



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 349 OF 2016

KAHINDI KAHASO KOMBE PLAINTIFF

-VERSUS-

JOSEPH DANIEL KENGADEFENDANT

JUDGMENT

BACKGROUND

1. By his Plaint dated and filed herein on 19th December 2016, Kahindi Kahaso Kombe (*hereinafter “the Plaintiff”*) prays for Judgment against Joseph Daniel Kenga (*hereinafter “the Defendant”*) for:

(i) *A permanent injunction restraining the Defendant from interfering with the Plaintiff’s enjoyment of land Parcel No. Ngomeni Settlement Scheme/2161 (Original No. 1079 and 2119) including the fencing of the same; and*

(ii) *Costs of this suit.*

2. Those prayers arise from the Plaintiff’s contention that he is the registered proprietor of the said parcel of land having inherited the same from his father the late Karisa Kahaso Kombe. The Plaintiff accuses the Defendant of wrongfully entering the said parcel of land measuring 3 acres sometime in 1999 and thereafter proceeding to plant Coconut trees thereon.

3. It is the Plaintiff’s case that his efforts to stop encroachment have been in vain as the Defendant has resorted to violence and instructed his workers to halt any attempt by the Plaintiff to exercise his rights over the suit property.

4. But in his Statement of Defence dated and filed herein on 10th February 2017, the Defendant avers that he is the beneficial owner entitled to exclusive possession of all that parcel of land situated at Ngomeni measuring 5.76 Ha or thereabouts and more particularly known as Title No. Ngomeni Squatter Settlement Scheme/1107.

5. The Defendant further asserts that he was the first person in time to settle in the area in the year 1976 while the Plaintiff’s father arrived much later in the year 1978 or thereabouts and found the Defendant already occupying his parcel of land. Accordingly, the Defendant denies that he has encroached onto the Plaintiff’s said parcel of land.

6. The Defendant avers that contrary to the Plaintiff’s contention, it is the Plaintiff who ignored the boundary that existed when he arrived and proceeded to plant Coconut trees right in the Defendant’s parcel of land. The Defendant denies that he has threatened to unleash violence on the Plaintiff and/or his workers and asserts that it is the Plaintiff who has wrongfully been trying to hive off part of the Defendant’s land after refusing to have the boundary of their parcels of land determined by the Land Registrar.

7. The Defendant further avers that the dispute herein is a boundary dispute and that as such, this Court lacks jurisdiction to entertain the same in view of the provisions of **Section 18(2) of the Land Registration Act, No. 3 of 2012.**

THE PLAINTIFF’S CASE

8. At the trial herein the Plaintiff called a total of three (3) witnesses in support of his case.

9. PW1 – Kahindi Kahaso Kombe is the Plaintiff and a farmer at Ngomeni Settlement Scheme. Relying on his statement dated 13th October, 2017 but filed herein on 5th July 2019, PW1 told the Court that he was given the suit property by his father the late Karisa Kahaso Kombe.

PW1 told the Court his father gave land to all his sons along Ngomeni Beach and that his (PW1's portion was the last one to the North and bordered the property of the Defendant.

10. PW1 testified that he cleared the bush and started planting Coconut trees. The Defendant then started interfering with the land and PW1's father reported the dispute to the Area Chief who went to the land accompanied by other elders among them one Chaguo Baya Thoya. PW1 told the Court that on that occasion, the Defendant denied encroaching on PW1's land but the Defendant's own father admitted before the Chief that indeed his son was the aggressor. The Chief then decided the dispute in PW1's favour and directed the Defendant to stop the encroachment.

11. PW1 testified that when the Chief made the pronouncement in his favour, the Defendant refused to accept the decision and assaulted the Chief. Thereafter the Defendant proceeded with his wrongful actions on the land. Later, a Government Surveyor came to the land to fix the boundary but the Defendant refused to attend. When PW1 later tried to fence his portion of the land as per the boundary that was fixed by the Surveyor, the Defendant stopped the exercise after threatening violence.

