



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

[ENVIRONMENT AND LAND DIVISION]

ELC CASE NO. 36 OF 2012

DICKENS OGADA MITOKO.....1ST PLAINTIFF

LUCAS OKORE MITOKO.....2ND PLAINTIFF

MARK OTIENDE MITOKO.....3RD PLAINTIFF

VERSUS

JULIUS OLANG OKELLO.....DEFENDANT

JUDGMENT

By a plaint dated 24th August 2012 the plaintiffs' herein sued the defendant seeking for the following orders:

- a) A permanent injunction restraining the defendant, his servants and /or agents , whatsoever or howsoever acting from trespassing upon, encroaching onto, alienating and/or assuming possession of any portion of the plaintiff's parcel of land known as KISUMU/NYAHERA/842 and /or interfering with the beacons and /or demarcations separating land parcel No. KISUMU/NYAHERA/842 & KISUMU/NYAHERA/1980 or in any other way interfering with the plaintiff's right to the enjoyment and use of the parcel of land.
- b) General damages for trespass.
- c) Costs and interest on b & c at court rates.

The defendant was served with summons to enter appearance and a copy of the plaint and filed a defence and denied the claim. The plaintiff filed an authority dated 21st August 2012 giving the 3rd plaintiff the authority to appear, plead and act on their behalf in this suit.

Plaintiff's case

PW 1 who adopted his witness statement filed in court on 24th August 2012 gave evidence and stated that they are joint proprietors of land parcel No Kisumu/Nyahera/842 whose neighbouring parcel No. Kisumu /Nyahera/1980 belongs to the defendant Joshua Okello Olang.

It was the plaintiff's evidence that they have been having a long standing dispute with the defendant who has encroached on the suit parcel of land and has further uprooted their eucalyptus fence. The plaintiff further testified that he went to Ministry of Lands Kisumu, came with surveyors but they could not carry out any work as the defendant became violent.

The plaintiff also stated that that in February 2011 they reported the matter to the District Land Registrar and that a team of surveyors came to the suit parcel of land whereby they established the boundaries and placed beacons. The plaintiff testified that immediately the surveyors left the defendant uprooted the beacons together with the freshly planted eucalyptus.

It was the plaintiff's evidence that he reported the matter to the Provincial Administration but the defendant continued with his acts of trespass. The plaintiff testified that the defendant has encroached on 0.2 hectares.

PW1 produced official search, a report by the District Land Registrar dated 19/9/14 and a bundle of documents in the list of documents filed in court as exhibits to prove his case.

PW1 stated that the report of the District Land Registrar confirmed at page 2 that the late Olang Okello had encroached on the suit land by 0.2 Ha. He therefore urged the court to enter judgment as prayed in the plaint in their favour as the encroachment has affected them.

On cross examination by Mr. S. M Onyango Counsel for the defendant, the plaintiff stated that they amended the plaint in 2016 as the original plaint was against Joshua Okello who was the late father of the defendant Julius Olang Okello.

PW 1 also stated that by the time he filed the suit Joshua Olang Okello was deceased and that the survey report was done in the absence of Joshua olang Okello. The plaintiff also confirmed that the boundary dispute report dated 19/9/14 did not mention the representatives of the defendant and that the court order was addressed to Joshua Olang okello who was deceased. He finally stated that the defendant Julius Olang Okello is not the owner of parcel N. 1980.

On re-examination, PW1 stated that he has sued the defendant as a person who has encroached on his suit parcel of land and destroyed his fence. He also stated that he had amended his plaint and does not have a claim against Joshua olang Okello who is deceased. He further stated that it is clear from the two reports from the District Land Registrar that there is encroachment on parcel No. 842 by 0.2 Ha.

PW2 Dickens Ogada Mitoko also gave evidence and reinforced PW1's evidence on how the defendant has encroached on the suit land by removing beacons. He prayed that a permanent injunction be issued against the defendant restraining him from interfering with the suit land together with damages and costs of the suit.

On cross examination by Counsel for the defendant, PW2 stated that they had initially sued Joshua Olang Okello who is deceased and is the father of the defendant Julius Olang Okello. He stated that one of the sons of the deceased had built a house on the plaintiff's parcel but he later demolished the same and moved to their parcel of land which is adjacent to the suit land. He further stated that the defendant is the one who is still in occupation.

The plaintiffs therefore closed their case after two of them testifying.

Defendant's Case

The defendant stated that his father was known as Joshua Okello Ombok and not Joshua Olang Okello as stated by the plaintiffs. He also testified that they come from the same village with the plaintiffs and that they grew up together. He confirmed that he was born in 1962 on parcel no Kisumu/Nyahera/1980 which belongs to his late father and the same borders plot No. 842 belonging to the plaintiffs.

DW1 admitted to having signed witness statements and told his lawyer to change the name to Julius Olang Okello as per his ID card. The defendant adopted his statement dated 5/9/12 and stated that he is the one who instructed Onsongo & Co. Advocates to file a defence on his behalf and that he is not the registered owner of the suit land.

It was the defendant's evidence that he has not encroached on the suit land and that he stays of plot No. 1980 which belonged to the father.

