



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Case 315 of 2010**

**JULIUS TABARAI OLE MAITO TAMPUSHI ..... PLAINTIFF**

**VERSUS**

**WILLIAM LERIKAN KONCHELLAH ..... 1<sup>ST</sup> DEFENDANT**

**NICHOLAS LEKIRERE NTURU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The plaintiff in his plaint dated 3<sup>rd</sup> November 2010 and filed on the 4<sup>th</sup> November 2010 prays for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for

*(a) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have encroached onto the plaintiffs parcels No. TRANSMARA OSINONI/234 to the extent of 12 acres and as per the District Land Registrar's report dated 19<sup>th</sup> October 2010.*

*(b) An order of eviction to evict the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from the plaintiff's parcel NO. TRANSMARA/OSINONI/234.*

*(c) An order of permanent injunction to restrain the Defendants jointly and severally from encroaching into the plaintiffs parcel NO. TRANSMARA OSINONI/234 or any other portion thereof.*

*(d) General damages for trespass.*

*(e) An order that the District Land Registrar, Transmara District do fix the boundaries between the plaintiff's parcel No. Transmara/Osinoni/234 and the defendant's parcels No. Transmara/Osinoni/213, 2 and 217 as per his report dated 19<sup>th</sup> October, 2010.*

*(f) Costs of this suit and interests(sic) thereon.*

2. It is the plaintiff case that originally his father was the proprietor of parcel No Trans-Mara/Osinoni/1 while Nturu his brother was the

proprietor of parcel No trans-Mara / Osinoni/2 which were separated by a common boundary beginning from a hill top through a valley up to Newterit point.

3. In 1990, a dispute arose between the two on the issue of boundary but the same was settled by a

decision of the Land Adjudication Officer registered on 24<sup>th</sup> June 1994 restoring the common boundaries that had been recognized by the parties.

4. In 1996 the plaintiff's father subdivided his land parcel No Trans-Mara/ Osinoni/1 and gave it to him and his brother and he managed to get parcel No Trans-Mara/ Osinoni/234 which borders Nturu's then parcel No 2.

5. He was issued with a title on 26<sup>th</sup> July 2000. When he got the land in 1996, the barbed wire fence that had been constructed by his father in 1995 was intact but in 2007 he received information from his father that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had started destroying the said fence.

6. He tried to replace the original boundary fence but was stopped by the area chief one Jonathan Sialo who referred him to the Department of lands. In June 2005 1<sup>st</sup> Defendant constructed another barbed wire fence and planted Mauritius thorns but when he went to the District land Registrar's office to lodge a complaint he could not be given a date prompting him to see the Chief Land Registrar who directed him to the District land Registrar again.

7. In the year 2009 the plaintiff paid Kshs. 5,000 for registration to determine the dispute and a further Kshs. 11,620 towards survey fees which was paid on the 28<sup>th</sup> April 2010. Thereafter, the District Land Registrar in the company of the District Surveyor went to fix the boundary. This was again done on the 5<sup>th</sup> June 2010, and 15<sup>th</sup> September 2010 and a report was given on the 19<sup>th</sup> October 2010 to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had encroached into the plaintiff's land but since the portion encroached upon was big, the result was this case.

8. The plaintiff contended that the Defendants had, by the time the dispute started, been registered proprietors of parcels No Trans-Mara/Osinoni/213 and 217.

9. The Defendants on their part filed their statement of defence, on the 13<sup>th</sup> November 2010 in which they contend that the plaintiff is the registered proprietor of L.R No TRANSMARA/ OSINONI/ 234 whereas they are the registered proprietors of L.R Nos. TRANSMARA/OSINONI/213 and 217 respectively.

10. They deny that they have encroached on the plaintiffs parcel of land and contended that L.R Nos. Trans-Mara/Osinoni/213 and 217 arose from subdivisions of the original L.R Nos. Trans-Mara/Osinoni/2 which was registered in the name of Nturu Ole Nongerieti and that the boundary between the original plot numbers 1 and 2 were ascertained and demarcated by the Adjudication and Demarcation Officer in 1991 vide objection proceedings Number 31 of 1991.

11. The Defendants also deny having destroyed the common boundary that existed between the parcels and that they had occupied and taken possession a total of over 12 acres of the plaintiff's parcel of land. They contend that the boundary that was adjudicated upon between the original plot numbers 1 and plot number 2 still subsists and that it is the plaintiff who is trying to destroy and/or interfere with the same.

12. The Defendants admit that there was a complaint filed by the plaintiff to the District Land Registrar but contend the report was tainted with fraud corrupt practices as the same ignored the boundaries set by the Land Adjudication Officer. As a result, they have filed an appeal to the Land Registrar Nairobi whose decision is still pending consequently the content of the report dated 19<sup>th</sup> October 2010 is invalid and irrelevant. The defendants have outlined the particulars of fraud in paragraph 9 of the Statement of Defence.

