



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 58 OF 2011

DANIEL TOKALI MWAMUYE.....PLAINTIFF

-VERSUS-

1. ABDI HASSAN GURE

2. ADEN HASSAN YUSUF

3. ISMAIL MOHAMED

4. MAARIM MOHAMED ALI MUSE

5. MOHAMED OSMAN GEDI

6. HUSSEIN IBRAHIM

7. RASHID NASSORO

8. ALI ABDI ISAL.....DEFENDANTS

JUDGEMENT

1. This suit brought by the plaintiff vide his plaint dated 18th March 2011 wherein he sought judgement to be entered against the defendants jointly and severally for:

(a) A permanent injunction be issued restraining the Defendants/Respondents by themselves, their agents, employees, servants, and/or assigns either acting by themselves or their agents, assigns, employees, servants and/or in any other manner whatsoever from constructing, developing, damaging, further alienating or selling, letting or in any other manner howsoever interfering with the suit property, Plot/Sub-division No. 1655/III/MN and a declaration that the Defendants are illegally and/or unlawfully occupying the Plaintiff's land to wit, Plot/Sub-division No. 1655/III/MN situated at Mtwapa Kilifi District.

(b) An order directing the Defendants to forthwith hand over vacant possession of the suit property, to wit, Plot/Sub-division No. 1655/III/MN situated at Mtwapa Kilifi District to the plaintiff and/or an eviction order against the Defendants from the parcel of land known as Plot/Sub-division No. 1655/III/MN situated at Mtwapa Kilifi District and General damages for trespass to land.

(c) Cost of and incidental to this suit.

2. The suit is defended vide the defence and the defendants counter – claimed in their statement dated 15th April 2011. In the counter – claim, the defendants have prayed that the plaintiff's suit be dismissed and judgement entered in their favour in the following terms:

(a) A declaration of the registration of the suit property in the plaintiff's name was fraudulently obtained.

(b) A declaration that the defendants are the rightful owners of all that parcel of land known as subdivision No. 1655/III/MN situated at Kikambala within the Kilifi County.

(c) An order directing the Registrar of title, pursuant to section 64 of the Registration of title Act Cap 281 and section 38 of

the Limitation of Actions Act Cap 22 to register sub division No. 1655/III/MN in the common names of the Defendants.

(d) Any other relief which the Court may deem just in the circumstance.

(d) Costs of this suit.

3. Both parties filed their witnesses' statements and documents. After pleadings closed they made oral evidence. The plaintiff was a sole witness while the defendants called two witnesses. The two witnesses gave evidence on their own behalf and on behalf of the 2nd, 3rd, 4th, 5th, 6th and 8th defendants. The 7th defendant is saved to have moved out and hence did not defend the suit.

4. In brief, the plaintiff stated his case that he is the registered owner of land No 1655 (Original 427) section III Mainland North. The Original plot 427 belonged to Sheilla Norton who later left it to her employees. She did this by writing a letter dated 16th November 1980 to the D. C and the lands office. That this plot was over 200 acres and the letter instructed the D. C to sub – divide the land and give each person a title. The plaintiff continued that the government came and surveyed the land. Thereafter they filed a case vide Mombasa H. C Misc. Civil No 208 of 2001 (O.S). He was No 22 in the list of applicants. The judgement was entered in their favour and titles were issued according to the judgement.

5. The witness continued that after he was issued with a title deed, he sued the defendants before the Kilifi Land Disputes Tribunal case No 2 of 2001. He produced the Tribunal's proceedings as Pex 1. That the Tribunal found the land is his. The defendants filed an appeal against this award but they have not pursued that appeal. The plaintiff stated further that the defendants also sued him in Misc. Civil application No 305 of 2004 (Pex 4) but which they later withdrew. He also produced an agreement dated 23.10.2003 as Pex 2 in which the defendants agreed to pay rent. That the defendants later refused to pay rent or leave the suit land. The plaintiff produced a copy of certificate of title to the suit land as Pex 3. He said the defendants are occupying an approximate area of $\frac{1}{2}$ - $\frac{3}{4}$ acres of the suit land. He continued further that initially the defendants comprised of mud/makuti houses but some are now cementing and replacing the makuti with iron sheets. The plaintiff produced the following documents:

(i) Judgement in O. S No 208 of 2001 – Pex 4

(ii) Decree & Order issued from O.S. 208 of 2001 as Pex 5 (a) & (b)

(iii) Judgement in Land Disputes Tribunal case No 2 of 2001 Pex 6

(iv) Order adopting Award of LTD as Pex 6a

(v) Memo of appeal in Land case No 20 of 2001 by the defendants as Pex 7

(vi) Defence in Civil case No 305 of 2004 as Pex 8

(vii) Agreement to pay rent (between 3rd defendant & plaintiff) dated 26.5.2006 as Pex 10

(viii) Letter from the chief asking defendants to move as Pex 11

(ix) Demand letter by the plaintiff to the defendants to vacate Pex 12.

