



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**ELC NO. 147 OF 2011**

**DENNIS MANONO NYATUNDO ..... PLAINTIFF**

**VERSUS**

**RICHARD GEORGE MORANDIA ..... DEFENDANT**

**JUDGMENT**

The dispute between the parties herein is over a parcel of land measuring 5.5 m by 27 m (approximately 0.01 hectares) (**“the disputed land”**). The plaintiff is the registered owner of all that parcel of land known as LR. No. Nyaribari Chache/B/B/Boburia/6645 (**“Plot No. 6645”**) while the defendant is the registered owner of all that parcel of land known as LR No. Nyaribari Chache/B/B/Boburia/6646 (**“Plot No. 6646”**). Plot No. 6645 and Plot No. 6646 were sub-divisions of a larger parcel of land known as LR No. Nyaribari Chache/B/B/Boburia/5868 (**“Plot No. 5868”**). Plot No. 5868 was at all material times registered in the name of Daniel Ratemo Kemuma as the proprietor thereof. The said parcel of land measured 0.23 hectares or thereabouts.

On or about 4/7/2000, Daniel Ratemo Kemuma (**“Ratemo”**) sold to the defendant a portion of Plot No. 5868 measuring 65 feet by 80 feet by 65 feet at a consideration of Kshs.400,000/=. Following this transaction, Ratemo (now deceased) caused Plot No. 5868 to be subdivided into two (2) portions namely Plot No. 6645 and Plot No. 6646. The mutation for this sub-division was drawn by the District Surveyor, Kisii and was registered on 13/7/2000. According to the said mutation form, Plot No. 6645 was to measure 0.18 hectares while Plot No. 6646 was to measure 0.05 hectares. For reasons which are not clear from the evidence on record, the measurements of the two plots were amended or altered on 20/6/2000 by the District Surveyor before the registration of the mutation form and the measurement of Plot No. 6645 was reduced to 0.17 hectares and that of Plot No. 6646 increased to 0.06 hectares. Ratemo thereafter transferred Plot No. 6646 to the defendant and retained Plot No. 6645 in his name. Plot No. 6645 was registered on or about 13/7/2000 as measuring 0.17 hectares in accordance with the amended mutation form which I have referred to above. Plot No. 6646 which was transferred by Ratemo was also registered at the same time but there is a dispute whether its registered measurement was 0.06 hectares in accordance with the amended mutation form or 0.05 hectares as per the original mutation form.

Ratemo died on a date which is not clear from the evidence on record and his wife, Loyce Wangare Ratemo (**“Wangare”**) was registered as the owner of the Plot No. 6645 by transmission on 20/2/2002. After a lapse of about six (6) years from the date when she acquired the said property, Wangare sold and transferred the same to the plaintiff on 8/4/2008 at a consideration of Kshs.2,000,000/=. Plot No. 6645 and Plot No. 6646 are adjacent to each other and in fact share a common boundary.

The plaintiff brought this suit against the defendant on 21/7/2011 seeking; a declaration that the plaintiff is the registered owner of Plot No. 6645, a permanent injunction restraining the defendant from re-entering, trespassing onto, cultivating, building on, interfering with and/or in any other manner

whatsoever dealing with the portion measuring 6 metres by 27 metres of Plot No. 6645 and general damages for trespass. The plaintiff averred that he was the owner of Plot No. 6645 which measured 0.17 ha. While the defendant was the owner of Plot No. 6646 which measured 0.05 ha. which parcels of land share a common boundary. The plaintiff averred that in September 2008, the defendant commenced construction on Plot No. 6646 by putting up a brick walled pit latrine next to the plaintiff's gate. The plaintiff averred that on or about 8/7/2011, the Defendant brought bricks and placed the same on a portion of Plot No. 6645 owned by the Plaintiff with the intention of undertaking the construction of a structure on that portion of Plot No. 6645 without the plaintiff's permission. The plaintiff averred that as a result of the defendant's actions aforesaid, he had been deprived of a portion of Plot No. 6645 measuring 6 metres by 27 metres which the plaintiff had annexed or excised from Plot No. 6645. The plaintiff averred that he had been deprived of the use and enjoyment of the said portion of Plot No. 6645 and had therefore suffered loss in respect of which he claimed damages from the defendant.

