



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

**CIVIL CASE NO. 25B OF 2005**

**LOMERI LOTOPONGOLE ..... ] PLAINTIFF**

**VERSUS**

**TEKO LOPOYETUM ..... ] DEFENDANT**

**JUDGEMENT**

The plaintiff brought this suit against the defendant seeking a declaration that he is the sole registered proprietor of LR No. West Pokot/Siyoi “A”/885. He also prayed for an injunction against the defendant restraining him from interfering with his plot.

In paragraph 5 of the plaint, the plaintiff averred that on or about the 14th day of June 2005, the defendant and his agents unlawfully and without any colour of right, consent or authority or court order trespassed into his land and commenced demolition of a barbed wire fence and pulled down an off-cut fence and destroyed structures therein.

During the hearing, the plaintiff testified that he is the registered owner of LR No West Pokot Siyoi “A”/885. He produced title as exhibit 1. He went on to state that in 2005, the defendant claimed that he had a plot in front of his. That on 4/6/2005 the defendant demolished a fence which he had put round his plot.

The plaintiff further testified that he reported the incident to Kapenguria police station who arrested the defendant's agents but were later released after it was established that they were innocent. The plaintiff and the defendant later agreed to send a Government Surveyor to the plot to ascertain the position on the ground.

The report was later sent to court and the plaintiff in his evidence stated that he entirely agreed with the findings of the surveyor. The plaintiff therefore urged the court to declare that he is the sole owner of the suitland (West Pokot/Siyoi “A”/885) and that the defendant should be ordered to move out of the same.

The defendant on his part testified that he does not contest the fact that the plaintiff is the registered owner of LR No. West Pokot/Siyoi “A”/885. He denies that he has encroached on to the plaintiff's plot. He testified that he is owner of an unsurveyed plot known as plot No M which plot was allotted to him in 1998. He testified that his plot is distinct from the one held by the plaintiff but that the two plots are neighboring each other. He produced a map showing the two plots on the ground.

I have gone through the pleadings as well as the evidence adduced herein. The issue which emerges for determination is whether there exists a plot known as unsurveyed plot No. M and if

so whether the owner of unsurveyed plot No. M has encroached on to plot No. LR West Pokot/Siyoi "A"/885.

The plaintiff contends that plot No. M which is unsurveyed does not exist and that the defendant who says that plot No. M. belongs to him has encroached on to his land. Contrary to the plaintiff's contention, the defendant called evidence from the then Kapenguria county council who confirmed that the defendant was allotted an unsurveyed plot No. M at Makutano.

This evidence was given by DW2 Nahason Mayo a senior administrative officer with the council. He confirmed that it is the council which recommended allocation of the said plot to the defendant and that the said plot neighbours. Plot No. West Pokot/Siyoi "A"/885.

The defendant also called DW3 Henry Lumasayi the District Surveyor West Pokot. He testified that he was asked by the High Court Kitale to visit Makutano township and determine the position of the plots in issue. He went to the ground on 26/8//2005 and measured the two plots. He found out that each of the two plots had been reduced in acreage due to expansion of the road reserves. He found out that plot No. West Pokot/Siyoi "A"/885 was 0.1 hectares but on the ground it is 0.072. Plot M which is 0.049 hectares was on the ground measuring 0.007 hectares. He explained that plot No. M was reduced because it fronted Kitale – Lodwar road whose road reserve was 40 metres but was enlarged to 60 metres.

He also explained that plot No. West Pokot/Siyoi "A"/885 fronts Makutano - Kaibos road whose road reserve was initially 10 metres but was upgraded to 20 metres.

The plaintiff is the one who alleged in the pleadings that the defendant trespassed to his land and that plot M an unsurveyed plot did not exist. He is the one who was bound to prove that there was encroachment or trespass. Contrary to his allegation that plot No. M does not exist, the defendant has demonstrated that he was allotted the plot legally and that it exists only that he has not obtained title to the same. DW4 James Osoro a Principal Land Administration officer in charge of Trans-Nzoia and West Pokot produced a file containing a duplicate of a letter of allotment – (exhibit 3) which shows that plot M was allotted to the defendant.

The District Surveyor confirmed that there was no encroachment on either of the two plots. It therefore follows that the defendant cannot be enjoined from what he has not committed. The defendant is not contesting that the plaintiff is the registered owner of plot LR West Pokot/Siyoi "A"/885. The plaintiff appears to be holding the notion that the defendant grabbed the plot now known as M and that his plot should be fronting the Lodwar – Kitale High way. There is evidence that the defendant is owner of plot M which actually exists. Whether the plot was regularly or irregularly given was not a point for determination by this court and there was no allegation that that was the position. This only emerged in cross-examination of the defendant's witnesses as well as the defendant.

I find that the plaintiff has failed to prove his case against the defendant. The same is hereby dismissed with costs to the defendant.

**Dated, signed and delivered at Kitale on this 29th day of January 2014.**

E. OBAGA

**JUDGE**

In the presence of:-

M/S Arunga for Mr. Samba for plaintiff

Mr. Tigogo for defendant

Court clerk – Kassachoon

E. OBAGA

JUDGE

**29/1/14**

**MR. TIGOGO:** I pray that the file which was produced as defence exhibit No. 1 be released to the surveyor who produced it.

**COURT:** Let the file produced as defence exhibit No. 1 be released to the surveyor who produced it.

E. OBAGA

JUDGE

**29/1/14**