He urged the Court to grant his prayers as per the plaint and award him general damages for trespass for living on his land without paying him rent and without his consent.

6. In cross – examination, the plaintiff conceded that the chief's letter said the defendants had been on the land for over 10 years as at 2001. That in 2001, the suit land was not in his name but he had a receipt to show the plot was his. That the judgement in case No 208 of 2001 was given in 2002. The plaintiff said he approached the chief when the defendants refused to move out. He also said he was given the land by Sheilla Norton in 1978. He sued the defendants before the Tribunal who also noted the defendants had lived on the land for over 10 years. That he has not appealed this award. But he filed this case because the defendants neither bought the land nor pay him rent. The witness said the defendants were not joined in O.S No 208 of 2001 although they were living on this land. That there are no proceedings still going on in No 208 of 2001 and he was not aware of any stay order issued therein. He denied deliberately registering himself as owner over the land with the defendants living there. He is aware there is built on the land a mosque and a madrassa before he filed this case.

7. The 1st defendant testified as DW 1. He said he is now retired but worked at Sun & Sand Hotel as a security guard in 1978. He went to the then area chief known as Ali Chiba requesting for a place to live with his children. They were seven of them. The chief granted them permission, they cleared the bush and put up their houses, built a mosque and also dug a well. That the chief informed them the land belonged to a white person who had left. At that time, the plaintiff was not living there but he came after 10 years. DW 1 said he did not know the plot number but the land was from the hotel upto the main road.

8. DW 1 continued that the plaintiff came and built next to them then said the plot was his. DW 1 stated that they told the plaintiff they will not leave because they had settled on the land. The plaintiff therefore sued them before the Kilifi Land Disputes Tribunal who allowed them to continue living on the land. That the defendants also sued him vide HCC 203 of 2001 but their file got lost. It is the DW 1's case that he got married while living on this land and now they are over 100 people living there but they have not gone outside the boundary. He said he heard the land was being sub-divided but he did not know who did so. He urged the Court to allow them to continue living there.

9. In cross – examination, DW 1 said he began working with Sun & Sand in 1978 and were housed by the hotel. He was born in Garissa and first came to Mombasa – Vipingo as a herdsboy. They did not get into the suit land but “karibu karibu”. That the land did not belong to the chief. DW 1 heard the land was given to the workers of the *Mzungu*. DW 1 conceded that Kilifi Land Disputes Tribunal said they buy the portions they are occupying but they have not bought. He denied reaching an agreement with the plaintiff to pay rent in the year 2006. He also denied being served with notice to vacate. He admitted they have once sued the plaintiff. He did not have any document he owns the suit land.

10. DW 2 is SALIM MWINYI BAKARI. He testified that he was born in 1926 in Kikambala. He stated that in 1978, the Somalis came and asked him for a place to build a mosque. He referred them to the chief. The chief showed them a place which was bushy with no one living there. DW 2 did not know when the plaintiff started living on the suit land. DW 2 also knew the owner of the land was a *Mzungu* who had left. That he heard the land was shared. He adopted his statement filed in Court.

11. In cross – examination, DW 2 said he lives in the place he was born in todate. That he lives about 3 – 4 kilometers away from the suit plot. That he also worked for Sheilla Norton. That the defendants previously went to worship at Kikambala before building the mosque on the suit plot. The persons went to see him were Ahmad and Abdi and he referred them to the clan elder who later referred them to Chief Ali Chiba. That the homes built were about 7. He has not seen the plaintiff on the suit land but he knows he has a share. In re – examination, he restated that he saw the defendants settle on the land in 1978. This was the close of the defendant’s case.

12. The advocates on record for the parties filed their respective submissions which I have read and taken note of. The certificate of title in respect of the suit property C. R No 36977 issued to the plaintiff gives the size of the land at 1.276 hectares or thereabouts and being sub – division No 1655 (Original No 427/47/III as delineated on land survey plan No 175380. It is dated 23rd October 2003. The plaintiff is listed as No 22 in O. S No 208 of 2001 and in the judgement (Pex 4) at page 2 and 3; the Judge noted that the plaintiffs had agreed on the portions each is to get as Sheilla intended and as set out the affidavits. The decree (Pex 5 (b)) decree read thus:

“(1) That the parcel of land measuring 173.9 acres known as subdivision No 427/III/MN be sub-divided into portions set out in the application and each given individual titles document”

(2) No order as to costs”

13. This decree has not been varied or set aside. The plaintiff acquired his title pursuant to this decree. The defendants averred that they obtained a stay order. None was shown to the Court. It is also noteworthy from their evidence that the stay order if at all one was obtained, it was obtained after the plaintiff had acquired his title. The file No 208 of 2001 was also produced as evidence in these proceedings. No reasonable cause was given why the application by the defendants has not been prosecuted to date. The plaintiff was not the only applicant in the O. S No 208 of 2001. The **summons was served via an advertisement in the Daily Nation newspaper of 20th October 2001.** The defendants even after learning about the existence of this suit have not been diligent in setting aside the decree therein. In my opinion, the allegations of fraud as against the plaintiff as pleaded in paragraph 8 of their defence was not proved. In any event when the suit was filed, it was in respect of the entire parcel of land. The sub-division was a resultant action to create the suit title.

