



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 182 OF 2017

FRANKLINE NGIRA OSENOH.....PLAINTIFF

= VERSUS

ELPHAS BARASA OKHONJO.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed a Plaint on the 7th of November, 2017 but later amended his Plaint on the 5th June, 2020 where he impleaded the Defendant in this suit and prayed for judgement against him for:

a. An order of permanent injunction restraining the Defendant, their agents, servants, employees and such persons acting through them from encroachment and/or interfering with the Plaintiff's land parcel number SAMIA/WAKHUNGU-ODIADO/1120;

b. An order directing the Land Registrar Busia County and the Government Land Surveyor to visit the two land parcels number SAMIA/WAKHUNGU-ODIADO/1120 and SAMIA/WAKHUNGU-ODIADO/849 and establish a boundary thereof;

c. An eviction order against the Defendant from Land Parcel Number SAMIA/WAKHUNGU-ODIADO/1120 or a portion thereof;

d. Costs of this suit; and

e. Any other relief of the Court.

2. The Plaintiff contends that although he is the absolute owner and registered proprietor of the land parcel known and L.R NO. SAMIA/WAKHUNGU-ODIADO/1120 (the **suit property**) while the Defendant is the owner of the neighbouring land parcel number SAMIA/WAKHUNGU-ODIADO/849 and they share a common boundary. That the Defendant has without any colour of right encroached into a portion of the Plaintiff's land by extending part of his permanent building on the said encroached portion thereby infringing on and abusing the Plaintiff's rights over the said portion.

3. The Defendant filed his defence and counterclaim on the 13th of July, 2020 denying the claim. In the counterclaim, the Defendant contended that the Plaintiff encroached on his land parcel number SAMIA/WAKHUNGU-ODIADO/1438 and even built a kiosk that is partly inside his land. That despite the County Land Registrar and County Surveyor pointing out the correct boundaries for the land, the Plaintiff has declined to pull down the kiosk preventing the Defendant from completing his building. The Defendant prayed for a demolition and eviction judgement do issue against the Plaintiff in respect of the structures put up on Land Reference Number SAMIA/WAKHUNGU-ODIADO/1438 together with the costs of the counterclaim.

4. The hearing commenced on the 26th of November, 2020. The Plaintiff, **FRANKLINE NGIRA OSENOH** testified as **PW1**. He testified that he lived in Mukonde Village in Samia within Busia County. That the Defendant lives on Plot No. 849 where he has built a house that extends into his plot Number 1120. **PW1** relied on his witness statement dated 2nd June, 2020 as his evidence in chief, where he stated that the two parcels of land neighbour each other. That the Defendant invited the Land Registrar who, together with the County Land Surveyor came to determine the boundary. That the boundary determination was done in their presence and it was established that the Defendant's building has extended into his land.

5. **PW1** concluded by producing the letter dated 19/10/2017 as Pex1, the Surveyor's report dated 13/3/2020 was marked as MFI P2 and the map for L.R. No. 1120 as PEx 3. He urged this Court to issue a permanent injunction against the Defendant and for the County Land Registrar/Surveyor to determine the boundaries between the two parcels.

6. Upon cross-examination, **PW1** reiterated that he owns parcel No. 1120 while the Defendant owns L.R No. 849. That he bought land

measuring 12 meters by 35 meters from Adrian Achieng' and at the time his neighbour was Jeremiah Musumba who sold the land to the Defendant. That he had no idea that L.R No. 849 had been subdivided. **PW1** confirmed that he called a government surveyor when subdividing his land from Adrian. He confirmed that they have had a boundary dispute case before the Surveyor and Registrar. That there is no surveyor report because the surveyors who visited the land did not prepare any. That although he has seen the surveyor's report dated 6th November, 2020 filed by the Defendant, he did not agree with the report and called a private surveyor, Lubembe, to conduct the survey.

7. On re-examination, **PW1** confirmed that he produced his title together with his list of documents dated 7th November, 2017. He stated further that Jeremiah bought land from Adrian before he did. **PW1** concluded by stating that the survey conducted on the 6th of November, 2017 was between parcel number 849 and 1120 and on the map, parcel number 849 was not subdivided.

