



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

ELC NO. 61 OF 2004

PETER KIPYEGON KILEL.....PLAINTIFF

VERSUS

CHARLES CHIRCHIR.....DEFENDANT

JUDGMENT

1. The Plaintiff in his Plaint dated the 15th June 2004 seeks for an order of permanent injunction restraining the Defendant, his servants, agents and/or any person under his authority from occupying, using and/or in any manner dealing with that land known as LR Kericho/Kipchichim/334. He further seeks for costs and any other relief that the court may deem fit and just to grant.

2. The Defendant filed his defence on 5th July 2004 denying the allegations therein contained in the Plaintiff.

3. The Plaintiff then filed an application dated the 26th August 2004 seeking interim injunctive orders against the Defendant wherein vide a ruling delivered on the 3rd December 2004, the court directed the Land Registrar to visit the suit premises and determine the boundary dispute with LR Kericho/Kipchichim/245 and thereafter file his report within 30 days . Parties were directed to maintain status quo in the meantime.

4. On the 22nd February 2005, pursuant to the filing of a report by the Bureti District Land Registrar dated the 18th January 2005 which was self-explanatory, the Plaintiff's application dated 26th August 2004 was dismissed with costs to the Respondent.

5. On the 14th April 2009, the Plaintiff having failed to prosecute the suit for more than 3 years, the same was dismissed for want of prosecution. Subsequently, the Plaintiff via his application dated the 28th December 2018 sought to have the dismissed suit reinstated. On the 8th April 2019 when the application was scheduled for hearing, there was no appearance for both the parties and their Counsel and the said application was dismissed for non-attendance.

6. Via an application dated the 11th April 2019 the Plaintiff now Applicant sought that the court do set aside its orders of 8th April 2019 dismissing the application dated 21st January 2019 (sic) and to reinstate the same for hearing. The application was set for hearing on the 9th May 2019 where the court set aside its orders dismissing the Application and reinstated the same for hearing. Via a Consent Order of 27th June 2019, the application was allowed and the suit reinstated for hearing which then took off on the 8th February 2021 after parties had complied with pre-trial directions.

Plaintiff's case.

7. The Plaintiff testified as PW1 to the effect that he was a retired Primary School teacher living in Kipchichim within Kericho County. That the Defendant was the son of the owner of the land parcel No. Kericho/Kipchichim/245 one Kipchirchir arap Too who was his neighbor. That he was the proprietor of land parcel No. Kericho/Kipchichim/334 as per the title deed herein produced as Pf Exh 1. That the said parcels of land shared a common boundary. That he had sued the Defendant because they had been using a portion of his land since the year 1972.

8. He named the sons of the owner of the plot as being Joseph Cheruiyot, and Charles Kipchirchir and proceeded to testify that at the moment, Joseph Cheruiyot was the one using his portion of the land. That in the year 2004, Joseph Cheruiyot and his brothers had been using his land wherein the Defendant had destroyed the boundary which had been marked in the year 2003.

9. That when he discovered they were using his portion of land, he had complained to them wherein subsequently, the matter had been reported to the council of elders. That he had not been happy with the verdict of the elders wherein he had escalated the matter to the Land Surveyor who had gone on the site on the 4th September 2003 and marked the boundaries.

10. The plaintiff was referred to a letter dated 13th April 2004, wherein he confirmed that that was the letter that had been communicated to him by the Registrar. He produced the said letter as Pf exh 2. His evidence was that after the communication had been made to him that the defendants had encroached on his land, he had fenced the disputed area and started cultivating it by planting over 250 trees.

11. That he later received another letter dated the 20th April 2004(Pf exh 3) stating that the earlier decision by the Land Registrar was wrong. He confirmed that when the Surveyor and Land Registrar had surveyed his land, they had made marks on the corner of the land particularly on the area there was a dispute at which time the Defendant was not present.

12. When he was referred to another letter dated the 22nd July 2005 (Pf exh 6) he confirmed that it had been a letter from the Ministry of Lands and that although he could not read it, yet he could remember that an officer from the Ministry had gone to the suit land where he had seen the trees that had been uprooted by the Defendant and his siblings. He however stated that he could not tell exactly who had uprooted them.

