



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE 285 OF 2015**

**ABDALLA MOHAMED ABDALLA.....PLAINTIFF**

**-VERSUS-**

**THE COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT**

**JUDGEMENT**

1) The plaintiff instituted this suit by way of a plaint dated 3<sup>rd</sup> November 2015 and filed on 4<sup>th</sup> November 2015 in which he is seeking for judgment against the defendant for:

- a) **That the action by the Defendant is trespass on the plaintiff's properties.**
- b) **An order that the acquisition of the suit properties and construction of the road on the said properties is illegal.**
- c) **An order against the defendants to remove all the road and materials from the suit property and restore the suit properties to its previous state.**
- d) **In the alternative, that the defendant pays Kenya shillings fifty six million (Kshs.56,000,000/=) to the plaintiff and acquire the suit properties for the existence of the road.**
- e) **Costs and interests.**

2) The plaintiff's case is that he is the registered and beneficial owner of plot members MOMBASA/BLOCK XVI/583, MOMBASA/BLOCK XVI/598, MOMBASA/BLOCK XVI/606, MOMBASA/BLOCK XVI/607, MOMBASA/BLOCK XVI/608 and MOMBASA/BLOCK XVI/609 situated at King'orani area, Mombasa (hereinafter called "the suit properties") and are valued at Kshs. 56,000,000/=. The plaintiff avers that he has been in total and exclusive enjoyment and possession of the suit properties since he purchased the same and had them registered in his name. The plaintiff further avers that he has always paid rates to the defendant previously known as the County Council of Mombasa since he acquired ownership of the properties to date, and that by virtue of having the said properties in his name, he is entitled to full protection of the law from any interference from any person or the defendant.

3) The plaintiff avers that sometime on or about 8<sup>th</sup> September 2015 at around 3.00 p.m. the defendant trespassed on the suit properties and demolished some structures, embarked on laying and constructing a road on the said properties. The plaintiff states that upon inquiring from the defendant, he was informed that the properties were on a road or road reserve.

4) It is the plaintiff's contention that the suit properties and the Defendant has no right to trespass on the same and construct a road without following due process. The plaintiff states that he never received any demand or report that the suit properties were situated on a road reserve or a road and all records at the land registry reflects his name as the registered owner. According to the plaintiff, the defendant has acquired the suit properties for the benefit of public use without compensating him for the value being Kshs. 56,000,000/=. He avers that as a result of the compulsory acquisition of the suit property by the defendant, he cannot benefit from the said properties unless compensated fully and wants the defendant to compensate him at full market value. It is the plaintiff's case that by reason of the aforesaid, he stands to suffer irreparable loss and damages as he will be deprived of the use and benefit of his properties.

5) The defendant filed a statement of defence dated 25<sup>th</sup> November 2015 and filed on 30<sup>th</sup> November 2015 in which it denies the plaintiff's averments in the plaint and put the plaintiff to strict proof thereof. The defendant avers that if there were any structures which were demolished, which it denies, then the same were constructed without the plaintiff having applied for and granted the necessary approvals from the defendant and/or in contravention of statutes and County Government laws in respect of physical planning and construction thus the same were demolished after such consideration and non compliance on the part of the plaintiff. The defendant further avers that the said structures were demolished since the same had been constructed on a road reserve area thus the exercise was conducted for the benefit of the public and in consideration of the efforts made by the defendant to put up roads and decongest the city and towards the realization of Vision 2030 goals.