8. **JOSEPHAT OKELLO** testified as **PW2**. He testified that he lives in Funyula town and proceeded to adopt his witness statement dated 22nd October, 2020 as his evidence in chief. In the statement **PW2** stated that he lives on plot No. 7 while the Plaintiff's parcel is L.R No 1120 where he resides while the Defendant's parcel is L.R No. 849 on which he has built permanent rental houses. That the two parcels share a common boundary and the Defendant has extended part of his permanent buildings into the Plaintiff's land. That the Defendant invited the Land Registrar who came to the ground accompanied by the County Land Surveyor to determine the boundary between the two parcels. That Tom Chepkwesi, the former Land Registrar and Julius Mulusa, the then County Surveyor, visited the two parcels on the 6th of November, 2017 and did the boundary determination process in his presence, the Plaintiff, the Defendant, Jeremiah Musumba, Oluoch Bwana Chrispinus, Seby Bagoya and Sylvester Ngira.

9. That Mr. Mulusa started by measuring the width of the road passing through parcels 1120 and 849 and determined it to be 4 meters. Mr. Mulusa then measured the width of L.R No. 1120 which extended to the permanent house built by the Defendant which was inside the Plaintiff's land. That Mr. Mulusa and Mr. Chepkwesi informed **PW2** to advise the Defendant to compensate the Plaintiff for the portion that his permanent house had extended into the Plaintiff's land but the Defendant declined to do so. That although he never saw the survey report of survey exercise carried out, he was surprised that the report in the Defendant's list of documents related to boundary proceedings dated 6th of November, 2017 together with a survey report of even date for a boundary dispute between L.R No. 1120 and L.R No. 1438.

10. Upon cross-examination, **PW2** stated that he neighbours both the Plaintiff and the Defendant. That the Defendant's parcel is L.R No. 849 although he did not know who sold the land to the Defendant. **PW2** confirmed that he was present when the survey exercise was conducted on 6th October, 2017 because he was invited to the meeting by the Plaintiff. When questioned on paragraph 12 of his statement, **PW2** admitted that he had no knowledge in survey and that although he was entitled to receive the survey report through the complainant, he has never seen the report of the visit of 6th November, 2017. **PW2** confirmed that he is aware of the survey between L.R No. 1120 and 849 and not L.R Nos. 1120 and 1438. That he did not know the owner of L.R No. 1438 although according to the search it is registered in the Defendant's name. That as per the search the title for 1438 was created on 7th August, 2017.

11. The Plaintiff's third witness was **FEBIAN LUBEMBE IMBWAGA** a surveyor employed by Mali Surveyors. He stated that he had over 30 years' experience and had been instructed by the Plaintiff to visit the disputed land parcel No. 1120. That he carried out the instructions and prepared a report dated 13th March, 2020 which he produced as PEx 2 and a map sheet for the area sheet No. 16 as PEx 3. **PW3** explained that on the ground parcel 849 was amalgamated to create a new number 1415. That ground size for parcel no. 1120 is 0.03Ha based on the wall built while parcel No. 849 was 0.09Ha before amalgamation. On the ground, 1120 is lacking 3 meters on the lower side while 849 had an excess of 3 meters i.e. instead of 18.5m, it was 21.5m. **PW3** explained that he did this by scaling the map produced. That there is a fixed road between the two parcels measuring 4 meters. **PW3** concluded that there was encroachment.

12. Upon cross-examination, **PW3** confirmed that he did not call the owner of L.R No. 849 during the survey and neither did he have a court order to do the exercise. He confirmed also that he did not know the dispute between 1120 and 1438. **PW3** stated that there was a green card for land parcel 1415 but he did not produce a copy to confirm the amalgamation. He recommended that the Land Registrar revisit the boundary and re-establish them. That he was not aware that there had been an earlier visit by the Land Registrar and the County Surveyor. **PW3** disagreed with Mr Mulusa's findings that No. 1120 was 0.04Ha as it was 0.03Ha. On re-examination, **PW3** reiterated that land parcel 1120 bordered land parcels 1415, 1186 and 803. This marked the close of the Plaintiff's case.

13. The Defendant called two witnesses. **DW1** was the Defendant himself. He testified that he is a retired civil servant who resides in Funyula and that the Plaintiff is his neighbour. He stated that he converted his parcel of land into a commercial plot. That before buying the land he conducted a search (Dex 1) and he became the duly registered owner of the plot on the 7th of August, 2017. That he started construction and found a small portion of a kiosk on his land about one metre and he could not proceed with the works. That the Surveyor visited the land and confirmed trespass.

14. Upon cross-examination, **DW1** stated that he last worked with the Ministry of Lands. He confirmed that he neighbours the Plaintiff although his land is 1438 and not 1415. He confirmed further that his land is where land parcel no. 1415 is indicated on the map. On re-examination, **DW1** stated that he was not stationed at Busia at the time of his retirement.

