



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 224 OF 2014

PAUSTINE AKUMU SEREJE (Suing as the Legal Representative of

the estate of the late – LUCAS VICTOR SEREJE – Deceased).....PLAINTIFF

-VERSUS-

IRENE WANJIRA KARUGU.....DEFENDANT

JUDGEMENT

1. The plaintiff filed her suit on 1st September 2014 against Irene Wangui. The defence entered appearance for Irene Wanjira Karugu on 26th September 2016 through the firm of Mburu F. N & Co. Advocates. The plaintiff amended her plaint with leave of the Court to correct the name of defendant. In the plaint, the plaintiff prayed for judgement for the following orders ;

a) A permanent injunction restraining the Defendant by herself, her agent and or/servants from entering upon, operating, using, wasting, digging, excavating, fencing, erecting any structure or interfering in any other way whatsoever with ALL THAT piece of land known as sub-division No. 2019 (Original No. 1869/20 of Section III), Mainland North situated North of Mtwapa Creek in Kilifi County registered under title C.R 22625.

b) An order of demolition do issue compelling the defendant to remove any illegal structures erected by the defendant on ALL THAT piece of land known as sub-division No. 2019 (Original No. 1869/20 of Section III), Mainland North situated North of Mtwapa Creek in Kilifi County registered under title C.R 22625 and to vacate the same forthwith.

c) That the Officer in Charge of Station Mtwapa Police Station to assist in the implementation of the above orders.

d) A declaration that the plaintiff is the legal owner of on ALL THAT piece of land known as sub-division No. 2019 (Original No. 1869/20 of Section III), Mainland North situated North of Mtwapa Creek in Kilifi County registered under title C.R. 22625.

e) Costs of the suit.

f) Interest on e above at Court rates.

g) Any other relief the Court may deem just to grant.

2. In a 4 paragraph statement of defence, the defendant denied the plaintiff's claim stating that she is in occupation of sub-division No 2018 Original No 1869/19 registered under C. R 23752 and measuring 0.0286 ha. The defendant put the plaintiff to strict proof. The defence statement added that she does not occupy subdivision No 2019. There was also a statement of defence filed by Munyao Muthama & Co. Advocates filed on 29th September 2014. This defence also denied the plaintiff's claim. Yet again on 19th March 2015, the firm of Omondi Waweru entered appearance for the defendant. They did not however file any defence.

3. Both parties filed their documents in support of their claims. From the record, the firm of Munyao Muthama & Co. Advocates actively participated in pre-trial stages. However the hearing notice was served on Omondi Waweru & Co. Advocates. The said advocates did not attend Court. The hearing thus proceeded ex parte on 19th July 2016. From the mix up in representation for the defendant, she had herself to blame for issuing multiple instructions.

4. The plaintiff testified saying her husband purchased plot No MN/2019. The husband passed away in 2000 and she took letters of administration of his estate in 2009. That the husband bought the land in 1993 and fenced it. The plaintiff said she was told by a neighbour that the defendant had built on this property. According to the plaintiff, the defendant currently lives on this property. She produced a copy of the title as Pex 1, copy of transfer as Pex 2 and letters of grant as Pex 3. She continued that the defendant has hired goons to stop her from accessing the land. She urged the Court to declare her husband as owner of the land and an order directed at the defendant to remove her structures. She asked for police assistance while executing the order.

5. The plaintiff's title is produced in evidence C. R No 23890 obtained pursuant to a transfer registered as No C.R 22625/13. It is also referred to as subdivision No 2019 Original No 1869/20. In the statement of defence, the defendant stated that she is in occupation of subdivision No 2018. In her documents filed, the defendant annexed title No C. R 23752 and her plot is referred to as subdivision No 2018. It is obvious that the two plots are distinct and adjacent to each other.

6. In paragraph 4 of the plaint, the plaintiff listed the particulars of encroachment to wit; fencing off the property by building a wall; putting up a permanent dwelling structure and hiring security guards/hooligans to deny the plaintiff access to the plot. In my view the plaintiff was under a duty to show this Court that indeed the wall and permanent structure (house) are on plot No MN/2019 and not 2018 as stated by the defendant in her defence. All she said is that a neighbour informed her that the defendant had built on her plot and that the defendant has hired goons to deny her access to this plot. This neighbour was not called to corroborate the plaintiff's assertion.

7. The plaintiff did not even approach the officer of the District land Registrar to get a confirmation that indeed the defendant has encroached on her plot and the structure complained of is on plot No 2019. The rule of evidence is that he who alleges must prove (Section 107 & 108 of the Evidence Act). Given the circumstances of this case that the plaintiff's plot neighbours that of the defendant's plot, I am not satisfied that the plaintiff proved the alleged encroachment and or trespass. The title in her husband's name for plot No 2019 is intact and therefore prayer (d) is not necessary. Since there is no proof of encroachment, prayer (a) – (c) of the plaint fails. I will award no costs to the defendant as none was demonstrated why the same should be awarded. I proceed to dismiss the plaintiff's suit with no order as to costs.

Dated and delivered at Mombasa this 11th day of November 2016

A. OMOLLO

JUDGE