13. It is the Defendants defence that they have not encroached on, trespassed upon and/or otherwise entered onto the plaintiffs' parcel of land as alleged. They contend that the disputed portion of land falls on L.R No Trans-Mara/Osinoni/213 registered in the name of the 1<sup>st</sup> Defendant. They also contend that

this Honourable Court lacks jurisdiction to order or direct the District Land Registrar to visit the suit parcels of land and fix the boundaries as such an assignment is a statutory obligation of the said District land Registrar.

14. The plaintiff called a total of 5 witnesses while the Defendants called three witnesses. Parties were thereafter directed to put in written submissions which they have accordingly complied with.

15. In their submissions the plaintiffs Advocate submits that parcel Nos. plot 1 and 2 and subsequent registration into the present parcels L.R No Trans-Mara /Osinoni/234,213 and 217 are owned by the parties herein.

16. The common boundary between the subject of the dispute involving plot Nos. 1 and 2 was finally settled through due adjudication process. He submits that the Defendants in the absence of the plaintiff altered and destroyed the common boundary in his favour in the year 2007 causing the plaintiff to seek to resolve the dispute through the District Land Registrar Trans-Mara where due process and formal boundary re-establishment/ascertainment was done.

17. Counsel referred to the evidence of PW4 and PW5 who testified as District Lands Registrar and District Land Surveyor Trans-Mara District at the time of the boundary dispute in issue. He submits that these 2 witnesses stated categorically that due process and boundary re-establishment was undertaken in respect of the subject parcels of these proceedings. PW4 made a report on the same and produced it as **P Exhibit 10 (a)** in which he stated that by guidance of RIM (**P Exhibit 3**) it was clear that the 1<sup>st</sup> Defendant had indeed entered the plaintiff's land and curved out approximately 12 acres and he advised the parties to seek redress in a court of law as it appeared to him that land ownership was indeed in issue, rather than a mere boundary dispute.

18. PW5 who surveyed the subject parcels drew a sketch map **P Exhibit 10 (b)** with clear keys to show encroachment into the plaintiff's parcel by the 1<sup>st</sup> Defendant alluded to in previous boundary decisions by the Land Adjudication Officer that confirmed the boundary between parcels No Trans-Mara/Osinoni/234 and 213 as a straight configuration from the Hill Top down to a point along a river called "Nenterit". PW4 stated that the 1<sup>st</sup> Defendant was also empathic that he has never altered the same while agreeing that issue on the same common boundary arose from 2001 and 2004 and that the District Land Registrar resolved the same. 1<sup>st</sup> Defendant however remains aggrieved with the land Registrar and surveyor's decision on this issue challenging the report on the sole basis of fraud and general illegality and affirms that they will only go by the court's decision.

19. It is plaintiffs advocate's submission that though DW2 knew the correctness in earlier boundary determinations during adjudication process he knew nothing about the present issue between the plaintiff and defendant DW3 agreed that indeed the boundary now between parcel Nos. 234 and 213 runs from the Hill top straight and perpendicular to Nenterit point along a river and agrees that issues between the plaintiff and the defendants later arose as to the exact positions on the ground vis a vis map work or actual survey according to the Land Registrar records.

20. According to the plaintiff's advocate's submissions the issues falling for determination are (i) whether the Trans-Mara District Land Registrars Report was fraudulent, corrupt and (ii) Whether the 1<sup>st</sup> Defendant had encroached onto the plaintiff's parcel of land.

21. On the first issue counsel submits that it is worth noting that all due process including summons and hearing of all parties by the District land Registrar and surveyor is clear in evidence. That there has never been an appeal, review or even judicial review in respect of the decision now challenged and that no plausible reasons have been placed before court as to why none of the above ways to challenge the decision have been pursued. Counsel has cited various authorities showing how quasi judicial authorities' decisions are challenged.

22. Regarding the second issue, counsel submits that the 1<sup>st</sup> Defendant remains a trespasser onto the

plaintiffs land as duly established in evidence and he concludes the submissions by praying for the orders in the plaint.

23. According to the Defendants counsel submission the issues for determination in this suit are:-

(a) *Whether this court has jurisdiction to entertain this suit.*

(b) *Whether the Report by the District Land Registrar trans-Mara District dated 19<sup>th</sup> October 2010 is authentic or not.*

(c) *Whether the exact boundary position should be the committee recognized boundary or the (PID) plotted boundary*

(d) *Whether the boundary between L.R Nos. TRANS-MARA/OSINONI/2, 213, 217 and 234 remain intact.*

(e) *Whether the plaintiff has proven his case on a balance of probability*

(f) *What orders are the plaintiffs entitled to if any?*

24. On the first issue counsel for the Defendants submits that PW4 the District Land Registrar said that he did not plant the boundary because there was an alteration and parties insisted on going to court, and that he did not plant and/or demarcate the exact boundary position between the parcels of land in question which is his statutory obligation under section 19 and 20 of the Registered Land Act cap 300 laws of Kenya (now repealed).

