



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC LAND CASE NO. 249 OF 2016

LYDIA WAMBUI GITAU.....1ST PLAINTIFF

REGINA WAMBUI GITAU.....2ND PLAINTIFF

-VERSUS-

SAIDI MWINYIKAI THOMAS.....DEFENDANT

JUDGEMENT

1. The plaintiffs have sued the defendant Saidi Mwinyikai Thomas vide the plaint dated 5th September 2016 seeking the following reliefs: -
 - a. **A permanent injunction restraining the Defendant by himself, agent, assigns or any other person appointed by him from trespassing, constructing upon, selling, disposing and/or dealing with in any matter the proprietary interest of the Plaintiffs in Plot No. Kwale/Diani S.S/33.**
 - b. **Vacant possession of the suit premises.**
 - c. **Costs of this suit with interest.**
 - d. **Any other or further relief this Honourable Court may deem fit to grant**
2. The defendant in a statement of defence dated 31st January 2017 and filed on the same date denied the plaintiffs' claim in its entirety and put the plaintiffs to strict proof. He pleaded that the plaintiffs' suit be dismissed with costs to him.
3. On 31.10.2017, the matter was listed for directions. The proceedings recorded that the plaintiffs had complied with the provisions of Order 11 of the Civil Procedure Rules. The defendant who was absent was given time to comply with the provisions of order 11 before the hearing date that was set for 13th February 2018. By 13th February 2018, the defendant had not complied with the provisions of Order 11. Similarly he did not attend Court for the hearing of the case although served. The plaintiffs were allowed to proceed to present their case.
4. The second plaintiff gave evidence on her behalf and on behalf of the 1st plaintiff who she said is her co-wife. Their husband Gitau Karanja Peter is deceased. They had taken out letters of administration in respect of his estate which PW1 produced as plaintiff exhibit – *pex 1*. The witness told the court that using the letters of administration; they transferred the suit property plot number Kwale/Diani S.S/33 into their names. She produced a copy of the deed as *pex 2*.
5. The 2nd plaintiff continued that on visiting the land, they found the defendant had built on their plot. They reported the case to the clan elders for the area who summoned the defendant. However the defendant insisted the land is his. PW1 stated further that the defendant had subdivided the plot into sub-plots and there were some houses being built. That they had obtained injunction orders to stop construction from going on pending the hearing of this case. The witness also produced the survey report as *pex 3*. It is the plaintiffs' evidence that they have never given the defendant permission to occupy the land. She asked the Court to give them orders for vacant possession. She also prayed for eviction orders to issue against any persons on the land. PW 1 referred the Court to photographs filed together with their list of documents in support of their claim. She also prayed for costs of the suit. This marked the close of the plaintiffs' case.
6. Although the defendant did not call any evidence, he filed his submissions on 19.3.18. The plaintiffs also filed their submissions on 6.3.18. The defendant submits that the plaintiffs did not prove their case because the National Land Commission wrote to the District Land Adjudication & Settlement Officer where the District Land Adjudication & Settlement Officer about this land and that the DLA &S officer wrote back confirming that the defendant was the true owner of the suit land. The defendant submitted further that the plaintiffs failed to

prove whether there are any established boundaries between the said plots. They cited the cases of **Azzuri Ltd vs Pink Properties Ltd (2017) eKLR** and **Machabo vs Richards Ongeru & Another (2017) eKLR** in support of their submissions that the plaintiffs have not proved their case to the standards provided.

7. In this case, the facts presented by the plaintiffs in their evidence are not controverted. The plaintiffs produced a copy of title deed (*pex-2*) for the suit plot issued to them on 13th July 2012. They also produced a demand notice for rates payment from Kwale County Government which bore the name of Peter Gitau Karanja- now deceased as the owner of the suit plot. The plaintiffs explained that the late Peter Gitau Karanja was their husband and they had taken out letters of administration to succeed him. The letters of administration was also produced in evidence (*pex-1*). Lastly the plaintiffs produced a survey report which indicated that a survey was done on 27th July 2016 by the District Surveyor, Kwale. The survey confirmed there is encroachment on the southern boundary by approximately seven (7) upcoming and complete permanent structures.

8. The defendant's submission that the District Land Adjudication and Settlement Officer wrote to the National Land Commission to say he was the owner of the suit property was unsupported as no such letter was filed in Court neither was any produced in evidence. His submission that the plaintiffs refused the survey exercise to be undertaken is also unsupported by evidence as no evidence of such refusal was brought to the attention of the court. To the contrary, the plaintiffs produced a survey report showing that the survey was indeed done. Further the defendant's submission that the boundaries of the said plots were not established is neither here as he does not specify which plots he wanted their boundaries to be established. There is only one plot mentioned to be in dispute which is Kwale/Diani SS/33.

9. The plaintiffs have demonstrated that there has been encroachment on their suit parcel by annexing the photographs as well as producing the survey report. Their rights as envisaged under section 25 of the Land Registration Act has thus been infringed by the said encroachments. Sec 25 of the LRA states in part thus;

“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court shall not be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenance belonging thereto free from all other interests and claims whatsoever subject only to liabilities set out under par (a) & (b).” (Underline mine for emphasis)

10. In the circumstances of this case where the title of the plaintiff has not been challenged in the manner provided in law and where facts of the case as presented is not contested, the only conclusion this court reaches is that the plaintiffs have proved their case on the standard required in a civil case. Consequently I enter judgment in their favour as prayed in the plaint in terms of prayer (a) – (c). The plaintiff to serve the decree on the defendant and any persons claiming through him to vacate the suit land in sixty (60) days from date of service of the decree. In default of handing over vacant possession within the stated timelines, the plaintiffs are at liberty to cause the evictions of the defendant and all persons claiming through him from the land parcel no Kwale/Diani SS/33. It is so ordered

Dated, signed & delivered at Mombasa this 27th June 2018

A. OMOLLO

JUDGE