- 6) It is the defendant's contention that the suit herein does not disclose any reasonable cause against it and that the same is an afterthought, an abuse of the court process and contrary to the law since the plaintiff has not pleaded adequate material and/or facts articulating the alleged trespass concisely and with a degree of specificity necessary to move the court accordingly, and urged the court to dismiss it with costs.
- 7) In his reply to defence dated 2<sup>nd</sup> December 2015, and filed on even date, the plaintiff reiterated the contents of the plaint and avers that the structures demolished on the suit properties had been erected with prior approval from the defunct Municipal Council of Mombasa and was in no way in contravening any law in respect to the physical planning and construction as alleged by the defendant. He further denies that any of the suit properties is situated on a road reserve and that the defendant's action cannot be said to have been conducted for the benefit of the public in an effort to realize vision 2030 goals as no due process was followed as required. The plaintiff maintains that he has incurred serious loss and damage as a result of the defendant's unlawful actions of trespass and avers that the suit discloses reasonable cause of action against the defendant.
- 8) The matter came up for hearing on 23<sup>rd</sup> October 2017 when only the plaintiff and his advocate attended court. The defendant and its advocates did not attend court although they were duly served with a hearing notice. The matter proceeded for hearing wherein the plaintiff gave evidence.
- 9) In his evidence, PW1 stated that he is a businessman and lives in Majengo, Mombasa. He adopted his witness statement dated 3<sup>rd</sup> November 2015 filed alongside the plaint as his evidence-in-chief. He produced certified copies of the Title Deeds for the suit properties as exhibits 1 to 6 and stated that the originals were in the bank. He stated that on 8/9/2015, the defendant's employees demolished some structures on the suit properties and despite being shown the title deeds went ahead to construct a road using cabro, claiming that it was a road reserve. The plaintiff added that his title deeds have never been revoked and produced certificates of official searches as P. exhibits 7 to 12 showing that the properties were in his name. It is the evidence of PW1 that the said properties now form a road.
- 10) The plaintiff produced a valuation report dated 9/1/2015 by Ms Kiliru & Company (Exhibit 13) in which the properties known as MOMBASA/BLOCK XVI/606,607,608 and 609 were valued at Kshs. 40,000,000/= and another valuation report dated 30<sup>th</sup> September 2015 by m/s Dominion Valuers Ltd for Title members MOMBASA/BLOCK XVI/583 and 598 (P. Exhibit 14) in which the two plots were valued at Kshs.8,000,000/= each. The plaintiff also produced a map of the area (Exhibit 15).
- 11) The plaintiff stated that he used to pay rates for the plots though he had arrears and produced the property rates statements as exhibits 16(a) and (b). He added that before filing suit, he instructed his advocates to issue a demand notice to the defendant (Exhibit 17) but did not receive any response from the defendant. The plaintiff stated that his claim against the defendant is for Kshs. 56,000,000/= as compensation for his properties which have been turned into a road plus costs and interest. The plaintiff did not call any other witness and therefore closed his case.
- 12) The defendant did not call any witness and therefore no evidence was tendered by the Defendant.
- 13) Both the plaintiff's counsel and the defendant's counsel filed written submissions which mainly summarized their respective cases as pleaded.
- 14) The plaintiff's counsel in their submissions dated 29<sup>th</sup> November 2017 and filed on 30<sup>th</sup> November 2017 cited Article 40 (3) of the Constitution and submitted that the defendant cannot escape from its obligation of compensating the plaintiff to the tune of Ksh. 56,000,000/= for forcefully acquiring the plaintiff's, properties for public use as it would be impractical to remove the cabro and road construction materials for the plaintiff to use in future as the public has now used the road put up for a long period of time and the same would cause hardship to the public. The plaintiff submitted that the defendant should be ordered to pay the said amount together with interest as the defence has failed/or has been unable to offer any explanation for its action and that he has proved his case as required.
- 15) The defendant's counsel in its submissions dated 15<sup>th</sup> February 2018 and filed on even date submitted that the main issue for determination is whether the suit properties registered in the plaintiff's name are alienated as road reserve and therefore set aside for public use and that there was no evidence that the defendant offered it for further alienation or allocation for private purpose and whether or not the defendant is to be condemned to pay the plaintiff the sum of Kshs. 56,000,000/= being compensation in acquiring the suit properties for the existence of the road. It is the defendant's submission that the plaintiff is not deserving of the prayers sought.
- 16) The defendant stated that the plaintiff failed to explain the root of title and show how he came to acquire the suit properties as proof of sanctity of title. The defendant questioned how the suit properties were purportedly alienated by an individual as private property but continued to serve the public as access road. It was submitted that the certificate of title to the properties were fraudulently procured and cannot be protected under Section 26 of the Land Registration Act as well as Article 40 (6) of the Constitution and that they must be cancelled. Relying on the case of *Alice Chemutai Too -vs- Nickson Kipkurui Korir & 2 others [2015] eKLR*, it was the defendant's submission that the public purpose for the road reserve in this case is the construction of an access road which, in the defendant's view, serves as an overriding interest under Section 28 of the Land Registration Act.
- 17) The defendant submitted further that the plaintiff made attempts to ascertain land rates due for only two suit properties being parcel Nos. 583 and 598 as indicated by P. exh – 16 (a) and 16 (b) as recent as 30<sup>th</sup> September, 2015 in an effort to legitimize his certificates of title albeit having them registered in the year 1998 and 1995 respectively. According to the defendant, the plaintiff failed to pay land rates for all the suit properties as required of a bonafide purchaser and that the plaintiff failed to provide receipts for land rates and rents payment. The defendant submitted that there was in existence a road reserve which was serving the public as an access road before the disputed suit properties came to be registered in the name of the plaintiff and that they were not open to alienate them further for private allocation and/or development.
- 18) As regards public interest versus private rights, the defendant's counsel submitted that this court cannot countenance a situation where a public good is subjugated to and sacrificed at the multifarious alters of private interests and cited the case of *Kenya National Highway*

19) It was defendant's submissions that the plaintiff has not laid any basis whatsoever to require that the defendant be compelled to pay the sum of Kshs. 56,000,000/= being compensation in acquiring the suit properties for the existence of the road. Further, the defendant submitted that the valuation reports produced as exhibits in part confirm that the suit properties are indeed situate on a road reserve and that the plaintiff ought to be estopped from benefiting from irregular and unprocedural allocation of public property. In conclusion. The defendant submitted that plaintiff has failed to prove his case on a balance of probabilities as required in law and urged the court to dismiss the same with costs.

