



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 149 OF 2006

SONGORO KITENGE MTIMI

HALIMA JUMA OMAR.....PLAINTIFFS

-VERSUS-

GEORGE NJOROGE

NJUGU MWINYKIAYA ABDALA

OMAR MWABEGUME

LILIAN OGONJI

ALI NYAE.....DEFENDANTS

JUDGEMENT

1. Vide an amended plaint dated 4th May 2007, the two plaintiffs moved the Court seeking the following reliefs:

(a) A permanent injunction to restrain the Defendants by themselves, their servants or agents or otherwise howsoever from erecting or constructing and continuing to erect or construct any structures and from remaining or continuing in occupation of the plaintiffs' land.

(b) A declaration that the Defendants are trespassers.

(c) Damages for trespass.

(d) Demolish the Defendants' structures in the suit premises and hand over vacant possession

(e) Mesne profits at Kshs. 1,000/= per defendant per month.

(f) Costs of this suit.

(g) Any other or further relief that this Honourable Court may deem fit and just to grant.

2. The suit was defended. The 1st defendant filed a defence and counter – claim on 2.7.07. The 2nd – 5th defendants filed an amended joint statement of defence dated 30th May 2007. The 1st defendant in the counter-claim sought the relief that:

a) The plaintiffs' suit be dismissed with costs.

b) Alternatively, the plaintiffs do compensate the 1st defendant for the house situate on the portion of the suit property.

c) Costs of and incidental to the 1st defendant's counter-claim.

3. In compliance with Order 11, the plaintiffs and the 1st defendant filed documents as per the list in the file. The plaintiffs' list consisted of the following:

1. Minutes for Msambweni Divisional Land Control Board dated 20/11/2002.
2. Letter of consent.
3. Agreement of sale in Kiswahili dated 10/12/2002.
4. Transfer of Land.
5. Title Deed Number Kwale/Ukunda/3614.
6. Certificate of official search dated 22nd December, 2002.
7. The Registered Land Act Cap 300.
8. Letter to the Chairman, Land Dispute Tribunal dated 31st December, 2005.
9. Letter from M/s. Asige Keverenge & Anyanzwa Advocates dated 14th February, 2006.
10. Kalamazoo for plot No. Kwale/Ukunda/3614.
11. Property Rates Payment Request for 2009 dated 3/8/2009
12. Payment for Clearance Certificate dated 3/8/2009.
13. Clearance Certificate dated 3/8/2009.
14. Boundary dispute conducted by Land Registrar Dated 22nd July, 2008.
15. Demand Notice for rates dated 12th January, 2011.
16. Payment of rates dated 8th March, 2011.

The first defendant's documents comprised of the following:

1. SALE Agreement between Rehema Wayua and the 1st Defendant.
2. Document dated 8th July, 1998.
3. Judgment in land case No. 21 of 2008 at Kwale.
4. Msambweni Land dispute No. 49 of 2008.
5. Notice of Appeal No. LND/TA/58 of 2008.
6. Letter dated 13th August, 2010 to the Principal Magistrate, Kwale.
7. Letter dated 30th September, 2010 from F. M. Mwawasi & Co. Advocates to the Chairman, Provincial Land Disputes Appeals Tribunal, Coast Province.
8. Ruling in Land case No. 21 of 2008

4. Both parties then proceeded to adduce oral evidence. The plaintiffs' case is that they purchased the suit land Kwale/Ukunda/3614 from Mwanakombo Hamisi in 2002 for a sum of Ksh 60000/=. They paid the whole sum of the purchase price and had the title documents registered in their names. He produced copies of Land Control Board Consent, transfer form and the title deed to support their claim. The plaintiffs aver that at the time they were buying the land, the same was vacant save for some temporary structures/stalls which were being used to sell groceries and the sellers would leave in the evening.

5. The 1st plaintiff stated further that when he attempted to dig a trench on the land, some of the defendants herein tried to stop him. He reported to the Land Registrar who visited the disputed plot and made a report (produced in evidence). That the land Registrar confirmed the land was theirs and advised the defendants to leave. That the defendants have refused to leave and they are also not paying them any rent.

He therefore filed this suit seeking the reliefs contained in the plaint.

6. The 1st defendant made a statement dated 4th May 2012 and filed in Court on 6th June 2012. In the statement, the 1st defendant said that on May 1998 he bought a kiosk from one Rehema Wayua who had leased a portion of the land in dispute paying a monthly ground rent of Kshs 100= . That the original plot No 765 belonged to two Sisters Mwanakombo Hamisi and Asha. This plot was sub-divided and he later found that his kiosk was now located on the plaintiffs land. When he heard of the dispute, he went to see Mwanakombo who told him that she had only sold a portion of the land where the plaintiffs' house is. He therefore denied that his kiosk is on the plaintiffs' land. That the plaintiffs' plot should be about 16 by 25 feet similar to the size occupied each of the defendants. That the plaintiffs should have sued Mwanakombo not him.

