



**Mukhwana v Mateo & 2 others (Environment & Land Case 188 of 2014)
[2023] KEELC 21923 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 188 OF 2014
DO OHUNGO, J
NOVEMBER 28, 2023**

BETWEEN

ESBON SIFUNA MUKHWANA PLAINTIFF

AND

ALFRED BARASA MATEO 1ST DEFENDANT

BENSON BARASA 2ND DEFENDANT

BOAZ EKESA 3RD DEFENDANT

JUDGMENT

1. The plaintiff moved the court through plaint dated 5th June 2014 wherein he averred that he was the registered proprietor of the parcel of land known as Bunyala/Nambacha/1053 (the suit property) and that the defendants trespassed into the suit property thereby causing him loss and damage. He prayed for judgment against the defendants for the following orders:
 - a. A permanent injunction to restrain the defendants by themselves, their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the plaintiff's land parcel.
 - b. General damages for loss resulting from the defendant's illegal occupation of the plaintiff's land parcel.
 - c. Mense profits to be computed at market rates.
 - d. Costs of the suit and interest thereon until payment in full.
2. The first and second defendants filed a statement of defence and counterclaim in which they denied the plaintiff's allegations and averred that the plaintiff purchased 0.05 hectares from the first defendant as opposed to the 0.07 hectares in the plaintiff's title of the suit property. They averred that they



would continue to be in peaceful occupation of Bunyala/Nambacha/1052 and further averred that the plaintiff had used fraud, force, and threats to acquire 0.07 hectares instead of 0.05 hectares. They therefore prayed for dismissal of the plaintiff's case and for judgment against the plaintiff for protection of their title and for cancellation of the plaintiff's title to the suit property and issuance of a new title with the correct size of 0.05 hectares.

3. On his part, the third defendant filed a defence in which he denied the plaintiff's allegations and added that if there was any trespass then it was the plaintiff who trespassed on the third defendant's parcel of land known as Bunyala/Nambacha/229. He added that he would continue to be in peaceful occupation of Bunyala/Nambacha/229 and urged the court to dismiss the suit with costs.
4. On 14th December 2021, prior to commencement of trial, counsel for the plaintiff told the court that the second defendant had passed away on 1st October 2014. He withdrew the claim against the said defendant.
5. At the hearing, the plaintiff testified as the sole witness in support of his case and adopted his witness statement filed on 6th June 2014. He stated in the statement that he was the registered proprietor of the suit property having purchased it from the first defendant in 1991 and that he stayed on the suit property peacefully for 24 years. That in the year 2014, the second and third defendants who are the first defendant's sons started grumbling that the plaintiff had grabbed their father's land and that on 31st May 2014, the second and third defendants sent thugs to start clearing the land which he had farmed. He added that he reported the matter at Navakholo Police Station through OB No. 11/31/5/2014 and that the second defendant who was an officer attached to the Military Police and the third defendant who was a C.I.D Officer then started threatening to 'deal' with him and started cutting trees on the suit property on 1st June 2014 despite the plaintiff's protests.
6. He further stated that the defendants attacked him on the suit property again on 5th June 2014 and cleared all his crops, grass, and flowers. He produced copies of his title deed in respect of the suit property and a certificate of official search as on 5th June 2014 and added that he purchased 0.07 hectares from the first defendant as opposed to 50 feet by 100 feet. That the portion he purchased was triangular and measured 18 meters, by 46 metres and 13 metres on the last side. That they had a written sale agreement which the first defendant retained but the measurements of the portion were not included in the sale agreement. He further stated that he fully paid the purchase price and that the land registrar visited the land on 8th May 2014 and established the boundary. He denied invading parcel Bunyala/Nambacha/1052.
7. The plaintiff's case was then closed.
8. The first defendant then testified as DW1 and adopted his witness statement dated 13th June 2013. He stated in the statement that he sold to the plaintiff land measuring 50 feet by 100 feet in 1990 and that the plaintiff was issued with a title deed for the suit property in 1991. That the plaintiff encroached on his parcel known as Bunyala/Nambacha/1052 and upon noticing, he approached the plaintiff so that the issue would be rectified but since the plaintiff was adamant, he lodged a complaint, and the Land Registrar rectified the boundary on 8th May 2014.
9. The first defendant further stated that the second defendant who was his son never stepped into the suit property and never threatened the plaintiff as alleged. That while he was away on 7th June 2014, the plaintiff and three other men entered his compound without his consent and harassed his wife, took photographs, and forced her to sign unknown document. He added that the plaintiff had trespassed into his Bunyala/Nambacha/1052 for twenty four years and should therefore pay him KShs 50,000 per year making a total of Kshs 1,200,000.



