



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 64 OF 2013

KARIM AMIRALI ABBANY.....PLAINTIFF

VERSUS

IVAN R.....1ST DEFENDANT

FRANCIS KADENGE KENGA.....2ND DEFENDANT

JUDGMENT

1. By a Plaint filed herein on 11th April 2013, the Plaintiff avers that he is the registered owner of all that property known as Malindi Plot No 9831(“the suit property”) situated along Casuarina road opposite Crocodile Farm while the defendants are the registered owners of Malindi Plot No. 9833 bordering the Plaintiff’s property. The Plaintiff states that in or about the year 2011, he wanted to demarcate and develop his property as a result whereof he instructed a Surveyor to carry out the work.

2. It is the Plaintiff’s case that upon completion of the survey, he discovered that the Defendants had encroached upon and took possession of a portion of his property and they have since wrongfully remained in possession thereof. As a result of the defendants acts aforesaid, the Plaintiffs states that he has suffered loss and damage. Consequently the Plaintiff prays for a number of injunctive reliefs against the Defendants.

3. In their Written Statement of Defence, the Defendants aver that while the Plaintiff only purchased the land in issue in the year 2010, the Defendants have had exclusive, peaceful and uninterrupted possession and use of the premises from 6/9/2002. The defendants who are husband and wife admit that they are the Plaintiffs neighbours and the registered owners of Plot No. 9833. It is the Defendants case that the disputed section measuring about 14.49 M x 38 M has not been taken to be part of Plot No. 9831 for a very long time and that the documented boundaries of the plots do not correlate with the situation on the ground. It is therefore their case that the plaintiff ought to have carried out a survey before they purchased the property otherwise the plaintiff should be deemed to have accepted the property as it was when it was shown to him and he bought it “as it was”. They further deny that the plaintiff served them with any demand and/or notice prior to the filing of this suit and urge the court to condemn the Plaintiff to meet the costs of this suit.

The Plaintiff Case

4. Both the plaintiff and the Defendants called Oral evidence in support of their respective positions.

5. The Plaintiff Karim Amirali Abbany testified as PW1. He testified that the Defendants are his neighbours although he had never met them before. He stated that the Defendants have substantially encroached on his land-Plot No. 9831. He states that he was shown the land when he bought it and he then took possession. When he decided to develop it, he discovered some encroachment of about 560m². He engaged a surveyor who prepared a report. PW1 produced the bundle of documents filed in court on 6/3/2015 as Plaintiff Exhibit 1.

6. Upon cross -examination PW1 stated that he was shown the boundaries and he accepted and bought the land. He stated that the place was bush and he never saw the defendants' house when he bought the land. He therefore could not tell if the defendants house had been there for 10 years. He was not shown the beacons but was only shown a rough area of the land.

7. PW2- Barthlomew Mwanyunyu a land surveyor testified that the Plaintiff instructed him to prepare a Survey Report to enable him to know the extent of the boundary of Plot No. 9831. It was his finding in the Report which he produced as an exhibit that there was an encroachment by Plot No. 9833 upon 9831. It was his case that some of the beacons were inside Plot No. 9833 which was fenced off and were therefore inaccessible. Plot No. 9832 also encroached by a small portion into the suit property.

8. On cross- examination, PW2 stated that he did the survey in November 2013. The Deed Plan for the suitland is dated 23/2/1995. He stated that there was a Makuti Construction in Plot No. 9833 but he could not tell whether the development had been done in 2010. He did not find out if Plot No. 9833 was curved from 9822.

The Defence Case

9. The 1st Defendant Ivanar Renna testified on behalf of the Defence. She testified that she is the registered owner of Plot No 9833, Malindi. The Plot was registered in her name on 9/9/2004 and she has been residing thereon since. She testified that she bought the property from a company known as Hotel Buildings Ltd through its Director, one Marco Vancini. She further stated that the fence, building and gate were already there when she bought the land and she saw the map on the Indenture later after she signed the Sale Agreement. She stated that she was not aware that the property had encroached on any other property and that it was the said Marco Vancini who could explain the exact position.

10. On cross-examination, she agreed that though she was registered in 2004, the Registration Stamp showed the registration was done in 2008. Upon being shown the Indenture and Agreement of Sale, she testified that in 1994, the registered owner of the land was Hotel Buildings Ltd. She further testified that even though it is Marco Vancini who signed the indenture, she did not know if the said Marco had a power of attorney to sell the property on behalf of Hotel Buildings Ltd. It was further her testimony that she had constructed something on the garden portion of her property after being allowed to do so by the said Marco. She however contended that the rooms she constructed were on her portion of the land. She further told the court that her husband, the 2nd Defendant herein runs a Guest House in the portion that she constructed. It was her case that she only dealt with Marco Vancini and did not have much to do with Hotel Buildings Ltd.

