



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 548 OF 2013

SAMIMEX KENYA LIMITED..... APPLICANT

VERSUS

HAWO BISHARO OMAR..... 1ST RESPONDENT

SALAT FENUS.....2ND RESPONDENT

ISNINO OSMAN.....3RD RESPONDENT

FADUMO RAGE.....4TH RESPONDENT

ADOW SEDOW.....5TH RESPONDENT

COUNCILLOR ISMAIL MOHAMED.....6TH RESPONDENT

HAWO RAGE.....7TH RESPONDENT

JUDGMENT

The Plaintiff filed suit by Amended Plaintiff filed on 16th June 2011 seeking for judgment to be entered against the Defendants as follows:

1. A declaration that the Plaintiff is the rightful owner of the parcel of land known as GARISSA TOWN/BLOCK 5/3 (hereinafter referred to as the “suit property”);
2. A prohibitory permanent injunction to restrain the 1st, 4th and 5th Defendants by themselves, their servants or agents or otherwise howsoever from continuing with the illegal trespass of the suit property;
3. A mandatory permanent injunction to compel the 2nd, 3rd, 6th and 7th Defendants to vacate and hand over the suit property;
4. Damages;
5. Costs of this suit; and,
6. Any other or further relief that the Honourable court shall deem fit to grant.

It is the Plaintiff’s case that it was and still is the registered proprietor of the suit property having

purchased the same from Garissa Tanners Limited. Further, the Plaintiff through its director contended that sometime in the year 2010, the Defendants illegally and wrongfully entered the suit property and notwithstanding repeated requests from the Plaintiff to vacate the same, they refused to do so. The Plaintiff further contended that the Defendants had now commenced subdividing the suit property amongst themselves and had commenced construction thereon. The Plaintiff further contended that as a result of the Defendant's actions, it had been deprived of the use and enjoyment of the suit property and had thereby suffered loss and damage.

Only the 1st Defendant filed a defence in this suit vide her Amended Defence and Counterclaim filed on 27th July 2011 in which he admitted that the Plaintiff is the registered proprietor of the suit property but stated that she had acquired title of the suit property under the doctrine of adverse possession. She stated that she was an employee of the tannery on the suit property and that they entered the suit property in the year 1996 and were living there openly with the knowledge of the registered proprietor thereof at the time. She further indicated that the Plaintiff acquired the suit property in 1997 through a public auction but found her still living on the suit property. She further stated that the Plaintiff did not evict her from the suit property after purchasing the same and had not done so for the last 14 years. In her counterclaim, she made the following prayers:

1. The Plaintiff's suit be dismissed with costs.
2. The Land Registrar Garissa be directed to cancel the Plaintiff's Certificate of Lease to the suit property and in its place register her as the owner of the suit property.
3. The costs of the counterclaim be awarded to the her.

At the hearing of this suit which was not attended by any of the Defendants despite their having been informed of the hearing date, the first witness who took the stand was a lady by the name Fatma Salat who stated that she was the director of the Plaintiff. She testified to the fact that the suit property is registered in the name of the Plaintiff and she produced a copy of the Certificate of Lease to support this assertion. She further testified that indeed, the Defendants trespassed on the suit property in the year 2010. She stated that upon finding out that the suit property had been illegally occupied by the Defendants, she wrote to them asking them to vacate the suit property which the Defendants failed to do. She further stated that she then sought the assistance of the police to effect the eviction but received no assistance from there. She then stated that she then proceeded to file this suit in order to obtain eviction orders to remove the Defendants from the suit property. In further evidence, she produced copies of the receipts showing that she has been paying the county government rates in respect of the suit property. She also produced a search certificate to support the Plaintiff's claim of ownership of the suit property as well as photos of the suit property to show the encroachment by the Defendants.

The second witness was Mohamed Munir Chaudri, who identified himself as the Advocate who was involved in the purchase of the suit property by the Plaintiff. He testified that the suit property was under receivership when his client, the Plaintiff, became interested in purchasing it. He confirmed that he visited the suit property with his client and the receiver where he saw that there were no squatters on the land and that the land was vacant with the exception of the receiver manager's guards. He further testified that on their return to Nairobi, the price was agreed and he prepared the transfer leading to the suit property being registered in the name of the Plaintiff. He further testified that PW1 later informed him that some squatters had encroached upon the suit property when he instructed Mr. Patrick, a surveyor to carry out a survey on the suit property which was done.

The final witness for the Plaintiff was Mr. Patrick Mwaura Kahonge, the surveyor who was instructed to conduct a survey on the suit property. He testified that he works for Aganyo & Associates Surveyors and that he was served with a court order in this case to conduct a survey of the suit property. He stated that he teamed up with the Provincial Surveyor in order to conduct the survey. He produced a copy of the survey report which had been filed in court and confirmed that he located the corners of the suit property and saw the Defendant's encroachment thereon. He testified that only one of the buildings on the suit property was not occupied, all the others were occupied by people who were living therein and carrying on some cultivation thereon. He also confirmed that there was a road which had encroached the suit property on one corner. He confirmed that the Defendants were the encroachers.

In the absence of the Defendants in the hearing of this case, the case was closed and they did not tender any evidence.

The issues for determination therefore center on whether the Plaintiff should be granted its prayers contained in its Plaint.

Firstly, on the issue whether the Plaintiff has proved its ownership of the suit property, it is clear that the Plaintiff produced its Certificate of Lease as evidence in this case. The law is very clear on the rights of a registered proprietor of a piece of land where they hold a valid title deed thereto and this may be found in section 24(a) of the Land Registration Act which provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

In addition, section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The Plaintiff is the holder of a valid title deed over the suit property. That title has not been challenged by the Defendants. According to the law cited above, the Plaintiff is therefore the absolute and indefeasible owner of the suit property and is entitled to enjoy all rights and privileges belonging or appurtenant thereto. One of those rights is the right of exclusive possession to the exclusion of all others including the Defendants. I am convinced that the Plaintiff has proved its ownership of the suit property and is entitled to the prayers sought in the Plaint.

I find that the Defendants are trespassers on the suit property and therefore enter judgment in favour of the Plaintiff as prayed in the Plaint. In addition, the Defendants are jointly and severally condemned to pay the Plaintiff damages amounting to Kshs. 100,000/- for each year of illegal occupation of the suit property since the year 2010 to date.

DELIVERED AND SIGNED IN NAIROBI THIS 2ND

DAY OF MAY 2014

MARY M. GITUMBI

JUDGE