



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 121 OF 2014

1. MATHIAS MASIVA AHAZA

2. MARIKO MAHUGU MAJANGA

3. RAMADHAN ISANDA CHITE.....PLAINTIFFS

(Suing as trustees of Magongo Pentecostal Assemblies of God)

VERSUS

1. SAMUEL GICHUKI

2. VICTOR MWANYIKA

3. FRANCIS MWANGEKA.....DEFENDANTS

JUDGMENT

1. The Plaintiffs in this suit have sued the defendants seeking the following orders:

a. Eviction order be issued against the defendants, their agents and/or servants from the plot known as SUB-DIVISION NO.3517(ORIGINAL NO.3490/29 SECTION VI MAINLAND NORTH)

b. A permanent injunction be issued to restrain the defendants, their agents and/or servants from trespassing into the Plaintiffs' plot known as SUB-DIVISION NO.3517(ORIGINAL NO.3490/29 SECTION VI MAINLAND NORTH) to demolish all structures erected in the suit land and/or plot and payment of damages for unlawfully trespassing on the plot.

c. Costs and interest at court rates.

2. In the amended plaint dated 25th June 2014 the plaintiffs who are suing as Trustees of Magongo Pentecostal Assemblies of God, pleaded that Magongo Pentecostal Assemblies of God is the registered owner of the land known as **SUB-DIVISION NO.3517 (ORIGINAL NO.3490/29 SECTION VI MAINLAND NORTH)** measuring approximately 0.502 hectares. It is pleaded that sometime in April 2011 the defendants without any lawful cause whatsoever trespassed on the said plot and built thereon illegal structures and/or houses without the consent and/or permission from the plaintiffs. It is for this reason that the plaintiffs have sought the orders prayed in the plaint.

3. Upon being served, the 2nd defendant entered appearance and filed a defence dated 12th June 2014 in which he denied erecting any building on the suit land. The 2nd Defendant pleaded that he has built on land owned by the Wakf of Soud Bin Ali Bashir and that he pays rent for the same land under the regime of House without land. The 2nd Defendant avers that his house is built on **PLOT NO.413/VI/MN** and was built in the year 1998. The 2nd defendant prayed for the dismissal of the suit with costs.

4. The 1st defendant also entered appearance and filed a statement of defence. In his defence, the 1st defendant pleaded that he has no interest on Plaintiffs plot and that his house has not encroached or trespassed on the same. He avers that on or about 17th July 2002, he lawfully purchased a house without land on **PLOT NO.393/VI/MN** in Chagamwe at a consideration of Kshs.900,000 from one Omar Ngulu Mohamed and has since enjoyed exclusive possession thereof without any interference. He has further pleaded that he has since commissioned a licensed surveyor who, according to him, established that **PLOT NO.393/VI/MN** does not encroach on **PLOT NO.3517**. The 1st defendant prayed that the plaintiffs' suit against him be dismissed with costs. However, on 22nd May, 2017, the 1st defendant filed an application to have his name struck out from the suit. The application by the 1st defendant was allowed and therefore his name was struck

out from the suit on 12th October, 2017.

5. Upon being served, the 3rd defendant did not enter appearance nor filed defence within the stipulated time or act all. On 1st September, 2014 the plaintiffs requested for judgment and interlocutory judgment was entered for the plaintiffs against the 3rd defendant on 8th September, 2014.

6. Pleadings having been closed, this matter was fixed for hearing on 15th May, 2018 when only the plaintiffs attended court. Neither the 2nd defendant nor his advocate attended court during the hearing on 15th May, 2018 despite being duly served.

7. PW1, Mathius Masiva Ahaza testified that he is a pastor with Magongo Pentecostal Assembly of God, Mombasa and that the 2nd and 3rd Plaintiffs are Board members of the said church. PW1 testified that in the year 2011, Magongo Pentecostal Assemblies of God purchased **PLOT NO.3517 (ORIGINAL NUMBER 3490/29/SECTION VI MAINLAND NORTH.)** He produced the sale agreement dated 10th March, 2011, as P.exhibit 1. PW1 was one of the signatories to the said agreement. The vendor gave the plaintiffs the certificate of title which was duly transferred into the name of Magongo Pentecostal Assemblies of God. The transfer and the certificate of title in the name of the church were produced as p.exhibit 2 and 3 respectively.

8. When the plaintiffs wanted to develop the plot, they found out that some neighbours had encroached on the said plot. Among the people who had encroached on the Plaintiffs' land were the defendants. The Plaintiffs sought the services of a surveyor who confirmed that the 2nd defendant's house had encroached on the suit plot. It is then that the plaintiffs sought legal assistance and their lawyers wrote a demand letter to the defendants. The demand letter and the surveyor's report were produced as p.exhibits 4 and 5 respectively. PW1 also produced photographs (p.exhibit 6) showing the encroachment. The defendants did not heed the plaintiffs' demand, hence the filing of this suit.

9. The plaintiff's closed their case after the evidence of PW1. The 2nd and 3rd Defendants were not present and did not avail any evidence to rebut that of the plaintiff. Even if the 3rd defendant was present, I would have declined his adducing evidence as he has no defence on record and interlocutory judgment had been entered against him. The evidence on record is therefore only that of the plaintiffs.

10. I have considered the pleadings and the evidence of the plaintiffs. The same is uncontroverted. In their submissions, M/s Asige Keverenge and Anyanyazwa Advocates for the plaintiffs urged the court to enter judgment against the 2nd and 3rd defendants jointly and severally as prayed in the amended plaint dated 25th June 2014.

11. In my view, there is no doubt that the suit land is registered in the name of Magongo Pentecostal Assemblies of God of whom the plaintiffs are trustees. The copy of the certificate of title for the suit land was produced and the same speaks for itself. Although the 2nd defendant alleged that he has not encroached on the suit land, the surveyor's report (p.exhibit 5) is adequate evidence that contrary to his averments, he has encroached on the suit plot, especially since the 2nd defendant did not produce any evidence in rebuttal. The defendant has not called any evidence to controvert the evidence by the plaintiffs. In any event, the eviction order is being sought for **THE LAND PARCEL NO.SUB-DIVISION NO.3517 (ORIGINAL NO.3490/29 SECTION VI MAINLAND NORTH,)** and the 2nd defendant then ought not to worry if he is not resident on the said parcel of land.

12. By dint of being the trustees of Magongo Pentecostal Assemblies of God, which is the registered proprietor of the suit land, the plaintiffs are vested with all proprietary rights over the suit land including the right of exclusive possession. The rights are set out in Section 25 of the Land Registration Act which provides as follows:

25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject : -

a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

13. There is no defence and no counter-claim filed by the 3rd defendant to demonstrate that he has any rights over the suit land. Similarly, there is no counter-claim or evidence adduced by the 2nd defendant to demonstrate that he has any rights over the suit land. In the circumstances I have no doubt that the plaintiffs are entitled to have the 2nd and 3rd defendants evicted from the suit land.

14. On the prayer for damages for trespass, no evidence whatsoever was led on what amount the plaintiffs would be entitled to. The plaintiffs are however entitled to general damages for the tort of trespass. The amount of general damages is subject to the discretion of the court in which factors such as the duration of time that the defendants have been in occupation may be considered. The plaintiffs have pleaded that the defendants have been in occupation of the suit property since the year 2011. That is about three years before the suit was filed. I have therefore exercised my discretion and award the plaintiffs a nominal sum of Kshs.300,000/= as general damages.

15. I accordingly enter judgment for the plaintiffs against the 2nd and 3rd Defendants and make the following orders.

1) That the 2nd and 3rd defendants shall within 45 days of service upon them by the plaintiffs of the orders herein, vacate the premises known as PLOT NO.SUB-DIVISION NO.3517 (ORIGINAL NO.3490/29 SECTION VI MAINLAND NORTH). In default, eviction orders shall issue permitting the plaintiffs to evict the 2nd and 3rd defendant from the suit premises.

2) A permanent injunction is hereby issued to restraining the 2nd and 3rd defendants, their agents and or servants from trespassing into the plaintiffs' plots known as SUB-DIVISION NO.3517 (ORIGINAL NO.3490/29 SECTION VI MAINLAND NORTH).

3) I grant the plaintiffs general damages for trespass against the 2nd and 3rd defendants jointly and severally in the sum of Kshs.300,000/=

4) The plaintiffs shall have the costs of this suit.

DATED, DELIVERED and SIGNED at MOMBASA this 16TH day of October, 2018

C. YANO

JUDGE