10. The first defendant produced copies of sale agreement dated 25th October 1990, certificate of official search dated 5th June 2014 in respect of Bunyala/Nambacha/1053, letter dated 30th July 2013 from the first defendant to District Surveyor, Land Registrar's letter dated 2nd April 2014 and letter from Chief Nambacha location dated 25th July 2013. He added that following the dispute which arose, they had the land surveyed in his presence and that he was satisfied with the outcome of the survey. That when he sold the suit property to the plaintiff, the plaintiff's surveyor did not take proper measurements.
11. Lastly, the third defendant testified as DW2 and adopted his witness statement dated 25th June 2014. He stated in the statement that he was an occupant of land parcel number Bunyala/Nambacha/229, having inherited in from his father. He denied ever threatening the plaintiff, invading the suit property, or destroying the plaintiff's trees or crops and added that the portion where trees were cut was not his side of the boundary but that of the first and second defendants. He produced a copy the surveyor's report dated 14th May 2014 and added that he has no boundary dispute with the plaintiff who was his classmate in class 1 in 1965. That the first defendant is his uncle, and that the plaintiff was not in occupation of the suit property as of the date of DW2's testimony having left around the year 2015. He further stated that he attended the survey exercise in May 2014.
12. The defence case was then closed.
13. Parties thereafter filed and exchanged written submissions. I have considered the parties' pleadings, evidence, and submissions. The issue for determination is whether the reliefs sought by the parties should issue.
14. There is no dispute that the plaintiff is the registered proprietor of the suit property. The plaintiff's contention is that the defendants trespassed onto the suit property thereby causing him loss and damage. The parties are neighbours. It is manifest that the dispute is clearly one of boundary which led to the District Surveyor and Land Registrar visiting the ground on 8th May 2014 and compiling report dated 14th May 2014.
15. The plaintiff's claims of trespass and damage were denied by the defendants. The plaintiff did not produce any survey plan to show the extent of encroachment or trespass. On the contrary, what has emerged is that the parties who are neighbours have had a boundary dispute. Trespass has been defined in the 10th Edition of Black's Law Dictionary as "an unlawful act committed against the person or property of another; especially wrongful entry on another's real property." In the circumstances obtaining herein, it cannot be said that there was trespass since each party believed that they were in their rightful property. I find that the plaintiff's case is not proven and is for dismissal.
16. In their counterclaim, the first and second defendants contended that the plaintiff purchased 0.05 hectares from the first defendant as opposed to the 0.07 hectares in the plaintiff's title of the suit property. They relied on a handwritten home-made agreement. The copy that was produced is illegible and does not in any way support their contention that the portion sold to the plaintiff was 50 feet by 100 feet. Even if it did, I would not strictly go by those measurements since it is not shown that the parties involved a surveyor at the point of entering the agreement so that the measurements therein can be deemed to be precise. The District Surveyor and Land Registrar did not identify any anomaly with the parcel sizes. Instead, they simply fixed the boundary.
17. As a registered proprietor of land, the plaintiff is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or



misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

18. Beyond general allegations as to sizes, the first and second defendants have not made any case to warrant impeaching the plaintiff's title. I find that the counterclaim is not proven and is equally for dismissal.

19. In the result, I make the following orders:

- a. The plaintiff's case is dismissed.
- b. The first and second defendants' counterclaim is dismissed.
- c. Each party shall bear own costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

