



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL CASE NO. 259 OF 2014**

**JONES ALAKA KIMATU.....PLAINTIFF**

**VERSUS**

**JOSEPH KIMATU.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff Jones Alaka Kimatu has sued his brother Joseph Kimatu in his plaint dated 22<sup>nd</sup> October 2014 claiming to have incurred loss and damage as a result of the defendant's occupation of land parcel No CR. 10703. The plaintiff thus asks for judgement in his favour on the following terms:

**(a) A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the property known as CR. No sub-division No. 1811 Section VI Mainland North and the defendant is accordingly a trespass thereon;**

**(b) A mandatory injunction do issue compelling the defendant whether by himself, his agents, employees, tenants and/or servants to deliver up to the plaintiff vacant possession of the property CR. No. 10703 sub-division No. 1811 Section VI Mainland North and/or in the alternative, an eviction order in the same regard do issue;**

**(c) A permanent injunction do issue restraining the defendant whether by himself, his agents, employees, tenants, and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiff's property to wit CR. No. 10703 sub-division No. 1811 Section VI Mainland North or in any manner whatsoever dealing with the said property;**

**(d) General damages for trespass;**

**(e) Costs of this suit and interest at such rate and for such period of time as this Honourable Court may deem fit to grant;**

**(f) Any other just relief this Court may deem appropriate.**

2. Upon being served with the summons to enter appearance, plaint and verifying affidavit and interlocutory application dated 22.10.2014, the defendant filed a replying affidavit dated 1<sup>st</sup> December 2014, defence dated 12<sup>th</sup> May 2015 through the firm of J. O. Magolo & Company advocates and a memo of appearance dated 26<sup>th</sup> November 2014 (vide receipt No 6511291) by the same firm. In the defence filed, it is pleaded that this suit is res judicata.

3. On 15.5.2015, the plaintiff presented his evidence to the Court. He said that he bought the suit plot no 1811/IV/MN for Kshs 600,000= on 18.9.2013 and paid the purchase price in full. The seller was Rukia Binti Sood Bin Ali. That the transfer was effected in his name on the same date. He produced the sale agreement as Pex 1, Transfer Pex 2 and Certificate of Grant issued to Rukia as Pex 3. The plaintiff continued that there were temporary structures on the land owned by the defendant. He therefore served him with a notice dated 18.6.2014 to vacate within 30 days. The demand letter produced as Pex 4 and demand for rates as Pex 5.

4. On 30.1.2018, the plaintiff was recalled to give further evidence. He produced a sale agreement dated 18.9.2013 as Pex 6. That at page 3 in the certificate of title is entry No 3 recording transfer by assent to Rukia made on 30<sup>th</sup> August 2013 and entry No 4 recording transfer registered in favour of the plaintiff on 14.4.2014. He also produced as Pex 7 official search showing the title bears his name. Pex 8 is an order withdrawing the appeal Number HCC A 146 of 2013. He urged the Court to grant him vacant possession and costs of the suit.

5. In cross – examination, the plaintiff admitted he was one of the plaintiffs in Mombasa CMCC 1434 of 2009 which concerned dispute of structures on the suit parcel. He said he bought the land in April 2014. That he had no evidence of payment of the sum of Kshs 600,000=.

That the house was on the land as at 2009. That when case CMCC No 1434 of 2009 was filed, the structures were two. He denied wanting to get through the back door what he did not get in case No 1434 of 2009. He admitted there was an error on the transfer form if it included the structures. That he started buying the land on 26.10.2013 and finished on 14.4.2014. He did not know judgment was delivered on 1434/2009 on 23.9.2013.

6. During the recall, the plaintiff said he did disclose in the earlier proceedings that he had bought the suit land. That the finding in that case was over a house not plot. That the date of presentation of the transfer form was 24.2.2014. That after suit No 1434/2009, the owners of the suit land chose to sell to a willing buyer. That he was unaware of orders stopping sale issued in HCC 284 of 2003.

7. In re-examination, the plaintiff stated the defendant is not the owner of the suit plot. That he never lodged the transfer from 26.10.2013 because of ignorance and he was not under pressure. That in 1434 of 2009, he was claiming rental income since the plot had been leased to his father. That the temporary structures belonged to his father. That he was not engaged in fraud while transferring the land to himself.

8. Rukia Soudi testified as PW 2. She knew the plaintiff. PW 2 said she had letters of administration in respect of his father's estate (Pex 3). She confirmed selling the suit plot to the plaintiff and signing the transfer form. PW 2 did not know a Mr Muya who sold the plot to the defendant. That it is her son who deals with the land.

9. In cross-examination PW 2 denied knowledge of being sued by tenants on the land or knowledge of existence of any injunction orders. That may be her son knows. In re-examination, PW 2 stated she had capacity to sell the land. That she concluded the sale to the plaintiff. This marked the close of the plaintiff's case.

10. The defendant gave his testimony on 23.5.2018. He stated that the suit plot is his having bought it from Munira. That the plaintiff was a witness to the sale. He also stated that he developed the plot and has rented out to people. The defendant continued that they have had a case over the property since 2009 after the death of their father. That in CMCC 1434 of 2009, the Court found the plot was his. That as at 2003, there was a Court order issued against the owners of the land not to deal with it. He urged the Court to cancel the plaintiff's title based on his documents which he relied on and produced as a bundle.

11. In cross-examination, he stated that the plaintiff obtained his registration through fraud. That Munira Muya was the owner of the plot. In the order, they were claiming the whole land – several of them. That Mohamed sold to their father house without land on 4<sup>th</sup> October 1966. According to him, in 1434 of 2009, the Court found that both the plot and the land was his. He admitted that Munira Muya's name was not on the title. He denied receiving the demand letter issued by the plaintiff. The defendant then closed his case.