13. He proceeded to testify that after he had received the letter dated 20th April 2004, he had written a protest letter to the Land Registrar dated 19th January 2005(Pf exh 4) but could not remember the contents of the letter. That the 1st Registrar had determined the boundary then later contradicted what he had stated. The Plaintiff adopted the statement he had recorded on 3rd February 2021 as his evidence.

14. When the Plaintiff was referred to a ruling dated 3rd December 2004, he stated that the court had directed that there be a fresh boundary determination conducted wherein after the ruling, the Land Registrar did not go on the land. He produced the proceeding of the boundary determination dated 18th January 2005 as Pf exh 5 wherein he sought that the court orders for the boundary to be determined because he was not satisfied with the first determination which had been contradicted by the second determination. He also sought for orders of permanent injunction against the Defendant.

15. Upon being cross examined, the Plaintiff confirmed to having sued the Defendant because he was the eldest son to the owner of land parcel No. Kericho/Kipchichim/245 and that he had been the one leading the others to use his land. That he had also reported the matter to the police but the file had been destroyed and the Defendants had not been charged.

16. He also confirmed that his suit was not about the trees but about the boundary because there were two contradicting letters from the Ministry of Lands dated 13th April 2004 and 20th April 2004. He went on to state that he was at the meeting that had been held by the Land Registrar in the presence of the Chief but that the Registrar did not take measurements on the ground. That the determination was not based on any measurements and that he disagreed with that determination. That when he had appealed against that said determination, the Land Registrar had informed him that he had not wanted to contradict his colleague's findings. His grievance was that the Land Registrar did not do what the court had ordered him to do on the land.

17. He confirmed that he had bought his land around the year 1971-1972 although he could not remember when, and that at the time, Arap Too the father of the Defendant was in occupation of parcel No.245. That although nobody had been in occupation of parcel No. 334, yet the boundary had been there when he had bought the land and that the dispute over the boundary had started in the year 2003 when he had looked at the map and discovered that the portion of land being used by the Defendants was on his plot No.334.

18. When the witness was referred to Pf Exh 5, he testified that although his land measured 4 acres on the map, yet on the ground it measured about 3.5 acres.

19. On re-examination, the Plaintiff was referred to the proceedings of 18th January 2005 to which he responded that the court had ordered the Land Registrar to go and determine the boundary afresh after which he had registered his protest through a letter dated 19th April 2005 because he did not agree with what the Land Registrar had recommended because he had wanted the boundary to remain as had been held on 4th September 2003. He reiterated that he was not interested with the eucalyptus trees but the boundary which had been destroyed by the Defendant and his brother. The Plaintiff thus closed his case.

Defendant's case

20. The Defendant's case was opened by Charles Chirchir the Defendant himself who testified as DW1 to the effect that he lived in Kipchichim and that he had recorded a statement on 13th October 2020 to which he sought to adopt as his evidence. That he knew the Plaintiff whose land was Kericho/Kipchichim/334 as their neighbor, whereas he resided on parcel No. Kericho/Kipchichim/245. That the registered owner of parcel No. 245 was one Kiptonui Arap Too who was his father and who was now deceased.

21. His evidence was that he was almost 70 years old and that they had lived on parcel No. 245 since they were born. That he was aware of the boundary dispute and that the Plaintiff had found them in occupation of the disputed piece of land at the time he had bought land parcel number 334 from the previous owner one Arap Chemchor with whom they had no dispute.

22. He confirmed that indeed the court had directed the Land Registrar to determine the boundary and that he was aware of the said determination as both he and the Plaintiff had been present during the exercise where the Registrar had stated that the boundary should remain as it originally had been.

23. That in the year 2004, there had been another determination made wherein after one week, the Land Registrar made yet another determination. That the Land Registrar had informed the Plaintiff that in the previous determination, he had cheated them (defendants) when he determined the boundary in his (Plaintiff's). That in his opinion (Defendant's), the boundary should be left as it originally had been. He produced a letter dated 20th April 2004 as Df exh. 1 and the report on the boundary determination dated 18th January 2005 as Df Exh 2.

24. He proceeded to testify that there had been an issue of a claim by the Plaintiff that his trees had been uprooted wherein he had accused his brother Joseph Kipsalat Cheruiyot and the matter had been reported at the Police Station. That a letter had been written to the Plaintiff by the police telling him that the said accusation had no evidence and the case had been dismissed. He produced the letter dated 3rd January 2006 as Df exh 3.