On cross examination by Counsel for the Plaintiff, the defendant admitted that he stated in the statement filed and adopted in court that he is Joshua Olang Okello and signed the same and indicated his identity card number. He also admitted that he stated that he is the registered proprietor of parcel No. 1980 and that he gave that information knowing that he was not Joshua Olang Okello.

DW1 further confirmed during cross examination that he was present during the second survey and did not complain about the finding that he had encroached on plot No. 842 by 0.2 Ha.

On re-examination he reiterated that he was not Joshua Olang Okello and that he has not encroached on the suit land.

That was the close of the defendant's case.

Parties agreed to file written submissions within 21 days but when the matter came up for mention only the defendant had filed submissions.

DEFENDANT'S WRITTEN SUBMISSIONS

Counsel for the defendant filed submission and stated that the issues for determinations are as to whether the Plaintiffs' suit herein is time barred under the laws of Kenya, and whether the plaintiff sued a deceased person.

Counsel submitted that from the 3rd Plaintiff's testimony it is evident that the dispute is in respect of encroachment of a boundary between the two parcels of land which has been in existence since 1990s. Counsel therefore questioned why the plaintiffs never took action against the defendant on encroachment.

It was further Counsel's submission that since trespass to land is considered a tort in law, and according to Section 4(2) of the Limitation of Actions Act, an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. He therefore submitted that the plaintiffs' claim is time barred.

The other issue that Counsel submitted on was the issue of the defendant's name and the fact that the plaintiff sued the Defendant's father despite knowing that he was deceased. Counsel blamed the previous advocate on record for the defendant for allowing the defendant to sign an affidavit bearing his father's first name.

Counsel submitted that the defendant denied having trespassed on the suit land and cited

Section 18(2) and **19(2)** of the Land Registration Act 2012 which provides that

18(2) The court shall not entertain any action or other proceedings relating to dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

19(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

Mr. Onyango therefore submitted that Section 19(2) provides that the Registrar shall give all parties an opportunity to be heard before proceeding to define the correct position of the boundaries. It was his submission that the report written on the 19th September, 2014 should not stand because the dispute cannot be said to have been determined in accordance with **Section 18(2)** of the Land Registration Act.

Counsel also cited the case of Willis **Ochola v Mary Ndega (2016) eKLR** where the court stated that,

“Court has carefully considered the notice of preliminary objection, the pleadings, and the rival written submission and come to the following determinations;

a) That in terms of Section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the Land Registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18(2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar’s determination on the same has been rendered.

b) That the parties’ submission and pleadings shows clearly that the dispute before this court is one of the correct position of the boundary between, land parcels Kisumu/Karateng/298 and 296 owned by the Plaintiff and Defendant respectively. That this clearly mean that the first forum with authority to settle the boundary dispute is the Land Registrar in accordance with Section 18 of the Land Registration Act.

c) That contrary to the submissions by the Plaintiff’s counsel, the list of documents filed by the Plaintiff do not include any document with the Land Registrar’s determination of the boundary dispute between the parties herein as proprietors and land parcels Kisumu/Karateng/298 and 296. That the Kisumu County Surveyor’s report dated 27th April, 2015 cannot be a substitute of a land Registrar’s determination under Section 18(2) of the Land Registration Act for reasons that the two offices are not synonymous or the same. That the surveyor’s report did not settle or attempt to settle the dispute on the boundary but instead made a recommendation that the “Land Registrar to visit the site and solve the boundary dispute.” That this appears the Plaintiff, ignored the surveyor’s advice and instead came to this court which, was a premature move, as this court is without jurisdiction to determine the said boundary dispute until after the Land Registrar pronouncement on the issue.

Counsel therefore prayed that the plaintiff’s suit be dismissed with costs as being time barred.

Analysis and determination

The issues for determination in this suit are as to whether the defendant has encroached on parcel No. Kisumu/Nyahera/842 and whether the plaintiffs are entitled to the orders sought for permanent injunction and general damages.

The plaintiffs and the defendant gave evidence in support of their cases. It was the plaintiffs’ case that they have sued the defendant as a trespasser and not as the registered owner of the suit land. The plaintiff testified that the suit land belonged to the deceased father of the defendant of which the defendant admitted but denied having trespassed on plot No. 842.

It should be noted that the plaintiffs have had a long standing dispute with the neighbour of the adjoining parcel of land plot No. 1980. The defendant admitted that they grew up together with the plaintiffs and that their parcels of land are adjacent to each other.

The plaintiff gave evidence and produced several letters, court orders, Registry Index Map for Nyahera registration section, reports from the Ministry of Lands, Survey office and a report from the Chief Land Registration Officer a Mr. George Nyangweso.

The reports that were produced in court confirmed the encroachment on the plaintiff’s suit parcel of land by 0.2 Ha. The letter dated 20th December 2011 by the District Surveyor produced as exhibit 2 which was pursuant to a court order on site visit of the suit land by the District Land Registrar Kisumu indicated that the owner of Kisumu/Nyahera/1980 had encroached into Kisumu/Nyahera/842. It also indicated that Mr. Olang Okello the defendant herein who was present during the site visit claimed that the boundary established as per the map leaves the graveyards of his parents inside plot No. Kisumu/Nyahera/842.