12. On cross-examination, PW1 told the Court that the dispute was in regard to the boundary between his parcel of land and that of the Defendant. When the Surveyor went to the land, he stated that the Defendant had encroached on PW1's land by some 5 acres. PW1 told the Court the Defendant later removed the markings placed on the land by the Surveyor and that he still harvest Coconuts that are on PW1's land.

13. PW2 – Chapuo Baya Thoya is a resident of Gongoni. He told the Court he knows the Plaintiff and that he was for many years the Security aide for the Area Assistant Chief Zablon Matano.

14. PW2 testified that at one time, the Plaintiff's father had lodged a complaint with the Chief accusing the Defendant of encroaching on the disputed land. PW2 accompanied Chief Matano when he went with other elders to the ground in order to resolve the dispute. After the elders had taken measurements the Chief pronounced their decision and urged all parties to respect the boundary. The elders

had found that the Defendant had planted 3 Coconut trees on the Plaintiff's side and the Chief asked the Defendant to remove them or accept compensation for the same.

15. PW2 told the Court that the Defendant was infuriated with the decision and he stood up and pushed the Chief to the ground before the elders restrained him.

16. PW3 – Kahindi Charo Kigungu is a 'Nyumba Kumi' elder and a resident of Ngomeni. Relying on his recorded Statement filed herein on 5th July 2019, PW3 told the Court that the dispute herein initially started when the land was still owned by the Plaintiff's father. The Plaintiff's father accused the Defendant of encroaching on his land.

17. PW3 told the Court that when a Surveyor went to the scene to assist the Parties, he marked the ground by planting pegs thereon. After that, the Defendant refused to respect the boundary and continued to cross the same and to harvest the Plaintiff's Coconut trees. When the Plaintiff engaged someone to fence the place, the Defendant threatened to unleash violence.

THE DEFENCE CASE

18. On his part, the Defendant (DW1) testified as the sole witness in his case. Replying on his Statement dated and filed herein on 10th February 2017, DW1 told the Court that he is the beneficial owner entitled to possession of a parcel of land situated at Ngomeni Settlement Scheme and measuring 5.76 Ha.

19. DW 1 denied encroaching on the Plaintiff's parcel of land. He told the Court that when the Plaintiff arrived in the area, he found DW1 residing on his portion of land which land DW1 had already developed by planting Coconut trees thereon. DW1 testified that it is the Plaintiff who ignored the already existing boundary and proceeded to plant Coconut trees on DW1's land.

20. DW1 denied that he had threatened to unleash violence on the Plaintiff's workers. On the contrary, he told the Court he had only shown the workers the correct boundary between the two parcels of land after which the workers became convinced and abandoned the attempt to fence off his land.

21. DW1 further testified that the Plaintiff had refused to have the boundary determined by the Land Registrar as provided in law and urged the Court to dismiss the suit.

ANALYSIS AND DETERMINATION

22. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly considered the rival submissions and authorities placed before me by the Learned Advocates acting for the parties.

23. The Plaintiff herein is the proprietor of a parcel of land known as Ngomeni Squatter Settlement Scheme/1261. It is his case that his parcel of land is adjacent to that owned by the Defendant and that since the year 1999, the Defendant has been disregarding the boundary demarcating the two parcels of land and has been entering his land and planting and harvesting Coconuts therefrom.

24. The Plaintiff told the Court that sometime in May, 2016 after sub-diving his parcel of land from the original title that was in the name of his father, he started fencing his parcel of land when the Defendant appeared on the scene and threatened to unleash violence. By this suit,

the Plaintiff urges the Court to issue a permanent order of injunction restraining the Defendant from any further interference with the said parcel of land including the fencing thereof.