20) I have carefully considered the pleadings, the evidence tendered and the submissions made by the parties.

The issues for determination are:

- i) Whether the plaintiff is the lawfully registered proprietor of the suit properties.**
- ii) Whether the plaintiff was fraudulent in the acquisition of title to the suit properties.**
- iii) Is the defendant a trespasser on the suit properties?**
- iv) Is the plaintiff entitled to the reliefs sought.**
- v) Who will bear the costs of the suit.**

21. From the material placed before me, there is no dispute that the suit properties are registered in the plaintiff's name. The plaintiff produced the title deeds in his name (P. Exh 1-6) which were issued between 1995 and 2005. The plaintiff also produced certificates of official search (P. Exh. 7-12) which confirm that the properties are still in the plaintiff's name.

22. 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 court 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.”**

23. In its statement of defence and submissions the defendant has challenged the manner in which the plaintiff's titles were acquired. However, the defendant did not offer any evidence to support its contentions that the plaintiff in any way acted fraudulently or that he misrepresented any fact which led him to obtain fraudulent titles. The submission by the defence that the plaintiff acquired the suit properties unprocedurally has not been supported by any evidence. Not a single factor was pleaded showing any fraud on the part of the plaintiff.

24. Section 24 (1) of the Land Registration Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be party, or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy. It is therefore my finding that the plaintiff is the lawfully registered proprietor of the suit properties.

25. I now turn to the issue whether the plaintiff was fraudulent in the acquisition of title. The plaintiff has in his evidence explained how he acquired title to the properties. The defendant's counsel has however in his submissions attempted to show that the titles to the plaintiff may have been fraudulently obtained. The defendant was supposed to show fraud or misrepresentation on the part of the plaintiff and give cogent evidence in that regard. As none was offered, I take the submissions made to be merely sensational statements calculated to attract sympathy one way or the other and I shall therefore ignore it. The defendant had no evidence to show such fraud which could then be said to attach to the plaintiff. In conclusion therefore there is no evidence to show that the plaintiff was fraudulent in the acquisition of the title to the suit properties.

26. Is the defendant a trespasser on the suit properties? I have held that the plaintiff's titles are lawful. The next question is whether the defendant is a trespasser on the suit properties.

27. It is admitted that the defendant has constructed a road on the suit properties under the mistaken belief that the same was a road reserve. The plaintiff, it appears, never effectively occupied nor had he taken physical possession of the suit properties since he obtained title, or if he did, it appears such physical possession was also enjoyed by other people mainly the public. I say so because from the evidence on record the suit properties were being used as an access road.

28. I have perused the valuation report dated 9<sup>th</sup> January 2015 by M/s Kiliru & Company which was produced by the plaintiff as P. Exh. 13. At page 3 of the report, the valuer states:

**“... We confirm that the property named above has no public utility claims, is not on a wetland neither is it on road reserve and does not appear in the Ndungu’s Report. However, the plots are currently used by the owner as an access road to his other business premises and his residential properties. Successive use of these plots as an access road by the public for a long period may render the subject plots being declared public land. If the owner of the plots were to develop them, a number of properties including those belonging to the owner would have not access...”** (Emphasis added)

29. From the above report which forms part of the plaintiff’s evidence, it is apparent that the suit properties have for a long period been used as an access road by both the plaintiff and the public. Like I have stated, the defendant seems to have constructed a road on the suit properties believing the same were a road reserve. The defendant may have come to the conclusion, as it has done in its pleadings and submissions, that it was not trespassing on the suit properties but constructing on a road reserve. To my mind, the legal possession established by the plaintiff entitles him to possession against all other parties that have shown no better title than his own. The defendant fall in this category and once it is found that the properties lawfully belong to the plaintiff, the defendant can only be termed as a trespasser. In Winfield and Jolowic on Tort, 16<sup>th</sup> edition 2002, the point is graphically put at page 487 paragraph 131.