12. The advocates filed their written submissions. In his submissions, the plaintiff gave summaries of the evidence adduced and quoted the provisions of section 24 – 26 of the land Registration Act and section 107 of the Evidence Act. The plaintiff cited the case law of **Kenya National Highway Authority vs Shaleen Masood Mughal & 5 others (2017) eKLR** that discussed the indefeasibility of titles. The defendant on his part submitted that the plaintiff purchased the suit land when there was a Court order preventing sale. That the previous case made a finding which cancels the plaintiff's title. That the plaintiff has not proved his case and the same ought to be dismissed with costs.

13. I have considered the pleadings filed; the evidence tendered together with the submissions rendered and from them, I frame the questions for determination as follows:

**(1) Whether the defendants' rights over the suit property is the houses only or houses together with the land.**

**(2) Whether or not the plaintiff's title was obtained in a lawful manner.**

**(3) Whether or not the plaintiff is entitled to orders of vacant possession.**

**(4) Who bears the costs of the suit?**

14. The fact that the plaintiff is currently the registered owner of the suit property has been established by the production of the certificate of title and official search. The defendant said in his evidence that he purchased both the house and the land. He presented a list of documents numbering 1 – 15 to support his defence. I have flipped through them and the sale agreement dated 25.9.1988 in local dialect (item No 5 in the list) is indicated as the sale for the house by the defendant. The same is not translated into English or Kiswahili. The agreement on the face of it shows it was executed between the defendant and Munira. There is nothing shown by the defendant to prove that Munira had capacity to sell the plot other than the interest comprised of a house without land.

15. The defendant also stated that the trial magistrate in civil case No 1434 of 2009 awarded him both the house and the land. In the judgment of that Court, (item 7), the magistrate listed the prayers sought before him. *Prayer (a) was for an order of injunction stopping him from collecting rent. Prayer (b) asked for a true account of all the rental income collected from the premises Nos 1811, 1836 and 1906 since the death of their father and prayer (c) an order for appointment of an estate agent to collect the rent from the 3 plots and deposit in an account the Court directs and prayer (d) was for costs.* The judgment annexed is not complete but the defendant said he won. This is confirmed by the notice of appeal filed by the plaintiff although the appeal was subsequently withdrawn.

16. From this judgment, it is clear the dispute was not on ownership of the plot but rather rental income generated therefrom. I have also looked at the ruling made in HCC 284 of 2003 which I find that it is not a determination of ownership. It's an application that sought to dismiss the defendant's suit (HCC 284 of 2003) for want of prosecution. The upshot of all this is that I am not satisfied by the averment put forth by the defendant that he purchased both the house and the land.

17. Did the plaintiff acquire his title through lawful process? The plaintiff produced a sale agreement dated 18.9.2013 between him and PW 2. PW 2 was the registered owner of the suit property as at the time of sale and she confirmed selling the property to the plaintiff. She has confirmed signing the transfer form to the plaintiff (Pex 2 & 6). The issue raised of whether there was an order preventing PW 2 from selling the suit property. The defendant referred to the order in HCC No 284 of 2003 dated 14<sup>th</sup> May 2004 and issued on 7<sup>th</sup> June 2004. Part 1 of the order stated thus *“the defendants be restrained from selling or removing or in any way interfering with the plaintiff’s enjoyment of the plot comprised in Numbers 1312/183/VI/MN and 2325/413/VI/MN until hearing and determination of that suit.”*

18. The plaintiff in HCC 284 of 2003 included the defendant herein & 4 others and the defendants included PW 2 & 3 others. Besides annexing the order, the defendant did not present evidence to show that this suit was still pending. The ruling of Tuiyot J made on 19<sup>th</sup> April 2012 gave them 30 days to comply with the pre-trial directions and thereafter list the matter for hearing. Nothing would have been easier other than to present the proceedings that have taken place since April of 2012 to corroborate the pendency of this suit.

19. Further the order of 7<sup>th</sup> June 2004 refers to plot numbers that are different from the number 1811/VI/MN which is in dispute before this Court. The defendant has not told this Court the relationship between the three plots. Lastly this order was not proved to have been registered on the title of the suit property. Thus there is nothing that stopped the Registrar to effect transfer of interest if the same was presented whether by the plaintiff or any other person. Consequently I find nothing to support the allegation that Binti Soud had no capacity to sell or transfer the land nor the averment that the plaintiff is using the back door to get the land. Instead the plaintiff has presented documents to prove that he lawfully acquired the suit land.

20. Is the plaintiff entitled to orders of vacant possession as well as orders of injunction as prayed in the plaint? As the registered owner of the suit land, the law allows him to unimpeded use and occupation under section 24 & 25 of the Land Registration Act. Since there is no evidence to counter his title as provided under section 26 of the Land Registration Act, accordingly I enter judgment in terms of prayer (a), (b) and (c) of the plaint. The defendant shall hand over vacant possession of the suit land to the plaintiff within six months from the date of this judgment. In default, the plaintiff is at liberty to evict him.

21. In regard to prayer for general damages, I do not award any since the defendant’s structures were on the land as of right. Secondly the demand notice dated 18<sup>th</sup> June 2014 was addressed generally to *“all concerned”* and no evidence was led to show the defendant was personally served. The defendant has not counter – claim for his structures on the land. Parties are bound by their pleadings thus I am unable to make any award in regards to the defendant’s structure. In the circumstances of this case, I order each to bear their respective costs of the suit.

**Dated, signed & delivered at Mombasa this 26<sup>th</sup> October 2018**

**A. OMOLLO**

**JUDGE**