



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 46 OF 2015

1. SEIF SAID BUSAIDY

2. AKRAM SAID SEIF BUSAIDY (Suing as an Administrator of the

Estate of SAID SEIF SALIM BUSAIDY).....PLAINTIFFS

VERSUS

THE BOARD, LIKONI CONSTITUENCY

DEVELOPMENT FUND.....DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit by way of a Plaint dated 16th March 2015. The Plaintiffs are seeking for judgment against the Defendant for a permanent injunction restraining the Defendant from trespassing on all that piece or parcel of land known as **TITLE NUMBER MOMBASA/MAINLAND SOUTH/BLOCK II/52**, damages for trespass and costs.

2. The Plaintiffs' case is that they are the personal representatives of the estate of their late father; one Said Seif Salim Busaidy who is the registered owner of the suit property known as land **parcel TITLE NUMBER MOMBASA/MAINLAND SOUTH BLOCK II/52**. The Plaintiffs aver that on 5th March 2015, the Defendant wrongfully entered into the suit land, took possession of the same by constructing a road through the said land without the permission or consent of the Plaintiffs. The Plaintiffs aver that by reason of the Defendant's action, they have been unable to use or enjoy the suit premises and have thereby suffered loss and damage.

3. The Defendant was duly served with summons to enter appearance but failed to do so and upon request by the Plaintiffs, interlocutory judgment was entered against the Defendant in default of appearance on 21st December, 2016. The Defendant was subsequently served with several notices but failed to attend court. The suit proceeded for formal proof on 2nd April, 2019 when the 1st Plaintiff testified and the Plaintiffs did not call any witness.

4. In his evidence, the 1st Plaintiff told the court that on 5th March 2015 he saw bulldozers on their land which proceeded to pave a road through the said land. The 1st Plaintiff produced the Grant of Probate of written will dated 20th March 2001 (P.exh. 1); Certificate of Confirmation of Grant (P.Exh. 2); photographs showing the road that was constructed through the suit land (P.exh 3.) The 1st Plaintiff also produced the Certificate of Title in Plaintiff's names (P.exh 4) as well as a demand notice (p.exh 5).

5. The Plaintiff's Counsel, M/s Lumatete Muchai & Company Advocates in their written submissions filed on 28th May, 2019 submitted that the Plaintiffs adduced evidence to prove that the Defendant had wrongly entered their land and constructed thereon a road without the Plaintiffs' permission. That the evidence of the Plaintiffs on record is not controverted by the Defendant and thus stands unchallenged and proved. They relied on case of **Linus Nganga Kioko & 3 Others -v- Town Council of Kikuyu (2012) eKLR and Ntukusoi Ole Letira - v- Ruth Ngonyo Kangethe (2019)eKLR**.

6. It was further submitted that the Plaintiff has proved that they are the legal registered proprietors and lawful owners of the suit land and that the Defendant has trespassed on it and therefore the Plaintiffs are entitled to the orders sought in the Plaint. On prayer for damages, it was submitted that the Plaintiffs have proved that the Defendant trespassed on the suit land and have constructed thereon a road, hence diminished the value of the suit land and thus the Plaintiffs are entitled to damages. They relied on the case of Ntukusoi Ole Letiria (supra) where an award of Kshs.100,000.00 as compensation was given for the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the Defendants trespass. It was therefore Counsel's submissions that the Plaintiffs have proved their case on a balance of probabilities, and judgment ought to be entered in their favour.

7. I have considered the pleadings, the evidence tendered and the submissions made. The issues for determination are:

- i. Whether the Plaintiffs are the lawfully registered proprietors of the suit property.**
- ii. Whether the Defendant trespassed into the suit property.**
- iii. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.**
- iv. Who should bear the costs of the suit.**

8. From the material placed before me, there is no dispute that the suit property is registered in the Plaintiffs names. The Plaintiffs produced the title (p.exh 4) which confirms that the property is registered in their names.

9. Section 26 (1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate and the title of that proprietor shall not be subject to challenge, except;

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ”

10. There was no evidence tendered showing that the Plaintiffs acted fraudulently or that they misrepresented any fact which led to them to obtain title. There was no evidence indicating that the suit property was acquired by the Plaintiffs illegally, unprocedurally or through a corrupt scheme.

11. Section 24 (1) of the Land Registration Act vests in the person registered as proprietor of land or lease the absolute ownership of that land or the leasehold interest, together with all rights and privileges associated with that status. As the proprietors of the suit property, the Plaintiffs are entitled to enjoy rights and privileges associated with such ownership which include exclusive use; possession and enjoyment thereof without interference by any third party save with their consent. The Plaintiffs have accused the Defendant of encroaching onto and constructing a road through the suit property. The Plaintiffs' evidence has not been challenged and remains uncontroverted. The Defendant's encroachment on the Plaintiffs' land is unlawful. I find the evidence on record sufficient to prove that the Plaintiffs have proved their claim on a balance of Probabilities. Once trespass is established, it is actionable perse, and no proof of damage is necessary for the court to award general damages.

12. The upshot is that this court is satisfied that the Plaintiffs have proved their case against the Defendant on a balance of probabilities. Accordingly, judgment entered is for the Plaintiffs against the Defendant in following terms:

a) A permanent injunction to restrain the Defendant by themselves, their servants or agents or otherwise howsoever from wrongfully and illegally trespassing and/or constructing upon and/or dealing in any manner howsoever with all that piece or parcel of land known as TITLE NUMBER MOMBASA/MAINLAND SOUTH/BLOCK II/52.

b) Kshs.100,000.00 as general damages for trespass.

c) Costs and interest.

DATED, SIGNED and DELIVERED at MOMBASA this 18th day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mathare holding brief Lumatete for plaintiffs

No appearance for defendant

Yumna Court Assistant

C.K. YANO

JUDGE