The defendant filed a statement of defence on 12/3/2013. The defendant averred that he purchased the entire parcel of land comprised in Plot No. 6646 from Ratemo who gave him vacant possession thereof after which he fenced the same with cedar posts, barbed wire and Kei apple which boundary fence remained in place as at the time the defence was filed. The defendant averred that no dispute of whatsoever nature arose between him and Ratemo over the boundary of Plot No. 6646 that was sold to him and Plot No. 6645 that remained in the name of Ratemo which was subsequently sold by Ratemo's widow to the plaintiff. The defendant averred that Plot No. 6645 was sold to the plaintiff on a where is as is basis and as such the plaintiff's claim herein was not justified. The defendant averred that plot No. 6646 measured 0.06 ha. and had a boundary in place. The defendant denied that he had encroached on plot No. 6645.

Before the defendant filed the statement of defence aforesaid the court had by consent of the parties referred the dispute to Kisii Central District Land Registrar and Surveyor for them to determine the exact boundary position between Plot No. 6645 and Plot No. 6646 in accordance with the mutation that was registered on 13/7/2000 which I have referred to above. The District Surveyor filed his report in court on 22/12/2011 while the Land Registrar filed his report in court on 26/1/2012 following the said consent. In their reports, the Land Registrar and Surveyor made an observation that the existing boundary between the two parcels of land on the ground did not conform to the boundary as it appears in the mutation that was registered on 13/7/2000. They concluded that the area where the defendant had dug a borehole and constructed a pit latrine falls within Plot No. 6645 on the ground. These reports were contested by the defendant who made an application on 28/2/2012 to have the same set aside. When the defendant's application to set aside the said reports came up for hearing on 11/2/2013, the parties agreed that the said reports formally produced in evidence by the makers thereof.

This suit was heard on 3/6/2014, 15/7/2014 and 17/12/2014 when the plaintiff gave evidence and called one witness. The defendant on the other hand gave evidence and called three (3) witnesses. After the close of evidence, the parties were directed to make closing submissions in writing. There was a further order for the parties to set down the matter for mention for a judgment date once they had filed the submissions. The matter was not mentioned until almost seven (7) months later on 7/7/2015 when I fixed the matter for judgment on 18/12/2015. This was however not to be because in the same month of July, 2015 when I gave the parties a date for judgment, I was transferred to Nairobi. This explains the delay in the delivery of the judgment herein which is highly regretted.

Going back to the judgment, I have considered the plaintiff's claim as pleaded and the evidence that was adduced in proof thereof. I have also considered the defendant's statement of defence and the evidence that was tendered on his part. Finally, I have considered the closing submissions by the parties' respective advocates and the authorities that were cited in support thereof. The parties did not agree on the issues for determination by the court. The plaintiff framed 14 issues which he reduced to three (3) in his submissions while the defendant framed ten (10) issues. After considering the pleadings, the evidence on record and the issues that were framed by the parties, I would summarize the issues which in my view arise for determination in this suit as follows:-

1. Whether the disputed parcel of land where the defendant has constructed a pit latrine and sank a borehole is within Plot No. 6645?
2. Whether the defendant had trespassed on Plot No. 6645?
3. Whether the plaintiff is entitled to the reliefs sought in the plaint?
4. Who is liable for the costs of the suit?

### **The first issue:**

The Plaintiff's complaint in this suit is that the defendant had trespassed on a portion of Plot No. 6645 and constructed a pit latrine thereon. At the trial, it transpired that the plaintiff had also dug a borehole on this portion of land in dispute. It was common ground that the disputed portion of land measured 0.01 hectares. From the evidence on record, it was not disputed that Plot No. 6645 owned by the plaintiff and Plot No. 6646 owned by the defendant were sub-divisions of a parcel of land known as Plot No. 5868 which was owned by Ratemo. It was also not disputed that Plot No. 5868 measured 0.23 hectares and that it was sub-divided into two portions only. It was also not disputed that the portion of Plot No. 5868 that was sold to the plaintiff namely; Plot No. 6645 measured 0.17 ha. This means that the portion that remained from the original parcel of land namely, Plot No. 6646 ought to have measured 0.06 ha unless there was another sub-division of the original parcel of land which was not the case herein. The measurement of 0.17 ha for Plot No. 6645 and 0.06 ha for Plot No. 6646 is in tandem with the amended mutation that gave rise to the two parcels of land which I have referred to above. The plaintiff had the burden of proving that the disputed parcel of land measuring 0.01 ha is within Plot No. 6645.

