



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 2 OF 2017

FRANCIS MWAURA KAMAU PLAINTIFF

-VS-

JULIUS MUKUNA NDEGWA DEFENDANT

JUDGMENT

1. By a Plaint dated 13th February 2017 and filed in Court on 22nd February 2017, the Plaintiff instituted this suit against the Defendant seeking the following reliefs: -

- a) **An order for demarcation of boundary between LAND PARCEL NO.KWALE/SHAMBA HILLS/722 and LAND PARCEL NO.KWALE/SHAMBA HILLS/53**
- b) **An order for eviction or demolition of the Defendant's offending structures.**
- c) **Mesne profits for unlawful use of the portion.**
- d) **Costs of this suit**
- e) **Any other order which the Honourable Court may deem fit to grant.**

2. The Plaintiff's case is that he is the registered owner of LAND PARCEL NO. KWALE/SHAMBA HILLS/722 whereas the defendant is the beneficial owner of an adjacent LAND PARCEL NO. KWALE/SHAMBA HILLS/53. The Plaintiff states that the Defendant and his late mother, Mary Wanjiku Ndegwa have been embroiled in boundary dispute with the Plaintiff which has been a subject of deliberations by relevant government institutions. That the Defendant and his late mother have encroached into a portion of the Plaintiff's land and erected structures thereon. The Plaintiff avers that he has been involved in **Kwale Civil Suit No. of 2014** with the deceased but the case has abated.

3. The Defendant was duly served with summons to enter appearance but failed to do so and upon request by the Plaintiff, interlocutory judgment was entered against him in default of appearance on 14th July 2017. The suit proceeded for formal proof on 12th April 2018 when the Plaintiff testified but did not call any witness.

4. The Plaintiff in his evidence told the Court that he resides in Lukore Location, Kwale County and that he is the owner of the TITLE NO.KWALE/SHAMBA HILLS/722 while the Defendant who is his neighbour is the beneficial owner of TITLE NO.KWALE/SHAMBA HILLS/53. He stated that he has had a boundary dispute with the Defendant and the Defendant's late mother which culminated in **Civil Suit No. 2 of 2014** at Kwale Court, but that suit abated. The Plaintiff further stated that following the said dispute, the District Surveyor, Kwale visited the disputed portion and carried out survey and confirmed that the Defendant had encroached on the Plaintiff's land. The Plaintiff produced a copy of the TITLE NO.KWALE/SHAMBA HILLS/722 in his name and also a letter by the District Surveyor inviting the owners of parcels of land bordering that of the Plaintiff for the survey exercise as well as the survey report by the Chief Land Registration Officer, Kwale. The report found that the owner of TITLE NO.KWALE/SHIMBA HILLS/53 had encroached onto TITLE NO. KWALE/SHAMBA HILLS/722. The report further confirmed that the boundaries of the parcels of land were determined during adjudication period.

5. The Court has considered the pleadings and the evidence on record. The issues arising for determination are whether the Plaintiff has proved the allegations of encroachment of his land by the Defendant and whether the Plaintiff is entitled to the prayers sought.

6. The Plaintiff's claim against the Defendant is based on the tort of trespass. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. The onus was on the Plaintiff to prove that he is the owner of LAND TITLE NUMBER

KWALE/SHAMBA HILLS/722 and that the Defendant had invaded and occupied the same without any justifiable cause. I am satisfied on the material before me that the Plaintiff has proved that he is the registered owner of **TITLE NO. KWALE/SHAMBA HILLS/722**. The Plaintiff placed before the Court a copy of the title deed for the suit property in his name and a certificate of official search on the register of the suit property which confirmed that the property is registered in the name of the Plaintiff as the proprietor thereof. Under Section 24(a) of the Land Registration Act, the registration of a person as a proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. Section 26(1) of the said Act provides that the certificate of title issued by the land 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 the ground of fraud or misrepresentation to which the holder is a party or where the title is acquired illegally, unprocedurally or through a corrupt scheme.

7. The Defendant did not defend this suit. The title of the Plaintiff over the Suit Property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of such challenge, I am enjoined by law to take the Plaintiff on the basis of the title deed that he placed before the Court to be absolute and indefeasible owner of **TITLE NO. KWALE/SHAMBA HILLS/722**. As the absolute proprietor of the Suit Property, the Plaintiff is 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 his consent. The Plaintiff has accused the Defendant of encroaching onto and annexing a portion of the suit property and putting up a structure thereof.

8. From the report by the District Land Registrar following the survey undertaken by the District Surveyor, it was confirmed that the owner of the **Plot No.53** has encroached onto **Plot No.722**. Section 18 (2) provides that the Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined. In the report by the Land Registrar, it was confirmed that the boundaries of the suit parcels of land were determined during adjudication period. In this regard therefore this Court has jurisdiction to entertain this matter. The report which I have referred to hereinabove which was produced as an exhibit confirms that there is encroachment on the Plaintiff's land is unlawful. The Plaintiff has tendered documentary evidence that show that his land has been encroached by the defendant. The Plaintiff's evidence has not been challenged and his evidence remains uncontroverted. The defendant's encroachment on the plaintiff's land is unlawful. I find the evidence on record sufficient to prove that the Plaintiff has proved his claim regarding encroachment on a portion of his property by the Defendant. The Defendant having been proved to have entered the Plaintiff's property without the Plaintiff's permission or any lawful cause, the Defendant is a trespasser on the Plaintiff's land and the Plaintiff is entitled to judgment against the Defendant for eviction.

9. The Plaintiff has also sought an order for demarcation of the boundary. The report by the District Land Registrar confirms that boundaries were determined during adjudication. In my view therefore that prayer cannot issue. The Plaintiff has also made a claim for mesne profits. However, the Plaintiff did not lead any evidence on the mesne profits expected from the portion that the Defendant occupies and how long the Defendant has been in occupation. I therefore decline to grant the prayer for mesne profits. However, I am satisfied in the circumstances of this case that the Plaintiff has laid a basis for an award of general damages. Taking into account all the circumstances of this case, I am of the opinion that an award of general damages in the sum of Kshs.200,000 would be adequate compensation to the Plaintiff for the loss suffered as a result of the Defendant's acts of trespass.

10. The upshot of this is that this Court is satisfied that the Plaintiff has proved his case against the Defendant on balance of probabilities. Judgment is entered for the Plaintiff against the Defendant in the following terms:

i. The Defendant is directed to vacate and remove the structures from the Plaintiff's land title no. KWALE/SHIMBA HILLS/722 within sixty (60) days from the date of judgment in default he be evicted therefrom and the said structures demolished.

ii. Kshs.200,000 as general damages.

iii. Costs of this suit to be paid by the Defendant.

Judgment dated, signed and delivered at Mombasa this 30th day of July 2018.

C. YANO

JUDGE