25. On cross examination, the Defendant confirmed that there had been a boundary dispute between himself and the Plaintiff which dispute had started in the year 2003 when the Plaintiff had claimed that he had encroached on his land. The Plaintiff had reported the matter to the District Land Registrar in the year 2000 when they had been served with a letter by the Land Registrar who came on the land with the Surveyor. That they had gone round a bend and that was when the Land Registrar had informed them that the Plaintiff's land had extended into parcel No. 245 although they had not been shown the boundary or the portion which had encroached, and markings had been put on the ground. That they also did not go round with the Registrar and Surveyor, but that the Plaintiff put up posts based on the markings and planted trees on the disputed land thereafter. That one week after they had gone, the Registrar had asked the Plaintiff to move the boundary back to its original position as the previous verdict had been overturned.

26. When the Defendant was referred to a letter dated 28th April 2004 herein produced as Pf Exh 3, he responded that the same showed that an earlier decision had been overturned. That neither the District Land Registrar nor the Surveyor had made a second visit to the suit land after they had made the 1st determination. The defendants had then decided to go to the Land Disputes Tribunal on the 26th May 2004 wherein the Tribunal had also held that the original boundary be maintained. That was when the Land Registrar wrote the 2nd letter. His evidence was that they did not have a decree from court that gave them title to the land encroached on.

27. The defendant was also categorical that he was not the Administrator of his father's estate and neither was he in occupation of the portion in dispute. His evidence was that the said portion was occupied by his brother Andrew Cheruiyot after sub-division. The defence closed their case and parties were directed to file their written submissions, only the Defendant complied.

Defendant's submissions.

28. The Defendant gave a brief history of the matter in question being that the Plaintiff was the proprietor of the parcel of land referred to as LR Kericho/Kipchicim/334 whereas the Defendant's deceased father Kiptanui A. Too, was the registered proprietor of land parcel known as LR Kericho/Kipchicim/245 and that both parcels of land shared a common boundary.

29. That both parties had lived peacefully on their respective parcels of land until the year 2000 when the Plaintiff started alleging that they had encroached into his parcel of land and therefore the boundary needed to be amended and/or rectified. On the 4th September 2003 the Land Registrar had visited the suit land wherein he had determined the dispute in accordance to Registry Index Map (RIM). That thereafter, the Plaintiff fenced off part of the disputed portion deeming it to be part of his land. The Land Registrar also wrote a letter dated 13th April 2004 to the Defendant's brother Joseph Cheruiyot, who was residing on the disputed portion of land, asking him to remove himself and his agents from the said land, as per his verdict of the boundary dispute.

30. Subsequently via a letter dated the 20th April 2004 addressed to the Plaintiff and the District Officer, the Land Registrar reversed his earlier decision and directed that the boundary be restored to its earlier position. The Plaintiff did not comply and Joseph Cheruiyot sought the assistance of the Land Disputes Tribunal which delivered its verdict vide its minutes dated 26th May 2004 directing that the boundary be restored to its original position. The beneficiaries of the late Kiptanui A. Too then took possession and occupation of the disputed portion of land as was directed.

31. The Plaintiff being dissatisfied with the decision, filed suit seeking injunctive orders against the Defendants barring them from encroaching into his property. He also sought for orders that the Defendant pull down and/or remove any structures, including a fence and a pit latrine he had erected thereon.

32. That pursuant to a ruling delivered by the court on the 3rd December 2004, the Land Registrar was directed to conduct fresh investigation into the boundary dispute wherein he had filed his report dated 18th January 2000 which report had determined that the boundary be reinstated to its original position and the Registry Index Map (RIM) be amended to reflect what was on the ground.

33. The Defendant framed their issues for determination as follows;

- i. Whether the Plaintiff has set out his case to the required standard
- ii. Which is the correct boundary to the suit properties.

34. On the first issue for determination, it was the Defendant's submission that the Plaintiff had not set out this case to the required standard. That the Plaintiff instituted suit against the Defendant as the eldest son of the late Kiptanui A. Too who was the registered proprietor of LR Kericho/Kipchicim/245.

35. That at the time of adducing his evidence in court, the Plaintiff had conceded that it had been Joseph Cheruiyot and not the Defendant who was residing on the suit land. That the Plaintiff ought to have sued the representatives of the estates of the proprietor of land parcel LR Kericho/Kipchicim/245 rather than randomly instituting the suit against Defendant.

