



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL SUIT NO. 92 OF 2008.

JOHN WANYONYI MAKOKHA:::PLAINTIFF.

VERSUS

DONALD WANYAMA SHIRULIKHA:::DEFENDANT.

J U D G M E N T.

1. The plaintiff brought this suit against the defendant seeking an order of eviction of the defendant and or his servants or agents from 0.4 of an acre being part of plot N. 293, Meteitei farm. The plaintiff also seeks costs of the suit. The defendant filed his defence on 13/12/2008 in which he denied the plaintiff's claim and put him to strict proof thereof.

PLAINTIFF'S EVIDENCE.

2. The plaintiff John Wanyonyi Makokha testified that on 19/10/2004 he entered into an agreement with one Paul Kiptarus Kirwa who sold him 0.4 of an acre known as plot No. 293 at Meteitei farm. The plaintiff testified that the defendant who owns plot No. 295 which neighbours his plot has taken over his land and has prevented him from taking possession of the same. He produced a sale agreement between him and Paul Kiptarus Kirwa exhibit 1 as well as a judgment in Kitale High Court Miscellaneous Civil Application No. 92 of 1999 exhibit 2.

3. The plaintiff called PW2 Reuben Chebai Mwera an official of Meteitei farm. This witness testified that Meteitei farm comprises of about 700 acres which have been subdivided and given to the shareholders. He testified that he has been an official of the farm since 1970s and that the defendant owns plot 295. He produced an area list exhibit 3 showing those entitled to land at the farm. He testified that the defendant has invaded the plaintiff's land and sold part of it. He produced a letter from the secretary of the farm exhibit 4 addressed to the defendant which letter was informing the defendant that he had encroached onto the plaintiff's land and asking him to respect the boundary marks. The witness further produced a map showing that plot No. 293 boards plot No. 295. He testified that the farm committee has been urging the defendant to move out of the plaintiff's land in vain.

DEFENDANT'S CASE.

4. The defendant denied that he has taken part of the plaintiff's land as alleged. He contends that the plaintiff is being used by officials of Meteitei farm to defraud shareholders after the officials brought in a private surveyor who curved out people's lands. He maintains that the disputed portion belongs to him and that he has nothing to do with plot No. 293 as his plot is plot No. 295.

ISSUES FOR DETERMINATION.

5. I have gone through the pleadings herein as well as the evidence of both the plaintiff and the defendant. The issues which emerge for determination are as follows:-

(a) *Has the defendant encroached onto the plaintiff's land by 0.4 of an acre?*

(b) *What order should be made on costs?*

ANALYSIS OF EVIDENCE.

6. In the plaint, the plaintiff has pleaded that he owns plot No. 293 which measures 6.1 acres. He also contends that in 2006 the defendant encroached into his land by 0.4 of an acre and that he has since been utilizing the same. In his evidence in court, the plaintiff produced an agreement between himself and one Paul Kiptarus Kirwa. This agreement shows that Paul Kiptarus Kirwa sold the plaintiff a plot known as plot 293 measuring 0.4 of an acre. To this extent, it is not clear if plot No. 293 was 6.1 acres or it was 0.4 of an acre.

7. The plaintiff alleges in his pleadings that the defendant has encroached into his land by 0.4 of an acre. It is alleged that plot 293 borders plot 295 which belongs to the defendant. It was upon the plaintiff to adduce evidence to show that the defendant had encroached into his land by 0.4 of an acre. This evidence should have been from a surveyor who would have confirmed if there was any encroachment as alleged. The plaintiff sought for an order of court to enable the county surveyor to visit the disputed parcels and determine whether there was any encroachment. The order was granted by the court. However, as at the conclusion of this case there was no survey report availed. The plaintiff's counsel later informed the court that a surveyor had not gone to the ground because the defendant had not paid his part of the survey fees. A look at the record shows that it was the plaintiff who was to meet survey fees. Survey fees was not to be shared. There was no evidence that the plaintiff paid any survey fees. The burden of proof was on the plaintiff to show that there was encroachment as alleged. He did not do this. Had the surveyor gone to the ground, he would have either confirmed that there was or there was no encroachment. I therefore find that there is no evidence of encroachment and issue number one is answered in the negative.

DECISION.

8. Having found that there is no evidence of encroachment, I find that the plaintiff has failed to prove his case against the defendant on a balance of probabilities. The same is hereby dismissed with costs to the defendant.

[Dated, signed and delivered at Kitale on this 24th day of September, 2014.]

E. OBAGA.

JUDGE.

In the presence of M/s. Arunga for plaintiff.

Court Clerk – Kassachoon.

E. OBAGA.

JUDGE.

24/9/2014.