15. The defence hearing proceeded on the 22nd of July, 2021 with **GEOFFREY KAMADI** testifying as **DW2** who has been the Busia County Surveyor for two years. He confirmed that Julius Mulusa (deceased) was his predecessor. That the exercise on the suit parcel was conducted on the 6th of November, 2017 by Mr. Mulusa and Mr. Tom Chepkwesi, the former Land Registrar, Busia County and they prepared a report dated 8th November, 2017 (Dex 2). That the surveyor found that parcel number 1120 had encroached on number 1438 by one meter and the Registrar directed the Accused to remove the offending structure within two weeks of that date. **DW2** stated that he is not aware of any appeal against the ruling on the land.

16. Upon cross-examination, **DW2** stated that the survey office went to the site in 2017 although he did not personally go to the site. He confirmed that L.R No. 1120 belonged to the Plaintiff while the Defendant's parcel was a subdivision of L.R No. 1415. That the resulting

numbers did not interfere with the neighbouring plot number 1120 and it should therefore remain on the same acreage it was before the subdivision of 1415. That the mutation of 1120 shows it measures approximately 0.05Ha and on the survey on approximation is less than 0.05Ha. That 0.8Ha is within the range of 0.076Ha. **DW2** stated that Mr. Lubembe was not a licensed surveyor nor is a government surveyor.

17. On re-examination **DW2** stated the surveyors are licensed by Institute Surveyors of Kenya (ISK) and although anyone is allowed to carry out a survey but it must be done under the guidance of a licensed or government surveyor. This marked the close of the Defendant's case.

18. Parties were then directed to exchange their written submissions. The Plaintiff filed their submissions on the 9th of September, 2021. He submitted that the dispute is between his L.R No. 1120 and the Defendant's L.R No. 1438. That the Defendant failed to disclose that his parcel was an amalgamation of plots including plot no. 849. He submitted that although Mr. Lubembe did not have a current survey license, that did not disqualify him from giving evidence on what he observed. He concluded that it is only fair and just to have the boundary dispute determined by the County Surveyor and each party have their own surveyors present to exclude the perception that the Defendant having been a boss at Ardhi House might have influenced the outcome of the previous site meeting.

19. The Defendant filed his submissions on the 10th of August, 2021. He submitted on the following issues for determination: who is the registered owner of L.R No. Samia/Wakhungu-Odiado/849 vis-a-vis L.R No. Samia/Wakhungu-Odiado/1438; whether Fabian Lubembe was a competent witness and if so whether his report should be relied upon; and whether the Defendant has proved his counter-claim. On the first issue, the Defendant submitted that from the evidence it emerges that the Plaintiff does not know that L.R No. Samia/Wakhungu-Odiado/849 is not owned by the Defendant. That the report produced by PW2 does not convey the true status on the ground. The Defendant further submitted that this Court should not place any weight on PW2's reports as he did not prove that he had the competency to carry out the survey especially on the fact that he relied on a survey map overtaken by events. That the survey report indicated the Plaintiff had trespassed on a portion of his land and put up a kiosk. He prays for judgement in his favour for the Counterclaim and for the Plaintiff's claim be dismissed with costs.

DETERMINATION

20. Having considered the parties' pleadings, submissions and the applicable law, the issues which in my opinion arise for determination are as follows:

- a. Whether the Plaintiff has established that the Defendant has encroached onto his parcel of land;**
- b. Whether the Defendant has proved his counterclaim;**
- c. Who pays for the costs of this suit?**

21. With regards to the **first issue**, the Plaintiff has alleged that the Defendant has encroached into his land parcel number L.R No. 1120 by three meters. The Land Registration Act, no 12 of 2012 at section 18 provides as follows:

- 1. Except where, in accordance with section 20 it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan be deemed to indicate the approximate boundaries and the approximate situation only of the parcel;**
- 2. The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section;**
- 3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to the boundaries and situation as may be necessary;**

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act (Cap.299).

22. The mandate to determine disputes lies with the Land Registrar first and any other subsequent appeal to the Chief Land Registrar or a complaint to this Court. This was the ruling in the case **George Kamau Macharia v Dexka Limited [2019] eKLR** the Court held that:

“...The framers of section 18(2) of the Land Registration Act placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court.”