Analysis of the Evidence

11. Both parties filed Written Submissions. I have considered them. To prove his case, the Plaintiff has relied on a Survey Report dated 25th November 2013. The Report prepared and produced by PW2 in court reveals that a wall demarcating the boundary of Plot No. 9833 (owned by the Defendants) was encroaching on Plot No. 9831 (Owned by the Plaintiffs) by 5 metres towards the North. The wall demarcating the boundary of Plot No. 9832 also encroaches upon the Plaintiffs Plot by about 0.0078 ha.

12. I did not understand the defendants to be disputing the fact that there might have been distortions of the original boundaries and therefore encroachment of one property upon the other. It was their case that whatever the measurements were, the boundaries, fences and beacons had been placed by the previous owners of the property who had at one time consolidated them and the boundaries and fences remain so

to-date. In the Witness Statement recorded by DW1 Ivana Renna dated 28th August 2015 and filed herein, she states at paragraph 5:-

“I further state that the Plaintiff’s house and fence around it like in the case of the Defendant’s property were erected many years ago by the people who owned the land. By the time the Plaintiff bought the empty property from Hotel Building Ltd, in 2010, the said company which also previously owned the land upon which the Plaintiff’s house is erected held both properties in the manner they presently are situated and even at the time the Plaintiff was shown the boundaries of his land, he was shown the boundaries that are presently on the ground.”

13. From the evidence placed before this court the Plaintiff bought his parcel of land from Messrs Hotel Buildings Ltd on 26th April 2010. In his testimony in Court the Plaintiff states that at the time of the purchase, he was shown the boundaries of the land he was buying by the sellers and that he accepted and bought the land. I have looked at the Sale Agreement between the Plaintiff and the said Hotel Buildings Ltd (PEX. 3). It reads in the relevant part as follows:-

“AND WHEREAS the Vendor has caused the said pieces or parcels of land to be consolidated into one piece or parcel of land known as Portion Number 9822 and the said parcel of land has been sub-divided into various portions;

AND WHEREAS the vendor has agreed with the purchaser for the sale to the purchaser of one of the said portions of land in the manner hereinafter appearing and hereinafter intended to be conveyed;

NOW THIS INDENTURES WITNESSES that in pursuance of the said agreement and IN CONSIDERATION of the sum of Kshs 1,000,000/= now paid to the Vendor by the Purchaser... the Vendor as the BENEFICIAL OWNER HEREBY GRANTS AND CONVEYS unto the Purchaser all its right, title and interest in ALL THAT piece or parcel of land above better described as Portion No. 9831(Original No. 9822/10) Malindi more particularly delineated and described on Deed Plan No. 193409 attached thereto TO HOLD the same unto the use of the purchasers for an estate in fee simple free from all encumbrances.

14. Arising from the foregoing, it is clear to me that the previous owners of the properties had earlier on consolidated them before sub-dividing them into the portions which were shown to the Plaintiff when he bought his portion on 26th April 2010. In 2011 when the Plaintiff wanted to develop his land, he realised that his neighbours in Plot No. 9832 and 9833 occupied what should have been part of his plot as per the measurements contained in the documents that had been passed to him by the Vendor.

15. I did not hear the Plaintiff to be saying that the Defendants herein encroached and/or trespassed upon his land after he bought the same in April 2010. All he states is that in 2011 when he wanted to develop the land, he carried out a survey which revealed that the two neighbouring plots had encroached onto his land. No explanation was however forthcoming why the owner of plot No 9832 was not sued for similarly encroaching onto the Plaintiffs land. In my view the Plaintiff knew the acreage of the land he was purchasing and ought to have carried out due diligence before he purchased the land. The Defendants had bought their portions from the same Hotel Buildings Ltd almost 10 years earlier and were not involved in the sub-divisions. Indeed, in her recorded statement filed in court on 1st September 2015, DW1 gives a clear analogy of the history of the suitland which clearly indicates that even the predecessors in title to the Plaintiff had taken possession thereof as it is and that the existing sub-division and fences had been put there by the previous owners. Having found that the size of the plot he was sold was not the correct one, I think the Plaintiff was duly bound to take legal action against the previous owners who sold him the property and not the Defendants.

16. It is clear to me that the said Hotel Buildings Ltd and those who preceded the parties herein in title may have misled everyone, including both parties in this suit to believe that the fences existing on the suitland were erected in accordance with the sub-divisions done on the property. That in my view is the reason why in the Sale Agreement cited herein above between the Plaintiff and the said Hotel Buildings

Ltd, there was very little emphasis placed on the size of the land being sold.

17. That being the case, I do not find merit in the Plaintiff's case. The same is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 27th day of July, 2017.

J. O. OLOLA

JUDGE