36. That further, the suit was based on the Plaintiff's dissatisfaction of the Land Registrar's decision to revert the boundary to its original position. The Defendant relied on the decided case in **Samuel Wanjau vs Attorney General & 2 Others [2009] eKLR** to submit that the Plaintiff ought to have approached the court by way of Judicial Review rather than a plaint which had sought orders that were un-attainable

from this court. That the suit was barred in law and the same ought to be dismissed with costs plus interests, to the Defendant.

37. On the second issue for determination, the Defendant submitted that given the evidence adduced in court by both parties and the exhibits therein in support, it was on record that the honorable judge, via his ruling of 3rd December 2004 had directed the Land Registrar to conduct fresh determination on the boundary dispute and file his report. The said report dated 18th January 2005 was filed where the Land Registrar had determined that the boundary be reinstated to its original position. That the provisions of Section 21(2) and (4) of the Registered Land Act (now repealed) were clear and therefore the court should accept and uphold the report dated the 18th January 2005 as the true boundary position in the circumstance of this case.

38. That the Plaintiff failed to establish his case on a balance of probability and the same ought to be dismissed with costs plus interest.

Determination

39. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. From the summation of the same it is not in dispute that there was a boundary issue between land parcel No. Kericho/Kipchichim/334 and land parcel no. Kericho/Kipchichim/245. It is further not disputed that the District Land Registrar in exercising his mandate proceeded to determine the dispute and prepare a report where he directed that the parties adopt the boundaries as per the findings on the ground. I find matters for determination as being:

- i. Whether the suit was time barred and therefore the court has no jurisdiction to determine the same.
- ii. Whether the Land Registrar's finding of 18th January 2005 on the general boundary should be upheld.
- iii. Whether the court has jurisdiction to hear the boundary dispute before it.

40. On the first issue as to whether the suit was time barred and therefore the court has no jurisdiction to determine the same, I find that it is clear from the proceedings held by the Land Registrar that the Plaintiff is recorded as stating that he had not been shown the boundaries by the seller of the land and that he knew the boundaries on the basis of trees planted in 1976. His evidence in court was that after he had gained site of the Registry Index Map (RIM) he had realized that the boundaries to his land extended into the part of land occupied by the Defendant who had been in occupation since 1972. That the boundary dispute then started in the year 2003.

41. Section 7 of the Limitation of Actions Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

42. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Defendant having supposedly occupied/encroached onto part of the Plaintiff's land in the year 1972, the Plaintiff herein could only seek to recover it from him, but only if he did so within twelve years after the cause of action. The suit was filed in the year 2004 which was almost 32 years later. There is no doubt that the period of about twenty one years had lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court.

43. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation went to the jurisdiction of the court to entertain claims and therefore if a matter was statute barred, the court had no jurisdiction to entertain the same.

44. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

45. Clearly, this Court lacks jurisdiction in the Plaintiff's suit and the matter is at its end.

46. In case I am wrong, then I shall determine the second issue which is whether the Land Registrar's finding dated 18th January 2005 on the general boundary ought to be upheld. The evidence on record is clear to the effect that parcels of land No. LR Kericho/Kipchichim/245 and LR Kericho/Kipchichim/334 boarder each other and were registered under the Registered Land Act (now repealed) in the names of the deceased Kiptanui A. Too and the Plaintiff respectively. That both the deceased Kiptanui A. Too and the Plaintiff herein had been occupying their respective parcels of land since 1971.

47. The Plaintiff sued the Defendant who was a son of the owner of the land No. Kericho/Kipchichim/245, because he and his brother Joseph Cheruiyot had been using a portion of his land since 1972 and now Joseph Cheruiyot, was the one using his portion of the land. That in 2003, the Defendant even destroyed the boundary which had been marked. I also note that the matter/and or dispute had been reported to the local administration where meetings had been held and the Surveyor and Land Registrar had been called to survey the suit land and determine the boundaries wherein they had visited the suit land on the 4th September 2003.

