



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 129 OF 2010

JOSEPH KENGA VOTI.....PLAINTIFF

VERSUS

MOMBASA CEMENT LTD.....1ST DEFENDANT

VENUS METAL DEVELOPERS LIMITED.....2ND DEFENDANT

JUDGMENT

Introduction:

1. In the Plaintiff dated 3rd November, 2010, the Plaintiff is seeking for an order of permanent injunction restraining the Defendant or his servants from interfering with his land known as Kilifi/Boyani/101 (*the suit land*) and for an order of mandatory injunction compelling the Defendant to uproot, pull down and remove the illegal fence and beacons which he has put around the suit land.
2. The Plaintiff has averred in the Plaintiff that sometimes in June/July, 2010 the Defendant's employees embarked on all illegal process of forcefully fencing off the Plaintiff's land.
3. The Defendant denied having trespassed on the suit land.

The Plaintiff's case:

4. The Plaintiff, PW1, informed the court that he is the registered proprietor of parcel of land known as Kilifi/Boyani/101 measuring 0.40Ha; that the Defendant's directors or employees are fencing his plot, amongst other plots and that he cannot access his plot after the Defendant stationed guards to stop him from accessing his land.
5. PW1 informed the court that the sub-division scheme of the area shows the roads that are to be used to access different plots.
6. The Plaintiff's neighbour, PW2, informed the court that in the year 2000, he was allocated, together with others, a plot; that he was allocated plot number 66 measuring approximately one (1) acre while the Plaintiff was allocated Plot No. 101.
7. According to PW2, the people who were allocated the plots agreed to sell to the Defendant their respective plots for Kshs. 80,000 per plot but the Plaintiff, with a few others, refused to sell their respective plots.
8. It was the evidence of PW2 that in the year 2010, the Defendant's director started fencing off the entire scheme, including the plots that they had not purchased.
9. PW3 stated that he was allocated plot number 99 measuring approximately one (1) acre and that the Defendant bought most of the plots in the area. According to PW3, the Defendant is fencing the perimeter of the entire scheme, including the Plaintiff's plot, which it has not bought.
10. It was the evidence of PW3 that the whole scheme has been fenced by the Defendant and that the Defendant cannot access the suit land.
11. PW4 and PW5 informed the court that they were the owners of plot numbers 64 and 104 respectively which they sold to the Defendant. According to their evidence, the Defendant has fenced off the entire scheme, including the plots that it did not buy.
12. The Surveyor, PW6, stated that in December, 2014 he re-located the boundaries of plot number 101 (*the suit land*), and confirmed that the said land was within the settlement scheme.

13. It was the evidence of PW6 that survey plan number 289/39 shows the sub-division of L.R. No. 5025; that the said land was converted into a settlement scheme and that the survey plan and the typographical survey shows the existing roads.

14. It was the evidence of PW6 that the two roads on the map are used by the Defendants to ferry materials to its factory and that the Defendant has fenced the perimeter of the whole scheme, except the front which is a riparian area. It was the evidence of PW6 that due to the fence, the Plaintiff does not have a free access to the suit land.

Defence case:

15. An employee of the Defendant, DW1, informed the court that the Defendant has purchased a total of 163 plots within the Boyani Settlement Scheme. It was his evidence that all the plots within the scheme are accessible and that the Defendant has not denied the Plaintiff access to the suit land.

16. DW1 stated that other than the Plaintiff, the other people who have not sold their plots in the scheme are not complaining.

17. The Plaintiff and the Defendant's advocates filed brief written submissions which I have considered.

Analysis and findings:

18. The evidence before me shows that the Government established the Boyani Settlement Scheme which is represented in survey plan number F/R 289/39. The Plaintiff was allocated plot number 101 within the scheme and was issued with a Title Deed for the said land on 1st October, 2009.

19. Immediately after the scheme was established, the Defendant started the process of buying off the allottees. According to the evidence of DW1, the Defendant has purchased 163 plots from the allottees. However, 40 allottees, including the Plaintiff, have declined to sell their portions to the defendant.

20. The evidence by the Plaintiff and PW2-PW6 shows that the Defendant has commenced fencing the perimeter of the scheme. According to PW1, the Defendant's acts of fencing the entire scheme has enclosed his plot within the fenced area thus denying him free access to the plot.

21. The evidence of PW1-PW5 was supported by the Surveyor's evidence. According to the Surveyor, the 10 feet tall concrete polls, 3 metres apart, have been erected along most of the perimeter/outer boundary, with security control personnel at the exit points. It was the evidence of the Surveyor that access to Plot No. 101 is somewhat hindered by the non-existence of developed official access road to the plot.

22. The Defendant's witness stated that they have not denied the Plaintiff access to his plot. If that is so, then the Defendant should not have placed any concrete fence poles on any side of plot number 101.

23. Considering that the sub-division schemes shows several roads of access, the Defendant cannot purport to place guards at the entry or exit point of the said roads with a view of stopping the Plaintiff from accessing the suit land.

24. On the basis of the evidence placed before me, I am satisfied that the Defendant has erected concrete fence poles around the entire Boyani Settlement Scheme, including one side of plot number 101, thus denying the Plaintiff the right to freely access his plot. Article 40(1) of the Constitution does not only grant to the Plaintiff the right to own property, but also to access his property freely.

25. For those reasons, I allow the Plaintiff's application dated 3rd November, 2010 as follows:

a. An order of permanent injunction be and is hereby issued against the Defendant, its servants, assigns and/or agents stopping them from interfering in any manner whatsoever with parcel of land known as Kilifi/Boyani/101.

b. An order of mandatory injunction be and is hereby issued compelling the Defendant to uproot, pull down and/or remove the poles and beacons on any side of parcel of land known as Kilifi/Boyani/101.

c. The Defendant is hereby restrained by an order of permanent injunction from blocking any of the access roads shown in survey plan number F/R 289/39 also known as Boyani Settlement Scheme.

d. The Defendant to pay the costs of the suit.

DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF APRIL, 2018.

J.O. OLOLA

JUDGE