23. During the hearing all the witnesses agree that there was a Land Registrar's hearing on the boundary dispute on the 6th of November, 2017. PW1 produced a letter from the Land Registrar dated 19th October, 2017(PEX 1) informing him that the Registrar and the County Surveyor will be visiting parcels number 849 and 1120 in order to determine the boundaries of the said parcels. The hearing by the Land Registrar was done on the 6th of November, 2017 in the presence of the parties, County surveyor, and other individuals. The findings of the Land Registrar, Mr Tom Chepkwesi was as follows:

“The Surveyor has established that the boundary line marked on the ground along the demolished wall is/was correctly placed. Consequently, it is confirmed that there is encroachment into the complainant's parcel by the structure built by the accused. The

boundary line running from top downwards is a straight line.”

24. The Land Registrar made the following order:

“The Accused person is hereby ordered to remove the protruding structure that has encroached by a distance of 1 meter into complaints’ plot within 2 weeks from the date hereof.”

25. The surveyor, Mr. Mulusa in his findings stated that L.R 1438 measures 0.076ha while L.R 1120 measures 0.04ha. The county surveyor added that the parties should maintain boundaries as they were corrected. He also attached a sketch plan of measurements as picked from the ground. The Plaintiff was unhappy by these findings and decided to engage a private surveyor who made contrary findings to those of the County Surveyor. One of the reasons the Defendant urged the court to ignore the report of the private surveyor was because he did not have a valid practicing certificate for the year of the report.

26. The plaintiff’s title was issued in the year 1997 and it was a subdivision of Samia/Wakhungu-Odiado/1001 as per the mutation registered on 21st August 1995 produced in evidence by both the Plaintiff and the County Surveyor. According to the mutation and title deed, the plaintiff’s parcel is recorded as measuring 0.05ha. The Defendant’s title number 1438 was registered on 7th August, 2017 is given as measuring 0.08ha. The defendant’s title was thus issued after the Plaintiff’s. From the evidence, it is also apparent that the plaintiff took possession earlier than the defendant. This is deductible from the evidence that he had had a boundary dispute with the owner of parcel number 849 which dispute had earlier been resolved.

27. This Court is alive to the provisions of section 18 and 19 of the Land Registration Act which mandates the Land Registrar to resolve boundary disputes. In this instance, they visited the disputed boundary but their visit did not resolve the dispute. The County surveyor produced the mutation for 1001 which gives parcel number 1119 measuring 1.64ha as the parcel number neighboring 1120. In cross-exam, Mr. Kamadi said parcel number 1120 should remain with the same acreage it had before the subdivision of parcel number 1415. The surveyor or the defendant did not produce the mutation that subdivided parcel number 1119 nor the mutation for the amalgamation that created parcel number 1438. In my opinion, these documents were necessary given the RIM shows the current number of the plot numbering 1120 is parcel number 1415. The county surveyor ought to have laid a basis of his finding that 1120 had encroached on 1438 by one metre. Secondly, this information was necessary because according to his report, the ground size of 1120 was less than the size on the ground.

28. I am therefore satisfied that the plaintiff had every reason to complain against the findings of the registrar which was reached without any supporting documents all of which the Registrar is the custodian thereof.

29. The defendant had also counter-claimed for eviction of the plaintiff from the portion of the alleged encroachment. Under the law of evidence, he had an obligation to prove his claim. From the evidence adduced, he put his reliance wholly on the report of the County Land Registrar and County surveyor Busia. As already stated above, I found no evidence to confirm that the defendant established the boundaries of his parcel of land before buying so that he could accuse the plaintiff of encroaching on to his portion. He only referred to conducting a search before buying. There was no evidence produced that the plaintiff is occupying more land than what is in his title deed.

30. In conclusion, I make a finding that the Land Registrar’s report dated 6.11.2017 and the Survey report dated 8.11.2017 were inconclusive in so far as establishing that the plaintiff’s parcel number Samia/Wakhungu-Odiado/1120 had encroached onto the defendant’s land number 1438 and hence cannot be relied upon. Consequently, I enter judgement in terms of prayer (a) and (c). I decline to allow prayer (b) since the Plaintiff would have moved the court appropriately before judgement.

31. These are the final orders of the court;

a) An order of permanent injunction restraining the Defendant, their agents, servants, employees and such persons acting through them from encroachment and/or interfering with the Plaintiff’s land parcel number SAMIA/WAKHUNGU-ODIADO/1120;

b) The defendant to surrender vacant possession of the disputed portion within 60 days hereof, in default an eviction order to issue from Land Parcel Number SAMIA/WAKHUNGU-ODIADO/1120 or a portion thereof ;

c) Each party to meet their costs of this suit

DATED, SIGNED AND DELIVERED AT BUSIA THIS 17TH DAY OF FEB. 2022.

A. OMOLLO

JUDGE