



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 64 OF 2013

KARIM AMIRALU ABBANY.....PLAINTIFF

=VERSUS=

IVANA R.....1ST DEFENDANT

FRANCIS KADENGE KENGA.....2ND DEFENDANT

JUDGMENT

Introduction:

1. According to the Complaint that was filed in this court on 11th April 2013, the Plaintiff is and was the duly registered owner of a property known as Malindi Plot No. 9831 (the suit property) at all material times. On the other hand, the Defendants are the registered owners of plot No. 9833, which property abuts the suit property.
2. In the year 2011, the Plaintiff has averred that he discovered that the Defendant had encroached on his land and has wrongly remained in possession. The Plaintiff is seeking for a declaratory order that he is entitled to exclusive and impeded right of possession and occupation of the suit property and for a permanent injunction, amongst other reliefs.
3. The Defendants were served with the Summons to Enter Appearance by way of advertisement in the Daily Nation newspaper of 8th August 2013, They never entered appearance or filed a Defence.

The Plaintiff's case.

4. Pw1, Bartholomew Chakuri Mwanyungu is a qualified land surveyor. Pw1 informed the court that he prepared a report dated 21st November 2013 in respect to plot number 9821, Malindi (the suit property) upon being instructed by the Plaintiff.
5. According to Pw1, his report shows the extent of the boundaries of the suit property. According to the surveyor, he found encroachment on the suit by five metres to the South and eighteen metres to the North. It was his evidence that title number 9833 had encroached on the suit property to the extent described in the report. The report was produced as PEXB1.
6. The Plaintiff, Pw 2, stated that the Defendants are his neighbours and they are the owners of plot number 9833, Malindi. According to Pw2, the Defendants have encroached on his land. The Plaintiff produced the Indenture in respect to his land as PEXB3 and the official search as PEXB4.
7. It was the evidence of Pw 2 that he engaged a surveyor to establish the beacons of his land in

2011 and 2013. Pw 2 produced the survey report that was done in 2011 as PEXB5. Pw 2 stated that the Defendants have since put up a perimeter wall which has encroached on his land. It was the Plaintiffs evidence that the wall should be demolished.

Submissions:

8. The Plaintiff's advocate filed her submissions on 15th May 2014. Counsel submitted that the Plaintiff has proved the ownership in respect of the suit property and the extent of the encroachment and that the Constitution and the Land Act protects the rights of a registered owner of a suit property.

Analysis and findings:

9. The Indenture that was produced in this court as PEXB3 shows that Plaintiff was registered as the proprietor of land known as portion number 9831 on 19th May 2010. The land was particularly delineated and described on Deed Plan number 193409 which is attached on the Indenture.
10. According to the Deed Plan, the suit property measures 0.4104Ha. According to the Survey Report of B. Omondi of Opiyo and Associates, a wall demarcating the boundary of portion number 9833 (the Defendants' land) encroaches into the suit property by 14.49m for a length of 38m. The surveyor concluded that approximately 0.06 Ha of portion number 9832 is inside the boundary of the suit property.
11. The report of Opiyo and Associates dated 11th March, 2011 was confirmed by the survey Report of B.C Mwanyungu which was produced by Pw1. According to Mr. Mwanyungu's report, approximately 0.086 Ha of portion 9833 encroaches to the suit property and approximately 0.0078Ha of portion number 9832 encroaches into the suit property.
12. The Plaintiff's evidence that the Defendants' wall has encroached into his land as per the survey reports was not controverted by the Defendants. Indeed, the Defendants did not file a Defence. In the circumstances, I find that the Plaintiff has proved his case on a balance of probabilities. The Plaintiff's claim is allowed in the following terms.
 - a. **The Defendants, whether by themselves or their servants or agents be and are hereby ordered to demolish the building structure or perimeter wall which has encroached on the suit property within 30 days from today failure of which the Plaintiff, with the assistance and supervision of the Officer Commanding Station, Malindi and at the Defendants' costs, to demolish the said structure or wall.**
 - b. **A permanent injunction be and is hereby issued restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.**
 - c. **The Defendants to give to the Plaintiff vacant possession of the suit property and an order of eviction be and is hereby granted.**
 - d. **The Defendants to pay the costs of the suit.**

Dated and delivered in Malindi this 4th day of July, 2014.

O. A. Angote

Judge