25. On his part, the Defendant denied having encroached on the Plaintiff's parcel of land. On the contrary, the Defendant told the Court that he is the proprietor of land parcel number Ngomeni Squatter Settlement Scheme/1107 measuring some 5.76 Ha. or thereabouts. The Defendant admitted that his parcel of land abuts that of the Plaintiff but accused the Plaintiff of being the one who had ignored the known boundaries that were in place before the Plaintiff moved into the area and proceeding to harvest Coconuts from the Defendant's parcel of land.

26. From the material placed before me, it was apparent that the dispute herein relates to the position of the boundary demarcating the two adjacent parcels of land as the parties do not seem to agree on where the same lies. From the evidence of the Plaintiff and his witnesses, it would appear that the dispute has lingered on for a while and that at some point in time, the Plaintiff's father (*now deceased*) lodged a complaint against the Defendant for alleged encroachment.

27. The Plaintiff and his two witnesses told the Court that following the complaint, the then Area Assistant Chief one Zablon Matano visited the disputed parcel of land in the company of elders. The said elders including Chapuo Baya (*PW2*) who was then a security aide to the Assistant Chief carried out measurements and prepared a report which they then presented to the Assistant Chief. It was the determination of the elders as pronounced by the Chief that the Defendant had planted Coconut trees on a portion of the Plaintiff's land and the Defendant was accordingly ordered to remove the same and to cease from any further encroachment on the land.

28. It was further the Plaintiff's case that subsequently an authorized Land Surveyor had visited the land and marked the boundary between the two properties by planting wooden pegs thereon. According to the Plaintiff and his witnesses, the Defendant who refused to attend the survey later removed the pegs and continued with his illegal activities on the Plaintiff's parcel of land.

29. The report prepared by the elders and upon which the Area Assistant Chief had found the Defendant guilty of encroachment upon the Plaintiff's land was however not produced in Court and it was unclear what fixtures the village elders had relied on in fixing or determining the boundary between the Plaintiff's land and that of the Defendant.

30. At the same time, the Surveyor who is said to have surveyed the land on an unknown date and fixed some beacons thereon was not called to testify. The report by the surveyor or a determination by the Land Registrar on the boundary was also not produced by the Plaintiff in evidence.

31. While the Plaintiff produced photographs in an attempt to demonstrate the Defendant's encroachment, one could not tell from looking at the photographs whether what is shown is part of the Plaintiff's or the Defendant's land. In the absence of a survey report, it was difficult to tell whether the portion of land in dispute lies within the boundaries of the Plaintiff's parcel of land or was within the boundaries of the Defendant's parcel of land.

32. Indeed from the material placed before me, the Court could not determine that the boundary between the two parcels of land was determined and fixed in the manner contemplated under **Sections 18 and 20 of the Land Registration Act No. 3 of 2012**. In my considered view, given the provisions of **Section 18** of the said **Act**, the Plaintiff was obligated to first seek redress from the Land Registrar before filing this suit. That is the caveat provided at **Section 18(2) of the Act** which provides that:

“The Court shall not entertain any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with this Section.”

33. Thus, while **Section 13(2)(a) of the Environment and Land Court Act No. 19 of 2011** confers upon this Court jurisdiction to entertain disputes relating to boundaries, a reading of the above **Section 18(2) of the Land Registration Act No. 3 of 2012** reveals that the Court can only entertain such boundary dispute where it is shown that the boundaries had first been determined and fixed in accordance with the Land Registration Act.

34. In addition, it is trite that where a dispute resolution mechanism outside the Courts is provided in law, the same ought to be exhausted first before one can invoke the Court's jurisdiction. In the matter before me, it was apparent that the parties had not resorted to the procedure provided by the relevant statute and as such the suit as filed is premature and misconceived.

35. In the premises, I find and hold that the Plaintiff's suit lacks merit. The same is dismissed.

36. In the circumstances of this case each party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28TH DAY OF APRIL, 2022.

In the presence of:

Mr. Shujaa for the Defendant

No appearance for the Plaintiff

Court assistant - Kendi

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J. O. OLOLA

JUDGE