The report goes further to recommend that the dispute seems to be a land claim and advised the parties to seek redress in a court of law to hear and determine the issue and give directions of the next line of action to be taken. I believe this is why the plaintiffs filed this case in court after the advise of the Survey office and the Land Registrar.

From the above report it is clear that the defendant has always been a party to the processes of resolving the dispute through the survey office and the office of the Land Registrar. He also confirmed that he grew up with the plaintiffs as neighbours. The above report is also an admission by the defendant that his parents' graves are inside plot No Kisumu/ Nyahera/ 842 which belongs to the plaintiffs and is at the heart of the dispute herein.

The report by the Chief land Registration Officer dated 19th September 2014 which was filed in court on 13th October 2014 indicates that the plaintiffs and the defendants representatives were present together with 3 surveyors, Chief Land Registration Officer, security, and Area Chief whereby the map of Kisumu/Nyahera/842 registration section diagram 4 was used and the boundary between plot No 842 and 1980 was established. The report was consistent with the earlier report that Mr. Olang Okello had encroached into Kisumu/Nyahera/842. The report found that the issue at hand is not a boundary dispute but a claim over land of an area measuring 0.2Ha. The parties were advised to seek legal redress from a court of law.

Going back to the evidence of the parties, the plaintiffs produced documentary evidence to prove their claim from experts like Surveyors and Land Registrar including the RIM. The defendant however just denied the claim that he had not encroached on the plaintiff's parcel of land. The defendant also admitted that he had lied to his advocate that he was Joshua Olang Okello and even signed a statement and an affidavit claiming the same.

If the defendant could mislead his Counsel whom he has to tell the truth to enable him prepare a defence for him, then he can lie to anyone with a straight face. He did not strike me as a truthful witness from his demeanour and how he answered questions from his newly appointed Counsel. Counsel also looked frustrated by his own client and blamed him for misleading his previous Counsel Onsongo & Co. Advocates. I will therefore not dwell on the issue of the defendant's name as the plaint was amended to include the defendant's proper name.

Counsel submitted that the matter is a boundary dispute which ought to have been handled by the Land Registrar as per section 18 (2) of the Land Registration Act

18(2) The court shall not entertain any action or other proceedings relating to dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

I find that the reports from the Land Registrar and the surveyor are self-explanatory and that they have vindicated the plaintiff. After consideration of the dispute before them, the Land Registrar and the Surveyor gave a finding that this is not a boundary dispute but a claim over land which only the court has jurisdiction to handle. The defendant also does not have a counterclaim on the suit land from his pleadings and if it is his defence that he is not a trespasser on the suit land then he should not be worried about the implementation of any order in respect of plot No. 842.

The issue that this is a boundary dispute had already been determined by the court vide a ruling dated 31st July 2017 which dismissed the defendant's preliminary objection. It is not right for Counsel to raise the same issue that has already been determined.

On the issue as to whether the plaintiffs' suit is time barred, it is on record that the acts the plaintiff actively complained of the alleged trespass against the defendant in 2011 as per the letters and deliberations at the Land Registrars' office and filed the suit in 2012 when he was advised to seek legal redress from court. I therefore find that the plaintiff's suit is not time barred as alleged by the defendant. The plaintiffs in my view would be entitled to bring an action for recovery of their land before the expiry of 12 years from when the cause of action arose.

On the issue as to whether the plaintiffs are entitled to general damages against the defendant, it is trite law that trespass to land is actionable per se (without proof of any damage). In the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J., stated:-**

"I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..."

The plaintiff testified on how the defendant uprooted their eucalyptus fence and removed beacons and have had a long standing dispute over the suit parcel of land. If this is not suffering loss and damage then I would not know how to describe the same. The plaintiffs are therefore entitled to general damages for trespass on their parcel of land measuring 0.2Ha. I find that the plaintiffs will be adequately compensated with a sum of Kshs. 150,000/ as general damages as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the Defendant's trespass.

With the above I come to the conclusion that the plaintiffs have proved their case against the defendant and therefore enter judgement in their favour in the following terms.

- a) A permanent injunction is hereby issued restraining the defendant, his servants and /or agents , whatsoever or howsoever acting from trespassing upon, encroaching onto, alienating and/or assuming possession of any portion of the plaintiff's parcel of land known as KISUMU/NYAHERA/842 and /or interfering with the beacons and /or demarcations separating land parcel No. KISUMU/NYAHERA/842 & KISUMU/NYAHERA/1980 or in any other way interfering with the plaintiff's right to the enjoyment and use of the parcel of land.
- b) General damages for trespass Kshs. 150,000/
- c) Costs of the suit.

DATED and **DELIVERED** at **KISUMU** this **30TH** DAY OF **NOVEMBER, 2018**.

M. A. ODENY

JUDGE

JUDGMENT READ, and **SIGNED** in open court in the presence of;

- Mr. Talema holding brief for Njoga for Plaintiff
- Mr. Kowino holding brief for S. M. Onyango for defendant , and
- Court assistant, Joanne

M. A. ODENY

JUDGE