



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.115 OF 2012

DICKSON CHALOVA NGUMA.....PLAINTIFF

=VERSUS=

PATROBUS MANGI CHAI.....DEFENDANT

J U D G M E N T

Introduction:

1. In his Complaint dated 16th July 2012, the Plaintiff has averred that he is the registered proprietor of L.R. No.5054/7, Kilifi; that he rented part of the land and that on 11th July 2012, the Defendant trespassed on the suit property and started putting up buildings.
2. The Plaintiff is seeking for a permanent injunction to restrain the Defendant from trespassing on the suit property.
3. In his Defence and Counter-claim, the Defendant deposed that he has been in occupation of the suit land since 1974; that in the year 1977, upon the County Council of Kilifi recommending that he be allocated the suit property, he started putting up structures and that his claim over the suit property is by virtue of having been in possession and occupation of the same from the year 1974 to date.

Plaintiff's case:

4. The Plaintiff, PW1 informed the court that he bought the suit property for Kshs.11,000 after it was advertised in the local newspaper thereafter was given a letter of allotment.
5. PW1 informed the court that he has been paying the rates for the said land to the Municipal Council of Malindi and that he obtained a rates clearance certificate from the Council when he applied to be issued with the title document.
6. According to the Plaintiff, the Defendant started putting up a temporary structure on the suit property on 11th July 2011, an action of which he reported to the Council.
7. PW1 stated that the Council instructed the Defendant to demolish the structure but he has declined to do so.

8. According to the Plaintiff, he is yet to process the title document because of the bureaucracy at the lands offices in Nairobi.
9. In cross-examination, the Plaintiff stated that the advertisement for the plot was done between the year 1986-1987 and that he knew the Defendant because he was a doctor in Kilifi in the late 1990's.
10. It was his evidence that he was eventually allocated the plot by the Council after he applied for it. PW1 informed the court that he did not know what the status of the plot was before 1986 and that when he entered the plot in 1987, he found it was not occupied.
11. According to PW1, the suit property has his tenants who have put up temporary structures for their businesses.
12. It was his evidence that the Defendant put up his structures in the year 2012 and that the plot of Kombo Chiro abutts his plot. The Plaintiff denied the suggestion by the Defendant's counsel that his documents were a forgery.
13. PW2, a jua kali artisan in Kilifi, informed the court that the Plaintiff is his landlord whom he has known since March 2009.
14. According to PW2, he agreed with PW1 that he builds a small structure and allowed him to use it for his jua kali business. It was the evidence of PW2 that he been paying to PW1 a monthly rent of Kshs.1,500.
15. It was his evidence that on 11th July 2012, the Defendant came to the suit premises and fenced the whole land.

The Defendant's case:

16. The Defendant, DW1, informed the court that he knew the Defendant in 1985 when he started encroaching on the suit property.
17. According to DW1, he identified the suit property which was then bushy and in 1974 identified the then owner.
18. DW1 informed the court that he paid a Mr. Mohamed Sheik who was on the suit property Kshs.2,000.
19. After he paid off Mr. Sheikh, it was the evidence of DW1 that he had the plot surveyed in 1977 and a plot number was given to the land. In the same year, the Council recommended that he should be allocated the land vide the Municipal Council Minutes of 2nd June 1977.
20. It was the evidence of DW1 that although the plot was allocated to him, the Committee of the Council recommended that the same should be advertised and that the advertisement did not take place until 1985.
21. According to DW1, he put up a store on the suit property in 1977 although he was told to stop further construction until the advertisement was done. It was the evidence of DW1 that a dispute arose over the allocation of the plot and that his effort to get the plot failed.
22. According to DW1, PW2 invaded the suit plot in the year 2009 and informed him that he had been sent by the Plaintiff. When he told PW2 that the plot in question was his, PW2 agreed to sign an agreement with him dated 10th July 2009.

23. In cross-examination, DW1 stated that he was notified in 1987 that he had not been allocated the suit land although the Council of Elders intervened and confirmed that the land indeed belonged to him.
24. It was the evidence of DW1 that when he was informed that he had not been allocated the land, he never went to the Council to complain. DW1 stated that although the Plaintiff encroached on his land in the year 1987, he never sued him and that his structure is still on the land since then.
25. Although the Defendant stated that he had entered into an agreement with PW2 in the year 2009, he acknowledged that he has never received rent from him.
26. DW2, a former Chief, informed the court that he knows both the Plaintiff and the Defendant and that he became a Chief in 1982.
27. It was the evidence of DW2 that it is the Defendant who purchased the trees that were on the suit property from the owner whereafter he developed it by putting up a small house and a fence.
28. According to DW2, the Defendant was told to stop developing the suit property until the Council approves the allocation.
29. DW2 stated that the Defendant does not stay on the suit property although he is the original owner of the same after he purchased the trees from the initial owner.
30. The parties' advocates field their submissions and reiterated the evidence that was given by the witnesses in court. I have already summarised the said evidence and I do not wish to repeat the same.

Analysis and findings:

31. The only issue for determination is who between the Plaintiff and the Defendant is entitled to the suit premises.
32. The evidence of PW1 was that he applied for the suit property between 1986 -1987 and that his application was successful.
33. The Defendant acknowledged that although he paid off the person who had planted trees on the suit in 1974, he had to apply to the Council to be allocated the suit property. It was his evidence that he was later advised that the suit property had to be advertised before the same could be allocated.
34. The Defendant produced in evidence the Minutes of the District Plots Allocation Committee held on 2nd June 1977. In the said minutes, the Council recommended that the suit property which the Defendant had applied for should be advertised. The Committee did not allocate to the Defendant the said plot.
35. The Plaintiff on the other hand produced a letter of allotment dated 23rd November 1987 in respect to the suit property.
36. In the letter dated 27th July, 1993, the then Urban Council of Kilifi confirmed in writing to the Plaintiff that he had paid all the requisite charges in respect to the suit property, The Council advised the Plaintiff to pursue the title with the Commissioner of Lands.
37. The Plaintiff also produced in evidence an assessment report showing that as at 12th July, 2012, he owned the Town Council of Kilifi Kshs.151,305 in respect to the suit property.

38. There is also evidence on record which shows that the PW2 has been paying to the Plaintiffs rent for using the suit premises.

39. The evidence by the Defendant that the Plaintiff encroached on the suit property sometimes in 1987 confirms that indeed the Plaintiff took possession of the suit property immediately he was given a letter of allotment in 1987.

40. Considering that the Defendant was given a letter of allotment for the suit property, which is within Kilifi Municipality and in view of the fact that it is the Plaintiff who was entered in the Rating Roll of the Council, I find and hold that the Plaintiff has proved his case on a balance of probability.

41. It is the Plaintiff, and not the Defendant, who is in possession of a letter of allotment in respect to the suit property and he has been in possession of the same since 1987. Indeed, PW2 has been paying to the Plaintiff rent for using the said property since the year 2009.

42. The fact that the Plaintiff did not file a Defence to the Defendant's Counter-claim cannot vitiate the fact that the Plaintiff has proved his case on the required standard. Notwithstanding the non filing of a Defence to the Counter-claim, the Defendant's counter-claim cannot succeed because he has not proved that the suit property was allocated to him by the Council.

43. For those reasons, I allow the Plaintiff's Plaint dated 16th July 2012 with costs and dismiss the Defendant's Counter-claim dated 9th August 2012 with costs.

Dated and delivered in Malindi this **8th** day of **May**, 2015.

O. A. Angote

Judge