The Plaintiff gave evidence that he purchased Plot No. 6645 from Wangare. He stated that before purchasing the property in 2008 he was shown the boundaries thereof and he had no issues with the same. He had quiet possession of Plot No. 6645 until 8/7/2011 when the defendant who owned Plot No. 6646 brought truck load of bricks to be used for construction and put the same on a portion of Plot No. 6645. The defendant thereafter put up a pit latrine and also dug a borehole on the said portion of Plot No. 6645. His request to the defendant to relocate the said pit latrine and borehole to Plot No. 6645 did not yield any positive response. The plaintiff stated that he was left with no alternative but to file a suit. The plaintiff stated that after this suit was filed, the District Land Registrar and Surveyor visited Plot No. 6645 and Plot No. 6646 and confirmed that the disputed parcel of land is on Plot No. 6645. The plaintiff's witness was Stephen Rioba Kambaga (PW I). As at the time of his evidence, he was the Land Registrar, Kisii County. He told the court that plot No. 6645 was registered in the name of the plaintiff and it measured 0.17 ha and that Plot No. 6646 was registered in the name of the defendant and it measured 0.05 hectares. PW I produced copies of the register for Plot No. 6645 and Plot No. 6646 as exhibits. PW 1 stated that following an order that was issued by this court his predecessor, Mr. Onary visited the two parcels of land for the purposes of determining their boundaries and prepared a report after doing so. He produced the said report as an exhibit. The plaintiff relied entirely on this report (Plaintiff's exhibit 3) that was prepared by the District Land Registrar and Surveyor in support of his contention that the disputed parcel of land is on plot No. 6645.

In his defence, the defendant told the court that he purchased two parcels of land from Ratemo in the year 2000. He stated that under the first agreement that was made on 4/7/2000 he purchased a portion of Plot No. 5868 measuring 65 feet by 80 feet and 65 feet by 90 feet at a consideration of Kshs.400,000/=. Following this agreement, a surveyor came and sub-divided Plot No. 5868 so that he could have a separate title for the parcel of land that he had purchased. He stated that when this process was ongoing, Ratemo offered him more land from Plot No. 5868 thereby increasing the original parcel of land that he had purchased from Ratemo. He purchased the additional land at a consideration of Kshs.100,000/= through agreement for sale dated 20/7/2000. The defendant produced the two (2) agreements for sale as exhibits. The defendant stated that the two parcels of land put together measured 0.06 hectares which is the portion of Plot No. 5868 that he purchased from Ratemo. He stated that he took possession of the entire parcel of land that he purchased from Ratemo measuring 0.06 ha and fenced off the same with cedar posts and barbed wire. He also planted Kei apple around the fence. He stated that the said fence that marked the boundary of his parcel of land and Ratemo's land was still in place as at the time he was giving evidence.

He told the court that he did the fencing while Ratemo was still alive and his wife Wangare was also present and he was assisted by Ratemo's worker, one Charles Mogaka (DW 3). He stated that after the sub-division of Plot No. 5868 was completed, he was issued with a title deed for Plot No. 6646 while Ratemo retained Plot No. 6645. He produced a copy of the mutation form through which Plot No. 5868 was sub-divided to give rise to Plot No. 6645 and Plot No. 6646 as exhibit. He stated that he had no dispute with Ratemo over the boundary of Plot No. 6645 and Plot No. 6646 during his lifetime. He stated that according to the said mutation, Plot No. 6646 measured 0.06 ha while Plot No. 6645 which was registered in the name of Ratemo measured 0.17 ha. He stated that in the title deed that was issued to him for Plot No. 6646, the measurement of the said plot was given as 0.06 Ha. The same applies to the measurement that was indicated in the certificate of official search that was issued to him on 2/10/2008 (Defence exhibits 5 and 7).

He stated that he constructed a pit latrine and also dug a bore hole on the additional parcel of land that he purchased from Ratemo which is in dispute herein. He stated that in addition to the said latrine and borehole, he had his main house and servant quarters also on Plot No.6646. He stated that the plaintiff started complaining in the year 2008 that he was occupying his land. He stated that he engaged a surveyor who confirmed that the parcel of land he was occupying measures 0.06 ha. He produced a report by Arch Surveyors as an exhibit (Defence exhibit 8(a) and 8 (b)). He stated that he fenced the disputed parcel of land in the year 2000 before the plaintiff came to the scene in the year 2008. DW 2, DW 3 and DW 4 corroborated the defendant's evidence. In summary, the defendant's contention was that the disputed parcel of land formed part of Plot No. 6646 which he purchased from Ratemo.