14. Secondly the defendants raised the defence of adverse possession praying to be given the land because they have lived on it for over 38 years. It is only the first defendant who has specific about the time when he entered the suit land as 1978. Although giving evidence on behalf of his co-defendants, he only stated they came later but “*Karibu Karibu.*” The law provides that in a claim for adverse possession, the right accrues when the land is in possession of some person in whose favour the period of limitation can run (**section 13 (1) of Cap 22**). In this instance, when the defendants averred to have taken possession in 1978, the plaintiff was not the registered owner. The plaintiff acquired his title over the suit property upon the delivery of the judgement on 11th February 2002 in the originating suit.

15. Would it be correct to state that time was running against him when the rights had not accrued to him? I think not. However presuming the defendants had acquired this right and therefore the plaintiff acquired his title subject to the defendants’ right then this right was terminated when the plaintiff commenced proceedings before the Kilifi Land Disputes Tribunal in case No 2 of 2001 seeking to recover possession. Although the elders at the Tribunal acknowledged the defendants’ rights on the land, their finding was that the land belonged to the plaintiff. In their verdict made in February 2001 and adopted as an order of the Court on 3rd May 2001 (**Pex 6 & 6 (a)**), the Tribunal’s award read thus;

“(a) The defendants have occupied part of the disputed plot No 427/1655/MN/III and made some developments in the form of houses, mosque and madrassa. And since they have lived there for more than ten years they should not be evicted.

(b) The defendants have occupied part (¾ acre) of the suit plot while knowingly aware that it belongs to Daniel Tokali the plaintiff. The defendants should either pay rent for the said portion or buy it off at a price to be agreed by the two parties.”

16. The defendants appealed this decision but again seemed not to have pursued their appeal. Now they have raised a defence that this suit is res judicata. Though not clearly set out in their statement of defence, I shall take it to have been indirectly pleaded under **paragraph 5 of the defence**. The meaning of res judicata is given under **section 7** of the Civil Procedure Act. Does it lie? The 1st defendant in his evidence denied that they reached any agreement to pay rent to the plaintiff. He disowned the signature appearing in the agreement dated 26.5.2006 produced as **Pex 10**. The plaintiff had stated that the agreement was entered into between him and the 3rd defendant. The 3rd defendant did not adduce any evidence to deny the contents of that agreement. Further the DW 1 conceded in cross – examination that they have not paid for or bought portions of the suit land they occupy.

17. This Court takes judicial notice of the fact that the Land Disputes Tribunal has since been disbanded before the date of filing of this suit. Under the Land Disputes Tribunal Act (*repealed*) the Magistrate Courts role was merely to adopt the order and do nothing more. Consequently since both the Act under which the award was made and the body that made the award is no longer in existence, it would

defeat justice to invoke the doctrine of res judicata against a person who probably is executing a decree when default is occasioned by the party raising it. Probably this suit may have never been filed had the defendants complied with the terms of that award. They want to eat their cake and keep it at the same time. It is therefore my finding that this suit has not raised any issues which could have been dealt with before the Land Disputes tribunal since the cause of action is a consequential event to the decision already reached. Secondly even if I am wrong in that finding, the tribunal did not have jurisdiction to make an order for permanent injunction and or issue eviction. Therefore this suit fails the test in explanation 2 & 3 of section 7 and is not re judicata.

18. In conclusion, I find that the plaintiff has shown that he is entitled to enjoy and use his land because inspite of the defendants being aware that the portion they occupy belongs to the plaintiff (as was stated in paragraph **(b)** of the Kilifi Land Disputes Tribunal award) the defendants have failed to pay rent and or buy off the suit portions from the plaintiff. The plaintiff also prayed for general damages for trespass which I am satisfied has been proved by the evidence on record. Consequently, I therefore make the following orders:

(a) The 1st, 2nd, 3rd, 4th, 5th, 6th and 8th defendants to voluntarily surrender vacant possession of the suit plot 1655/427/III/MN within 90 days of the delivery of this judgement. In default the Plaintiff is at liberty to evict them using any lawful means.

(b) General damages is awarded assessed as mesne profits calculated based on the initial **monthly rent** stated to have been agreed of Kshs **300/=** for the year **2007** and taking inflation into account to be increased annually at the rate of **20% per anum** from **January 2008** payable by each of the defendants and to continue paying **until they surrender vacant possession and or pay for the plot** in the event an agreement to purchase is reached. At the date of delivery of this judgement, the court calculated that the amount due from **each** defendant covering upto the end of the year 2017 is **Kenya Shillings 116,209/=**

(c) In case of default with prayer b above, the plaintiff is at liberty to execute.

(d) Cost of the suit is also awarded to plaintiff

Dated, signed and delivered at Mombasa this 8th November 2017.

A. OMOLLO

JUDGE