**“...It is no defence that the only reason for ... entry was that he (the trespasser) had lost his way or even that he genuinely but erroneously believed that the land was his.”**

The action by the defendant amounts to trespass and the defendant is accordingly declared to be a trespasser on the suit properties as argued by the plaintiff and I so hold.

30. The other issue that I have to determine is whether the plaintiff is entitled to the other reliefs sought in the plaint. I note that one of the prayers sought by the plaintiff is an order against the defendant to remove all the road and materials from the suit properties and restore the suit properties to its previous state; in the alternative, that the defendant pays Kshs.56,000,000/= to the plaintiff and acquire the suit properties for the existence of a road.

31. The plaintiff has accused the defendant of trespassing onto the suit properties and demolishing structures thereon before putting up the road using cabro. Whereas the defendant has denied that there were any such structures and that if there were, then the same were constructed without the plaintiff having applied for and granted the necessary approvals from the defendant and/or in contravention of statutes and County Government Laws in respect of physical planning and construction. The plaintiff however, maintains that there were structures on the suit premises which had been erected with prior approval from the defunct Municipal Council of Mombasa.

32. I note however, that there were no approvals shown to the court by the plaintiff. The valuation report dated 9<sup>th</sup> January 2015 by Kiliru & Company (P. Exh 13) clearly states at page 3 thereof that there were no improvements in form of buildings. The same report further confirms that the plot were at the time used by the owner (plaintiff) as an access road to his other business premises and his residential properties. This report was prepared several months before the defendant constructed the road.

33. It is also to be noted that in the valuation report dated 30<sup>th</sup> September 2015 by M/s DOrnion Valuers Limited (P. Exh 14) the valuers state at page 6 thereof that *“there were no structural improvements on the plots before repossession...”* (Emphasis mine). It is therefore clear and I so hold, that there were no structures which were demolished by the defendant as alleged by the plaintiff.

34. I note from the plaint that one of the prayers sought by the plaintiff is an order requiring the defendant to remove all the road and materials from the suit properties and restore the properties to its previous state. In the alternative, the plaintiff would like the defendant to pay him the sum of Kshs. 56,000,000/= as compensation for acquiring the suit properties to construct a road.

35. I have already held that the plaintiff holds valid titles and therefore entitled to both ownership and possession of the suit properties. It follows therefore that no other party should have any right to enter therein. However, from the valuation reports already referred to, it is apparent that the suit properties were being utilized as road both by the plaintiff and the public. In the valuation report dated 9<sup>th</sup> January 2015 (P. Exh. 13), it is stated that the plots were at the time being used by the plaintiff as an access road to his other business premises and his residential properties. The report stated further that successive use of the plots as an access road by the public for a long period may render the subject plots being declared public land, and that if the owner of the plots were to develop them, a number of properties including those belonging to the plaintiff would have no access.

36. From the foregoing, it is clear that even prior to the construction of the road by the defendant using cabro, the suit properties have for a long period been used as an access road by the plaintiff himself to access his other business and residential premises. It is to be noted that the report (P. Exh. 13) clearly confirms that if the plaintiff were to develop the suit properties, a number of properties, including those of the plaintiff himself, would have no access.

37. It is my considered view that ordering the defendant to remove the road and restore the properties to its previous state would be superfluous as the previous state of the properties was also a road, albeit an access road with no cabro. I say so because from the plaintiff’s own evidence, the suit properties have always been used as a road. From the peculiar circumstances of this case, I would decline to order the defendant to remove the road as the end result would still be a road. That is my finding and order in this regard.

38. The alternative prayer seeks to compel the defendant to pay the sum of Kshs.56,000,000/= to the plaintiff as compensation for acquiring the suit properties. In my considered view, the suit properties remain the properties of the plaintiff and he is still utilizing it as before to access his other premises. The plaintiff has not been deprived of the use and benefit of his properties and in my view, he has not suffered any loss and damage. I say so because clearly, although the plaintiff has held titles to the suit properties, he has for a long time utilized them as an access, to his other properties as his own evidence confirm. Even though the construction of the road by the defendant on the suit properties would amount to an act of continuing trespass, the plaintiff in my view has not suffered any loss and damage. I also note that the properties have always been used by the plaintiff to secure loans from banks. The properties have not been acquired by the defendant and I do not think that this court has the power to compel the defendant to acquire it. The suit properties remain the properties of the plaintiff and it is upto the

plaintiff to decide what he wants to do with it.

39. In conclusion therefore I am not satisfied that the plaintiff has proved his case on a balance of probabilities. The same is hereby dismissed. Considering the circumstances of this case. I order that each party to bear their own costs.

It is so ordered.

**Dated signed and delivered at Mombasa this day 24<sup>th</sup> April 2018.**

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**C. YANO**

**JUDGE**