As I have stated above, the onus rested on the plaintiff to prove the alleged encroachment on Plot No. 6645. Apart from the report that was prepared by Mr. Onary, the former Kisii District Land Registrar (Plaintiff's exhibit 3) by an order of this court, the plaintiff placed no other evidence before this court in proof of the alleged encroachment. The plaintiff had submitted that the said report is binding on the court. I am not in agreement with this submission. The report in my view was nothing more than an expert opinion which is not binding on the court. As I have mentioned earlier, when a dispute arose over the said report, the parties agreed that the same would be treated like any other piece of documentary evidence. I am of the view that the report is deficient in several material respects as far as the issue of the boundary between Plot No. 6645 and Plot No. 6646 is concerned. I am of the opinion that when determining the said boundary, the District Land Registrar and the Surveyor ought to have considered the measurements of Plot No. 6646 and Plot No. 6645 before concluding whether the disputed parcel of land is on Plot No. 6645 or Plot No. 6646. It is common ground that plot No. 6646 owned by the plaintiff measured 0.17 ha. I wonder how the two officers would have concluded that the disputed parcel of land is on Plot No. 6646 without first ascertaining the measurement of Plot No. 6646. The sketch plan attached to the said Land Registrar's report shows that the two officers concentrated mainly on the disputed parcel of land. There is no indication at all that they bothered to take the measurements of Plot No. 6645 and Plot No. 6646. It is also interesting to note that the District Land Registrar and Surveyor who had the mutation that was registered on 13/7/2000 as their point of reference did not bother to find out why Plot No. 6646 which was supposed to measure 0.06 ha according to the said mutation was said to have been registered as measuring 0.05 ha and more particularly, where 0.01 ha of the original Plot No. 5868 which gave rise to Plot No. 6645 and Plot No.6646 had disappeared to.

According to the mutation which was their point of reference, Plot No. 5868 measured 0.23 ha. According to their report, Plot No. 6645 measured 0.17 ha and Plot No. 6646 measured 0.05 making a total of 0.22 ha. If the two officers had acted impartially and with diligence, they could not have failed to ask where 0.01 ha of the original plot had disappeared to. This is why it was important for the two officers to ascertain the measurements of Plot No. 6645 and Plot No. 6646 as they are on the ground and compare the same with the measurements contained in mutation before reaching a conclusion that the owner of one plot had encroached on the other. The two officers having failed to take measurements for Plot No. 6645 and Plot No. 6646 as they are on the ground, the plaintiff's exhibit3 is in my view of no probative value on the issue as to whether the disputed parcel of land is on Plot No. 6645 or Plot No.6646.

From the totality of the evidence on record, I am inclined to believe the evidence that was tendered by the defendant and his witnesses that the defendant had purchased the disputed parcel of land from

Ratemo. I find the evidence that was given by the defendant and his witnesses consistent and trustworthy considering all the circumstances surrounding the transaction. I can see no explanation why the mutation was amended with regard to the measurement of Plot No. 6645 to read 0.17 ha instead of 0.18 ha and Plot No. 6646 to read 0.06 ha instead of 0.05 ha. These measurements were not challenged in these proceedings. Nothing in my view turns out on the dates of the two agreements for sale that the defendant had entered into with Ratemo and the date of the mutation. I wonder why allegations of fraud were not raised against the first agreement that the defendant had entered into with Ratemo. The first agreement was dated 4/7/2000 while the mutation was dated 20/6/2000. I do not find it strange therefore when the defendant contends that the portion of land that he purchased from Ratemo pursuant to the second agreement dated 26/7/2000 was factored in the mutation that was registered on 13/7/ 2000. I also see no significance in the error in the number of the National Identity Card for one of the witnesses to the second agreement, Loise Wangare Ratemo. The number given was that of Wangare save that one figure was missing. Wangare was not called as a witness to deny that she witnessed the said agreement.

The defendant also led unchallenged evidence that he took possession of the disputed parcel of land in the year 2000 during the life time of Ratemo and fenced the same which fence was still in place as at the time this suit was filed. Ratemo or his wife Wangare could have objected to this move if the defendant's action was illegal. Their inaction lends credence to the defendant's contention that that parcel of land was indeed sold to him by Ratemo. In the final analysis and for the reasons given above, I am not satisfied that the disputed parcel of land is part of Plot No. 6645 as contended by the plaintiff.

**The second and third issues:**

Having made a finding that the disputed parcel of land is not part of Plot No.6645 owned by the plaintiff, the second issue must be answered in the negative. Since the defendant is not occupying the plaintiff's parcel of land, the issue of him having trespassed on that parcel of land does not arise.

In conclusion, it is my finding that the plaintiff has failed to prove his case against the defendant to the required standard. The plaintiff's suit is in the circumstances without merit and the same is accordingly dismissed with costs to the defendant.

**Signed at Nairobi this.....day of.....2016**

**S. OKONG'O**

**JUDGE**

**Delivered, Dated and Signed at Kisii this 15<sup>th</sup> Day of April 2016**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of**

.....for the Plaintiff

.....for the Defendant