



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 168 OF 2017

RAMA HAMISI BINDUPLAINTIFF

VERSUS

HASSAN KUTEMBELEA.....DEFENDANT

JUDGMENT

1. Rama Hamisi Bindi, the Plaintiff herein instituted this suit by way of a Plaint dated 16th March, 2017 and filed on even date. The Plaintiff is seeking for judgment against the defendant for:

- a. Vacant possession of PLOT NO. BUBUBU EXTENSION SETTLEMENT SCHEME/26.
- b. Demolition and removal of all illegal structures on the plot.
- c. Costs of this suit and interest thereon.
- d. Any other or further relief this Honourable Court may deem fit and just to grant.

2. The plaintiff's case is that at all material times relevant to this suit, the plaintiff is the legal owner of PLOT NO. BUBUBU EXTENSION SETTLEMENT SCHEME/26 (hereinafter referred to as the suit property), which he purchased on 15th December 2015 from one Ntenga Hamisi Mtsumi. The Plaintiff states that he took vacant possession of the suit property after transfer. The plaintiff avers that sometime around August 2016 he discovered that the defendant had trespassed onto and occupied a portion of the said land. It is the Plaintiff's contention that the forceful occupation of his plot by the defendant has occasioned him to suffer financial loss since his intention of putting up an income generating business has been hindered. The plaintiff avers that the defendant has proceeded to construct a semi-permanent house on the suit property further degrading its value. The plaintiff further avers that despite demand and notice of intention to sue, the defendant has failed, refused and/or neglected to vacate from the suit property, hence this suit.

3. The defendant was served with summons to enter appearance but failed to do so. Upon request by the plaintiff, interlocutory judgment was entered against the defendant on 4th October, 2017. The suit proceeded for formal proof on 24th April 2019 when the defendant also failed to attend despite being served with a hearing notice.

4. The plaintiff relied on his witness statement filed on 16th March, 2017 which basically reiterated the facts as contained in the plaint. The plaintiff testified that he lodged a complaint with the National Land Commission who ordered the defendant to vacate the land but the defendant failed to comply. The plaintiff produced a copy of the sale agreement dated 15th December 2015 between him and Ntenga Hamisi Mtsumi, a letter dated 10th August 2016 from the National Land Commission, letter dated 16th August, 2016 from the County Commissioner, Mombasa County, copy of transfer and the Title deed of the suit property in the plaintiff's name.

5. The plaintiff called one witness Ntenga Hamisi Mtsumi the original owner, who confirmed that she sold and transferred the suit property to the plaintiff. She testified that at the time of selling the plot, the same was vacant with no squatters. She stated that she did not know the defendant and denied selling the suit property to him.

6. At the close of the plaintiff's case, the plaintiff's counsel filed written submissions in which they summarized the plaintiff's case and submitted that the plaintiff has proved his case on a balance of probabilities.

7. The court has carefully considered the evidence on record. The issue that calls for determination is whether the plaintiff has established that he is the owner of the suit property and whether the plaintiff is entitled to the prayers sought.

8. The plaintiff has tendered documentary evidence that show that the suit property is registered in his name. The Plaintiff produced the title deed as an exhibit. The plaintiff also produced the agreement for sale and called the original owner of the suit property who confirmed selling and transferring the property to the plaintiff. From the material placed before me, there is no dispute that the plaintiff is the registered owner of the suit property.

9. Section 26(1) of the Land Registration Act provides that the certificate of title issued by the Registrar upon registration or 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. 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 proprietor of the suit property. Section 24(a) of the said Act provides that the registrations 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. 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 stated that the defendant entered part of the suit propriety forcefully and without permission and stated utilizing it has his property and went ahead to build a semi-permanent house thereon. No doubt the defendant's action amounts to trespass.

10. 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 illegal structures 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 the defendant 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 legal owner and is entitled to the suit property known as BUBUBU EXTENSIONS SETTLEMENT SCHEME/26.

b. The defendant and/or his agents, servants or other persons claiming through him be and is hereby ordered to demolish and/or remove all illegal structures standing on the suit property and to vacate and deliver vacant possession 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 forcible removal of the defendant whether by himself, his agents and/or servant or otherwise howsoever from remaining on or continuing in occupation of the suit property and demolition of the illegal structures standing thereon under the supervision of an authorized police officer form the nearest police station.

d. A permanent injunction restraining the defendant whether by himself, his servants, agent or otherwise howsoever from encroaching, trespassing, remaining on, taking possession, or continuing in occupation of the suit property.

e. The plaintiff shall have costs of the suit.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mulei for Plaintiff

No appearance for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE