup> Defendant who started claiming that he (the Plaintiff) had bribed the 2<sup>nd</sup> Defendant.

11. Under cross-examination by the 1<sup>st</sup> Defendant in person, the Plaintiff told the Court that his house was destroyed in March 2017 but when he went to report to the Police, they took no action. The Plaintiff denied that he entered the land courtesy of his marriage to the 1<sup>st</sup> Defendant's daughter.

**THE DEFENCE CASE**

12. The two Defendants also testified as sole witnesses in their respective cases.

13. The 1<sup>st</sup> Defendant maintained that the land in dispute belonged to him and that the documents to demonstrate ownership were with the Area Chief, having left them there when they went for arbitration over the dispute. He told the Court that he had owned the land from the colonial times.

14. On his part, the 2<sup>nd</sup> Defendant testified that he is the Area Chief Kipini and that both the Plaintiff and the 1<sup>st</sup> Defendant are from his area of jurisdiction. He further told the Court that he has dealt with the case before and that it was the 1<sup>st</sup> Defendant who has been on the land for more than 20 years.

15. Under cross-examination by the Plaintiff in person, the 2<sup>nd</sup> Defendant told the Court that the Plaintiff had lived on the land for about 3 years with his wife who is a daughter to the 1<sup>st</sup> Defendant.

**Analysis and Determination**

16. I have considered the Plaintiff's case and the response thereto by the two Defendants. I have equally considered the testimonies of the respective parties all of whom appeared unrepresented by counsel before me.

17. As it were both the Plaintiff and the 1<sup>st</sup> Defendant in his Counterclaim seek the grant of orders of injunction against each other in regard to the disputed property which is only described as a parcel of land measuring 40m x 50m situated within Kipini Village in Tana River County.

18. Generally, an injunction is sought in addition to other remedies. It is not usual for parties as has happened in this case to seek an injunctive relief as a stand alone remedy. The reasons for this I think lie in the basis for the Plaintiff's claim and that of the Counterclaim.

19. According to the Plaintiff, sometime in 2014, he found some bushland near Kipini Catholic Church in Kipini Village Tana River County. He then proceeded to clear a portion measuring 40m x 50m whereupon he proceeded to build his house. He then started residing on the land and cultivating parts thereof. However, in March 2017, the 1<sup>st</sup> Defendant with the help of the 2<sup>nd</sup> Defendant proceeded without any lawful reason to demolish his house and tried to chase him away from the land.

20. The 1<sup>st</sup> Defendant who happens to be the Plaintiff's father-in-law denies that they demolished the Plaintiffs' house. It is his case that the Plaintiff trespassed onto his parcel of land and tried to settle thereon.

21. As it were the basis for the Plaintiff's case is that both himself and his father-in-law are squatters on the suit property and that his father-in-law has no right to chase him away from the land. On the other hand, his father-in-law avers that the portion of land which the Plaintiff cleared is part of his 6 ½ acre parcel of land in Kipini.

22. Like the Plaintiff, the 1<sup>st</sup> Defendant also did not have any documents to demonstrate his entitlement to the land. His case was however supported by the 2<sup>nd</sup> Defendant, the Assistant Chief Kipini Sub-Location who testified that he has previously dealt with the dispute and asserted that the 1<sup>st</sup> Defendant had owned the land in dispute for more than 20 years.

23. In the circumstances before me, I was not satisfied that the Plaintiff had established his right to the piece of land in dispute and/or that there was any actual or threatened infringement of any such right by the Defendants.

24. Even though he claimed that he had no dispute with the 2<sup>nd</sup> Defendant, he sued him and dragged him to Court. From the material placed before me, it is evident that the 2<sup>nd</sup> Defendant had absolutely no interest in the property save for the fact that he performed his functions as the Area Assistant Chief.

25. Accordingly, I did not find merit in the Plaintiff's case and the same is hereby dismissed. I did not also find any basis for granting the 1<sup>st</sup> Defendant's Counter-claim in the manner in which it is framed and the same is struck out with no order as to costs.

26. The Plaintiff shall however pay the Defendants the costs of his suit.

**Dated, signed and delivered at Malindi this 20<sup>th</sup> day of September, 2019.**

**J.O. OLOLA**

**JUDGE**