



REPUBLIC OF KENYA



KENYA LAW
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Gakuru v Kilile (Civil Suit 85 of 2011)
[2023] KEELC 15718 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15718 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 85 OF 2011
MAO ODENY, J
FEBRUARY 21, 2023

BETWEEN

FRANCIS NG'ETHE GAKURU PLAINTIFF

AND

MOSES WAMBUA KILILE DEFENDANT

JUDGMENT

1. By a plaint dated June 30, 2011 the plaintiff herein sued the defendant seeking the following orders;
 - a. Possession
 - b. Damages
 - c. A declaration that the defendant is not entitled to the Plaintiff's land.
 - d. A permanent injunction restraining the defendant by himself, his servants, agents or employees or otherwise from entering or remaining or using the plaintiff's property or erecting structure or anything thereon.
 - e. Costs of the suit; and
 - f. Any other relief.
2. The plaintiff's case is that he was and is still the registered absolute proprietor and entitled to possession of all that piece or parcel of land known as Lamu/hindi Magogoni/356 measuring approximately 5.2 Hectares or thereabouts situate at Hindi, Lamu County. The plaintiff averred that the defendant purchased or was in the process of purchasing from one Joyce Muthoni Muriuki the parcel of land known as Lamu/hindi/magogoni/748 situate at Hindi, Lamu County which piece of land is registered in the name of the said Joyce Muthoni Muriuki as the absolute proprietor.



3. The plaintiff further averred that on or about June 16, 2011 the defendant unlawfully entered the plaintiff's property and took possession of seven acres and continues to do so by erecting structures thereon yet the parcel of land known as Lamu/Hindi/Magogoni/748 exists separately from the suit property. Further, that the actions by the defendant amount to trespass occasioning the plaintiff loss and damage.
4. In response, the defendant filed a defence and counterclaim dated September 5, 2011 where he averred that at no given time has he entered, encroached or trespassed into the Plaintiff's piece of land as he is legally and lawfully in occupation of land parcel number Lamu/Hindi/Magogoni/748.
5. The defendant further averred that he is not aware of the 7 acres to be subdivided as he purchased the entire land he occupies from one Joyce Muthoni Muriuki (deceased) vide an agreement dated May 15, 2007 for a consideration of Kshs. 250,000/- which has no connection to the plaintiff's piece of land.
6. The defendant filed a counter claim and sought the following orders;
 - a. A permanent injunction restraining the plaintiff by himself, his servant, agents, representatives and any other person claiming under him from interfering with the defendant's land known as Lamu/Hindi/ Magogoni/748 or claiming the same or any part of it.
 - b. A declaration that the defendant has not in any manner claimed or trespassed into the Plaintiff's any land or part of it and that the defendant is the rightful owner of land parcel no. Lamu/Hindi/Magogoni/748
 - c. Costs of the suit
 - d. Interest on (c) above
 - e. Any other or further relief that the court shall deem fit and just to grant.
7. PW1 Francis Ngethe Gakuru adopted his witness statement dated July 1, 2011 as his evidence and produced as PEX 1-6 a bundle of documents as per the list of documents dated June 30, 2011.
8. On cross examination, he told the court that the defendant has encroached and built on his plot, cultivated and dug a borehole. On re- examination he told the court that a survey had been done and a report prepared.
9. DW1 Moses Wambua Kilile adopted his witness statement dated December 6, 2021 as his evidence and produced as DEX 1-4 documents as per the list of documents filed on September 6, 2011.
10. On cross examination he stated that he did not have a Land Control Board consent and the said parcel No. Lamu/Hindi/Magogoni/748 was not transferred to him. He added that the surveyor's report indicated that there was an error on the map and the same was to be corrected.
11. The plaintiff elected not to file submissions and the defendant's counsel reiterated the contents of the defence and testimony of the defendant which I do not wish to reproduce.

Analysis and Determination

12. The issues for determination is whether the defendant has encroached on the plaintiff's land, whether the plaintiff is entitled to orders sought for possession, damages and injunction against the defendant, whether the defendant has proved his counterclaim against the plaintiff for an order of a permanent injunction.



13. It is not disputed that the plaintiff is the registered owner of all that parcel of land Known as Lamu/Hindi/Magogoni/356 measuring about 5.2 ha having produced a title deed issued on 28th August 2006. The Defendant also claimed that he bought the parcel of land known as Lamu/Hindi/Magogoni measuring 3.5 ha from the late Joyce Muthoni Muriuki which is still registered in the deceased's name. The Defendant produced the sale agreement and a copy of the title deed.
14. The contention herein is whether the defendant has encroached into the plaintiff's land. The plaintiff maintains that the defendant has encroached into his parcel of land and taken possession of seven acres which he has put into use. On his part, the defendant states that the two parcels of land exist distinctly and do not share a common boundary, border and/or margin save for being situate in the same geographical location.
15. It should be noted that the court had ordered for a survey to be carried out in respect of the two parcels of land and a report be prepared and filed in court. I have perused the survey report dated June 14, 2015 and taken note that the surveyor's findings are that parcel No. Lamu/Hindi/Magogoni/356 neighbours parcel No. Lamu/Hindi/Magogoni /748 which neighbours parcel No. Lamu/Hindi/Magogoni/ 341.
16. The survey report also found that the position of parcel Lamu/Hindi/Magogoni /356 on the ground was the correct position and the other parcels did not coincide with RIM thus there was a need for corrections.
17. The report shows that there is need for corrections in the Registry index map and the only remedy for both parties if to follow up with the survey office for rectification of the errors. The court should have declined to hear this matter from the start as it is a boundary dispute on rectification of errors on the map and on the ground.
18. Both parties are seeking for a permanent injunction against each other and yet they know where the problem is as per the survey report. If the court grants a permanent injunction, then how will that help the parties and yet they know where the problem is and which office can solve their problem. Courts to do not give orders in vain which cannot be implemented
19. I have considered the pleadings and the evidence of both parties and find that plaintiff and the defendant who filed a counterclaim have not proved their case, however the court orders the plaintiff and the defendant do pursue the implementation of the survey report dated June 14, 2015 for the rectification of the errors on the Registry Index Map and the ground in respect of the parcels of land.
20. Each party to bear their own costs. It is unfortunate that this matter had to take so many years in court and yet it could have been resolved even through alternative dispute resolution mechanism which the court encourages.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF
FEBRUARY, 2023.**

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