7. The 2nd and 3rd defendants did not present any evidence before the Court. The 4th Defendant, Lilian Ogonji Naum testified as DW 2. She said that she has lived in Ukunda since 1978. That she knew the plaintiffs when they sent people who were digging a well in front of her shop. Her plot has 14 rooms. That her husband first bought the plot with six (6) rooms in December 1980 then he added more rooms. She also went to complain to Mwanakombo. Mwanakombo said she had only sold to the plaintiffs a portion of the suit land to store charcoal. That it is wrong if the plaintiffs used the papers to get title deed for the whole land. DW 2 states that the plaintiffs obtained the title deed through fraud, which title now includes her portion. She asked the Court to give her her plot as she uses this income to sustain herself.

8. The 5th defendant said he is called Nyae Nyawa Kibunda and not Ali Nyae as stated in the pleadings. He adopted as his evidence his statement filed in Court on 29th May 2012. I could not trace this statement in the Court file. In cross – examination, he stated that he bought his house without land from Odhiambo. He was paying ground rent to Mwanakombo. That the plaintiffs came in 2002 and bought a plot measuring 17 by 12 feet at Ksh 60,000. DW 3 said the document between him and Odhiambo is also in the file. Since these defendants did not file any documents so I could not trace the document DW 3 was referring to. The defendants closed their case on 17th May 2017.

9. The advocates for the parties herein agreed to exchange written submissions within 14 days each. However as at 27.9.17 when the matter came up for mention a second time, only the plaintiffs had filed their submissions. And upto the time of writing this judgement, the defendants had not filed any submissions. I proceed to write the judgement based on the pleadings and the evidence adduced/produced and on record.

10. From the evidence, it is clear the 1st, 4th and 5th defendants are tenants without land as none of them are claiming purchasers rights. Other than the 1st defendant, none produced any evidence of how and when they acquired the portions of the land they are occupying. The 1st defendant produced the agreement between him and Rehema Wayua and between Rehema Wayua and Saidi Jumaa Mamba dated 8th July 1998. The agreement was in respect of plot Kwale/Ukunda/765 which was later subdivided to create the suit title. The agreements did not provide for how long it was to run or any termination clause.

11. The 1st defendant averred that the plaintiffs were sued before the Msambweni Land Disputes Tribunal which is true and the Tribunal found in favour of the claimant Japatan Hamisi Abdalla son to Mwanakombo Hamisi. However the decision of the tribunal was subsequently quashed by the High Court in Misc. Civil Application No 48 of 2005. The person who sold to the plaintiffs the land was Mwanakombo Hamisi. Both DW 1 & DW 3 confirmed that they were paying ground rent to this lady (Mwanakombo). They did not however join her in these proceedings as a 3rd party. The claimant before the Land Disputes Tribunal was also a witness to the sale of the land.

12. There has been no evidence led that Mwanakombo though made aware that the plaintiffs obtained title deed for the entire land upon receiving complaints from these defendants that she has sued these plaintiffs for taking more than what was sold to them. The defendants were not parties to the agreement of sale dated 1st December 2002. They have admitted they are not paying rent to the plaintiffs but they still continue to use the land. The defendants did not also produce any evidence (oral or documents) that they shall continue to pay any ground rent to Mwanakombo Hamisi after learning that the land had been sold to the plaintiffs.

13. In effect, the plaintiffs' title stands unchallenged since there is no evidence proffered to contradict that the agreement between Mwanakombo Hamisi and themselves was for the whole parcel Kwale/Ukunda/3614. The said Mwanakombo appeared before the Land Board and obtained the requisite consent and transferred the suit property Kwale/Ukunda/3614 free from all encumbrances. The defendants' rights if any under the house without land tenancy rests with the person to whom they were paying rent and who sold the land despite their presence on the land. That person is not the plaintiffs.

14. Consequently I find no merit in the defences filed on behalf of all the defendants and no merit in the counter-claim made by the 1st defendant as against the plaintiffs. I do therefore allow the plaintiffs suit in terms of prayers (a), (b) (d) and (f) of the plaint. I will not grant a prayer for damages for trespass because the plaintiffs admitted seeing the stalls operating before purchasing the land. Similarly I do not also grant prayer (e) for mesne profits because no tenancy relationship existed between the plaintiffs and the defendants. The defendants are ordered to give vacant possession of the suit premises within 45 days of this date. In default, the plaintiffs are at liberty to demolish the structures on the suit land at the defendants' costs and eviction to issue to the defendants and or their servants/agents or nominees using lawful means. Costs of the suit awarded to the plaintiffs.

Date, signed and delivered at Mombasa this 10th November 2017.

A. OMOLLO

JUDGE