



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 163 OF 2016

DAKAWOU TRANSPORT LIMITED.....PLAINTIFF

VERSUS

- 1. KATANA KALUME NASSORO**
- 2. JOHN KALUME NASSORO**
- 3. KITSAO KALUME NASSORO**
- 4. GERALD CHENGO KATANA NASSORO**
- 5. KAHINDI KATANA NASSORO**
- 6. THOMAS KAHINDI KATANA NASSORO**
- 7. KATUNDA DAMA KALUME**
- 8. NEMA KAHINDI KATANA NASSORO**
- 9. MATATA MWAKAMSHA NASSORO.....DEFENDANTS**

JUDGMENT

1. By a Plaint dated 22nd June 2016, the Plaintiff moved to Court on 27th June 2016 seeking for a judgment to be entered against the Defendants jointly and severally for:-

(a) A declaration that the Plaintiff is the lawful and absolute owner of the parcels of land known as Subdivision No. 5317/III/MN CR. 47814 and subdivision No. 5511/III/MN CR. 47138 both situate at Vipingo within Kilifi County.

(b) An order of eviction of the Defendants and/or their servants, workmen, agents, heirs, personal representatives or otherwise from the said parcels of land known as Sub-division No. 5317/III/MN CR. 47814 and Subdivision No 5511/III/MN CR. 47138 both situate at Vipingo within Kilifi County.

(c) A mandatory injunction compelling the defendants to remove the structures extending into the Plaintiff's parcel of land known as Subdivision No. 5317/III/MN CR. 47814 and

Subdivision No 5511/III/MN CR. 47138 both situate at Vipingo within Kilifi County;

(d) An Order of permanent injunction do issue to restrain the Defendants by themselves, their servants, workmen, agents, heirs, personal representatives, or otherwise howsoever from dealing with, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon or trespassing into or from in any way whatsoever and howsoever interfering with the Plaintiff's peaceful possession and enjoyment of the parcels of land known as Sub-division No. 5317/III/MN CR. 47814/III/MN and Subdivision No. 5511/III/MN CR. 47138 both situate at Vipingo within Kilifi County.

(e) Costs of this suit and mesne profits

(f) Any other relief that the Court deems fit to grant.

2. From an Affidavit of Service sworn by one Alex Philip Nzuki, a Court Process Server on 7th September 2016 and filed in Court on 6th October 2016, it is apparent that all the Defendants were served with the Plaint and Summons to Enter Appearance on 19th August 2016 at the office of the Assistant Chief Vipingo Kiyuwitu Sub location after the Area Assistant Chief Mr. Runya Mwalimu Runya identified each and every one of them to the Process Server.

3. As at the time this suit was set down for hearing, the Defendants were yet to enter appearance and/or file any documents in their defence even though it is again apparent that they were served with a hearing notice for pre-trial directions and thereafter to attend the hearing of this case. Accordingly on 8th March 2017, this suit proceeded for hearing in the absence of the Defendants.

The Plaintiff's Case

4. The Plaintiff called one witness in support of its case. PW1-Omar Ali Rassam testified that he is a businessman and the previous owner of suit property, namely Subdivision No 5317/III/MN CR 47814 and Subdivision No 5511/III/MN CR 47138 both situate at Vipingo within Kilifi County. He testified that he sold and transferred the two properties to the Plaintiff Company vide a Sale Agreement between himself and the Plaintiff dated 17th April 2015.

5. It was PW1's testimony that the Defendants have deliberately encroached and continued to be in occupation, possession and trespass on the suit property thereby depriving the Plaintiffs of the profits thereof and/or occupation therein. Arising from the acts of the Defendants, the Plaintiff has been unable to take full possession of the properties owing to constant disruptions from the defendants who are purporting to lay claim on part of the property without legal justification.

6. PW1 further testified that the defendants have encroached on the two plots and built some structures. In an attempt to resolve the dispute, PW1 and the Plaintiff's representative initially took the matter to the Area Chief, the District Officer and other Administration Officials but the issue was never resolved. It was his case that when he sold the land to the Plaintiff, the Defendants were not on the land. The Plaintiff has since the date of the sale not taken possession due to the defendants' encroachment.

7. PW1 concluded that unless the Defendants are restrained and evicted from sections of the suit property, they are most likely going to continue with their trespass, occupation, possession, erection of structures and generally interfering with the said property to the detriment of the Plaintiff who is the legal and rightful owner thereof.

The Evidence

8. This suit proceeded for hearing by way of formal proof after the Defendants failed to enter appearance and/or to file any documents despite service of summons and a hearing notice. From the evidence presented in this Court two issues arose for my consideration. The first issue is whether the Plaintiff has

established proprietary interest in the suit property and secondly if so, whether the Plaintiff is entitled to the Prayers sought.

9. For a start, the Plaintiff has produced a Sale Agreement showing that it purchased the suit property from its witness PW1. Indeed PW1 produced two certificates of Title showing that the two parcels of land were initially registered in his name. In addition, he produced two transfers clearly indicating that the two titles were both transferred by himself to the Plaintiff Company on 22nd May 2015. It is therefore right to summarize that the Plaintiff has established that it has proprietary interest over the suit property. The proprietary interest in both parcels of land were duly registered on 22nd May 2015. By dint of the registration, the Plaintiffs acquired absolute interest thereon and the defendants' continued occupation thereof even after the Plaintiffs asked them to leave is without basis and amounts to an act of trespass.

10. The Defendants did not challenge the Plaintiffs pleadings. PW1's testimony in Court also remains uncontroverted. I have no reason to doubt the said testimony. I must state however that even though the Plaintiff is claiming for mesne profits, no evidence was placed before me to show the use to which the suit property was put and how much money the Defendants got from the Suitland. In the circumstances, I am unable to assess the amount of damages available as mesne profits.

11. In light of the foregoing, I allow the Plaintiff's case as prayed in the plaint same for Prayer No. (e) in regard to mesne profits.

12. For the avoidance of doubt, the Plaintiff shall have the costs of this suit.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J. O. OLOLA

JUDGE