48. By a letter dated the 13th April 2004 addressed to the Defendant, the District Land Registrar had found that he (defendant) had encroached into land parcel No. 334 wherein he had asked him to vacate from the disputed area within 30 days. The Plaintiff then fenced the land and started cultivating it. Surprisingly enough, vide another letter dated the 20th April 2004 addressed to the Plaintiff, by the same District Land Register one Mr. Andrew Soi, he was now informing him that his earlier decision had been erroneous and that the boundary be reinstated to its original position to allow the Defendant go about his work.

49. It is also on record that vide an application dated the 26th August 2004 the Plaintiff sought interim injunctive orders against the Defendant wherein vide a ruling delivered on the 3rd December 2004, the court had directed the Land Registrar to visit the suit premises and determine the boundary dispute afresh and thereafter file his report within 30 days. The findings were filed in court via a report dated 18th January 2005 which report was to the effect that:

“According to section 21(1) of the Registered Land Act Cap 300 any map or filed plan only indicates the approximate boundary and appropriate situation of a given parcel. A map is therefore not for all purposes an authority’ on boundaries. To use a map to determine the boundary is therefore erroneous and unacceptable when the boundary has been accepted to be the right boundary for many years.

I take and accept the evidence on the ground to be true and the right indication of the boundaries between two plots.”

50. The Land Registrar concluded that the boundary be re-instated to its original position and the Registered Index Map (RIM) be amended to reflect what was on the ground. This in actual sense meant that there had not been any encroachment on the Plaintiff’s land by the Defendant. It is also apparent that this report by the District Land Registrar, Kericho/Bureti Districts had formed the basis for the dismissal, by the court, of the Plaintiff’s application dated 26th August 2004, with costs to Defendant.

51. Since the boundary dispute herein was determined during the regime of the Registered Land Act, *Section 21 (2) of the Registered Land Act (now repealed) stipulates as follows:*

‘Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary’. (Emphasis mine)

52. From the foregoing it is clear that where there is any uncertainty as to the position of any boundary, the Registrar is enjoined to determine and indicate the position of the uncertain or disputed boundary which in his case was done and there was confirmation that from 1972 to 2003, there had been a boundary on the ground between the two parcels of land which boundary had been respected by the original proprietors of the respective suit lands.

53. In the case of **Azzuri Limited v Pink Properties Limited [2017] eKLR**, Justice Angote, while making a decision relating to general boundaries stated;

‘ In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”

54. The paper defines “General Boundaries” as follows:

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”

55. In the case of **Ali Mohamed Salim vs Faisal Hassan Ali (2014) eKLR** it had been held as follows:

“The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in Section 18(1) of the Land Registration Act, 2012 to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any Surveyor because of the fixed nature of its beacons.”

56. In the case of **Samuel Wangau Vs. AG & 2 others (2009) eKLR**, it was held as follows:

“However, it is common ground that such maps (R.I.M) are not authorities on boundaries. Both the District Land Registrar and the District Land Surveyor said as much....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute.”

57. Indeed, for one to determine a dispute in respect to general boundaries, the physical features existing on the ground are very critical. Such features include rivers, hedges, fences, roads etc. Because general boundaries are identifiable by using the existing physical features, and by

interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court.

58. In this case, the boundary dispute the District Land Registrar was determining related to a general boundary and all the witnesses admitted there were general features to confirm an existence of a boundary between the two parcels of land. The Plaintiff must therefore recognize the boundary fixed by the Land Registrar

59. On the third issue as to whether the court has jurisdiction to hear the matter before it I find that the jurisdiction of this Court flows from Art 162(2) (b) of the Constitution as read with the provisions of section 13(2) of the Environment and Land Act. The latter provides as follows;

“In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land

60. For avoidance of doubt Section. 13 of the Environment and Land Act in my view does not oust the jurisdiction of the court to determine boundaries. However when it comes to general boundaries section 18(2) of the Land Registration Act provides in mandatory terms that the dispute should be submitted to the Land Registrar.

61. It is only after the Land Registrar had determined the dispute that the matter was escalated to this Court, following which the court, vide a ruling delivered on the 3rd December 2004, directed the Land Registrar to visit the suit premises and determine the boundary dispute with LR Kericho/Kipchicim/245 and thereafter file his report thereafter. I therefore find that this court has the jurisdiction to determine the said suit.

62. Putting all the matters herein aforesaid into consideration, I find that the Plaintiff has not proved his case on a balance of probability and I proceed to dismiss the same with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 17TH DAY OF FEBRUARY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE