



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC LAND CASE NO. 114 OF 2014

1. APOLLO MUIINDE

2. LUCY W. PETER

3. RACHEL W. MUTUNGA.....PLAINTIFFS

-VERSUS-

ERNEST OYAYA OKEMBA.....DEFENDANT

JUDGEMENT

1. The three (3) plaintiffs brought this suit vide their plaint dated 19th May 2014 against the defendant seeking judgement in the following terms:

a) A declaration that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the property known as Plot No. 539, Miritini and the defendant accordingly a trespasser thereon.

b) A mandatory injunction compelling the defendant to demolish and/or remove the structures erected on the property known as Plot No. 539, Miritini and to deliver up vacant possession of the suit property to the plaintiffs.

c) A permanent injunction restraining the defendant whether by himself, his servants, authorized agents, employees or through anyone deriving title through him or otherwise howsoever from continuing to construct, erect, excavate and/or build structures on the property known as Plot No. 539, Miritini and/or from disposing of, selling, transferring, leasing, charging or in any manner whatsoever dealing with the said property.

d) General damages for trespass.

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

g) Any such other or further relief as this Honourable Court may deem appropriate.

2. The defendant was served with summons to enter appearance on 27th May 2014 at his place of work described by the process server as Abukuse Properties situate on the 1st floor of Uganda Properties

Holding limited building along Moi Avenue Mombasa. The defendant did not enter appearance or file any defence within the prescribed time. The plaintiff thus requested for interlocutory judgement which was endorsed by the deputy registrar of this Court subject to the matter proceeding on formal proof. Subsequently the matter was listed for formal proof on 22nd June 2016.

3. Ms Rachel Wanjiru Mutunga testified on behalf of the plaintiffs. She said that she works as a legal assistant at Apollo Muinde & Co Advocates. She signed a witness statement on 19.5.2014 which was filed in Court on 21.5.2014. She produced the following documents in support of the plaintiffs' case:

i. Sale agreement for plot No. 539 dated 20th June 2008.

ii. Certificate of transfer issued to them by the council.

iii. Payment receipts for rates for the period 1996 – 2013.

iv. Photographs showing encroachment dated 20.5.14

v. Demand letter dated 10.4.2014.

4. Ms Rachel continued that the defendant has not complied with the orders issued by the Court as he is still on the land. She prayed for the Court to grant their orders as prayed in the plaint. This evidence marked the close of the plaintiffs' case.

5. I have perused the documents annexed in support of the plaintiff's case. They have shown that they purchased the suit plot from Allan Njoroge on 20th June 2008 as per the sale agreement. Mr Njoroge executed a transfer in their favour on the same date. The plaintiffs also produced photographs dated 20th May 2014 showing some iron sheets fence and a house in the background. They also did issue a demand letter dated 10th April 2014 before filing this suit asking the defendant to deliver up vacant possession.

6. In paragraph 5 of the plaint, the plaintiffs pleaded that in the month of May 2012, the defendant wrongfully entered into the suit premises and erected and continues to erect permanent and semi – permanent structures thereon. This action of trespassing by the defendant caused the plaintiffs loss as they have been deprived the use and enjoyment of the suit land. Consequently they urged the Court to issue them with a mandatory order of injunction compelling the defendant to demolish and remove his said structures from the land and to deliver up vacant possession of the suit property.

7. Having considered the pleadings and the evidence, I am satisfied that the plaintiffs have proved that they own plot No 539 Miritini having purchased the same. Therefore they are entitled to exclusive use and enjoyment of the property as there is no evidence adduced to contradict the position of the plaintiffs. What I am not satisfied with is proof having been made that the structures shown in the photograph produced are on plot No 539 Miritini and that they are owned by the defendant.

8. I will therefore enter judgement in favour of the plaintiffs in terms of prayer (a) & (c) of the plaint. I will however enter a conditional judgement in terms of prayer (b) on terms that the decree and or order be pasted on the doors of the said structures to give the occupants and or the defendant liberty to show cause within 30 days of the order being pasted on the premises why the structures should not be demolished at their expense. In default of any cause being shown within the period stated then the plaintiffs be at liberty to demolish the said structures and recover any such costs of demolition from the defendant and or occupant.

9. The plaintiffs also prayed for general damages for trespass. No proof of loss was made. The plaintiffs learnt of the acts of trespass in 2012 but waited for 2 years to bring this suit. Secondly they have not demonstrated what they intended to use the premises for immediately but were stopped by the acts of the defendant to be entitled to compensation. This prayer is not proved and is hereby dismissed. Lastly since the suit was not defended, the plaintiffs shall bear the costs of suit in any event.

Dated, signed and delivered at Mombasa this 12th day of April 2017

A. OMOLLO

JUDGE