



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1060 OF 2016

(FORMERLY HCC NO. 515 OF 2012)

BARNABAS NYAGAKA MOTARI PLAINTIFF

VERSUS

VIDELIS NYAGWARA NYABUTI 1ST DEFENDANT

NICODEMUS ONYONKA 2ND DEFENDANT

J U D G M E N T

1. The plaintiff vide a plaint dated 12th November 2012 instituted the present suit and claims to be the registered owner of land parcel **West Kitutu/ Bogeka/457** while the 1st defendant and the 2nd defendant are the registered owners of land parcel **West Kitutu/Bogeka/3981** and **3983** respectively. The plaintiff claims that the defendants on or about 30th January 2010 unlawfully trespassed onto his said parcel of land and constructed temporary structures thereon and that although the land registrar and the surveyor have visited the site and established the boundaries the defendants have refused to vacate and persist in trespass on the plaintiff's parcel of land.

2. The plaintiff prays for judgment against the defendants jointly and severally for:-

(a) An order of eviction;

(b) Permanent injunction;

(c) An order that the land registrar/surveyor re establish and fix the boundaries;

(d) Costs of the suit.

3. The defendants were served with summons to appear but never appeared and did not file any defence. The suit was fixed for formal proof hearing on 20th April 2017 when the plaintiff and his advocate appeared and the plaintiff testified as the sole witness in support of his claim.

4. In his testimony, the plaintiff testified that the defendants land parcels **3981** and **3983** border his land parcel **457** and they are neighbours. The plaintiff testified that he purchased his land parcel from one Julia Bosibori and that he was issued with a title deed. That the defendants on 30th January 2010 invaded his land parcel **457** where they built some temporary structures and damaged his crops. That when the plaintiff vide a demand notice dated 25th March 2011, demanded that the defendants vacate his land, the

defendants lodged a case at the Mosocho Land Disputes Tribunal which was heard and the Tribunal held that the dispute related to a boundary dispute and directed that the land registrar and the surveyor do visit the site and establish and fix the boundaries.

5. The plaintiff testified that the Tribunal's decision was adopted by the Magistrate's court and the decision was implemented as the land registrar and the surveyor re-established the boundaries and fixed the beacons. The plaintiff relied on the bundle of documents filed on 13th November 2012 to support his evidence and sought the grant of the orders sought in the plaint.

6. The court has considered the evidence adduced by the plaintiff and the documents relied upon by the plaintiff in support of his claim which at any rate have not been challenged as the defendants did not appear or file any defence. As per the documents tendered in evidence, I am satisfied the plaintiff is the registered owner of land parcel **West Kitutu/Bogeka/457** as per the title deed issued on 25th March 2010 (**PEx.1** as per list of documents dated 12th November 2012) and the certificate of official search dated 7th November 2012 (**PEx.2**). The plaintiff as the registered proprietor of the subject suit property is entitled to exclusive use and enjoyment of quiet possession of his land without any interference from the defendants and/or any other person.

7. The plaintiff's claim that the defendants unlawfully invaded and trespassed onto his land on or about 30th January 2010 appears credible as there is evidence that following demand by the plaintiff that the defendants vacate from the land, the defendants lodged a land dispute before the Mosocho Land Disputes Tribunal. The Tribunal as per the proceedings exhibited as "**PEx.7**" in the list of documents heard the dispute and determined that the dispute was but a boundary dispute which could be resolved by the District Surveyor. The Tribunal rightly, in my view held that the dispute between the parties related to trespass and under the **Land Disputes Tribunal Act, No. 18 of 1990** they were empowered under Section 3(1) to determine such disputes. The Tribunal's decision was adopted by the Chief Magistrate's Court, Kisii vide Misc. App. No. 53 of 2011 as judgment and a decree issued on 14th June 2011 as per "**PEx.9**" exhibited as document No. 9 in the plaintiff's list and bundle of documents.

8. The land registrar, Kisii Lands office, in execution of the decree visited land parcels **457** and **451**. The land registrar made a report dated 27th March, 2012 where he noted land parcel **West Kitutu/Bogeka/451** was subdivided to create land parcels **3981, 3982, 3983** and **3984** and that land parcel **451** was no longer in existence. The land registrar's report indicated the defendants had built their homestead inside parcel **457** owned by the plaintiff and further indicated the defendants were not willing to relocate their houses. The land registrar indicates in the report that the surveyor could not mark the physical boundary between parcel **451** and **457** because parcel **451** ceased to exist following the subdivision. The land registrar's report and the surveyor's sketch plan were annexed as document No. 5 in the plaintiff's bundle of documents. As per the sketch by the surveyor the defendants have encroached onto the plaintiff's land to the extent 0.17Ha.

9. On the basis of the evidence adduced and the documents tendered in evidence, I am satisfied the plaintiff has proved his case on a balance of probabilities and is entitled to judgment. Though there is clear evidence that the defendants are in trespass or have encroached onto the plaintiff's land parcel **West Kitutu/Bogeka/457** the land registrar in his report states that the boundary marks delineating land parcel **457** were not marked by the surveyor and hence there would be need for the boundary to be physically marked on the ground.

10. Accordingly, I enter judgment in favour of the plaintiff against the defendants jointly and severally in the following terms;-

(a) That the defendants have unlawfully encroached and are in trespass of the plaintiff's land parcel West Kitutu/Bogeka/457.

(b) That the land registrar, Kisii County and the County Surveyor are hereby directed to establish and fix the common boundary between land parcels West Kitutu/Bogeka/3981, 3982

and 3983 (formerly part of parcel 451) and land parcel West Kitutu/Bogeka/457.

(c) That upon the boundary being fixed by the land registrar as in (b) above, the defendants to vacate and deliver vacant possession of the portion of land parcel West Kitutu/Bogeka/457 that they have encroached on within 90 days of the date the land registrar establishes and fixes the common boundary.

(d) That in the event the defendants fail to vacate as in (c) above an order for the forcible eviction of the defendants to issue on application by the plaintiff.

(e) A certified copy of the decree issued herein to be served on the defendants within the next 30 days from the date hereof.

(f) Each party to bear their own costs of the suit.

Ruling dated, signed and delivered at Kisii this 31st day of May, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st and 2nd defendants

..... court assistant

J. M. MUTUNGI

JUDGE