25. He further argues that enforcement of the above provisions does not require directions of the Honourable Court and that at the time of filing the instant proceeding the District Land Registrar had not established the exact boundary position between L.R Nos. TRANS-MARA/OSINONI /2, 213 and 234 respectively. In counsel's view, this court has no jurisdiction to adjudicate on the subject dispute whatsoever. He has relied on **section 21(4) of the Registered Land Act Cap 300 laws of Kenya** and the case of **WAMUTU –VS-KIARIE [1982] KLR Pages 480-484.**

26. On the second issue counsel submits that the District Land Registrar was unable to adduce in evidence the minutes of the first two meetings and was also unable to determine the exact boundary position and he did not explain and/or expound on the Registrars process. The District Land Registrar also told the court that Registry Index Map is not an authority on boundary disputes thus he misconceived and misapplied his mandate in attempting to define the boundary position. Defendant's counsel raised the issue of disparity between the report by PW4 and PW5 and concludes that the report authored by the District Land Registrar is doctored for purposes of this case.

27. Regarding the third and fourth issues counsel submits that the dispute originated by the plaintiff herein flows from the disputed PID plotted boundary, which was overruled during the adjudication and demarcation process. Same having been over ruled and neither of the parties having appealed against the same it is erroneous for the District Land Registrar, Trans-Mara District to purport to ignore the decision of the objection court and place reliance on the PID plotted boundaries which had been overruled.

28. Finally on issues five and six, counsel submits that PW4 and PW5 informed the court that they were unable to determine and fix the boundary position thus the contention by the plaintiff that the Defendants had trespassed onto his parcel of land remains hollow and unproved. That the disputed portion of land which is claimed to have encroached upon by the defendants falls or forms parts of the 1<sup>st</sup> Defendant parcel of land L.R No TRANS-MARA /OSINON/213.

29. It is Defendants submissions that the plaintiffs claim has not been proved on a balance of probabilities and they want the same dismissed with costs.

30. In conclusion counsel for the defendant submits that the boundary between the disputed parcels of

land established by the objection committee on the 24<sup>th</sup> day of June 1994 exists to date the same having been confirmed by PW5 together with DW1, DW2 and DW3 respectively. It is thus the Defendants contention that the plaintiff has failed to prove his claim on a balance of probability and consequently the plaintiff's suit ought to be dismissed with costs to the Defendant.

31. From the pleadings filed before this court, submissions and authorities relied upon and the testimony of the witnesses from both the plaintiffs and Defendants, the following issues are for determinations:-

*(1) Whether the Defendant have encroached onto the plaintiffs parcel of land NO TRANS-MARA/OSINONI/234 to the extent of 12 acres and as per the District land Report dated 19<sup>th</sup> October 2010 and*

*(2) If the issue in (a) above is true what is the remedy in the circumstances and if not what will be the remedy.*

32. In answer to the first question the plaintiff has a title to land parcel No TRANS-MARA/OSINONI/234 which he produced as P exhibit 1. He has also produced a certificate of official search which confirms that he is the registered owner of the said parcel of land with the nature of title being absolute and the approximate area 15 hectares. He has explained to this court how he acquired the said parcel of land from his father and how his father told him that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had removed the fence and encroached onto his parcel while he was away.

33. The plaintiff has further explained the efforts he has made to retain the boundaries as they were when the same was given to him by his father.

34. The District Land Registrar Trans-Mara District assisted but could not fully complete his work as he found the issue in dispute was ownership of land and not boundaries. Thus, he advised the parties to seek redress in court. But before that, the District Land Registrar in his report dated 19<sup>th</sup> October 2010 found that the 1<sup>st</sup> Defendant had actually encroached onto the plaintiff's parcel of land by 12 acres. I find the District Land Registrar report credible and authentic as he notified all persons concerned to attend his meetings and he fully relied on the documents issued to him by the parties. The issue of minutes should not be brought about herein as the District Land Registrar tabled a report on his findings. These findings were not appealed against neither did the aggrieved party seek for judicial review writs to quash the same. That evidence remains intact and I accept it as such. The Defendants in their submissions agreed that the boundary between the disputed parcels of land herein was demarcated and established by the objection committee on the 24<sup>th</sup> day of June 1994 and the same exists to date as confirmed by PW5, DW1, DW2 and DW3. This being the case, then the plaintiff's 15 hectares should be intact and whoever has stepped onto his 12 acres should be evicted as provided by law.

35. As I had indicated earlier the District land Registrar Report is authentic for the reasons stated above and therefore the 1<sup>st</sup> Defendant has encroached onto the plaintiff's parcel of land.

36. On the second issue for determination which is on the orders to be granted to the plaintiff I must first start by stating that this court has jurisdiction on matters concerning ownership and title to land.

37. Secondly and as has been seen from the evidence on record, I do find that the plaintiff has proved his case against the Defendant. Therefore judgment is entered for the plaintiff as prayed in the plaint. The Defendants are hereby restrained from interfering and from encroaching onto the plaintiffs parcel No TRANS-MARA/OSINONI/

234 or any portion thereof. The 1<sup>st</sup> Defendant shall vacate the encroached portions of the plaintiff's suit property WITHIN NINETY (90) DAYS from the date of delivery of this judgment failing which he shall be evicted therefrom. I shall not grant any damages as the plaintiff failed to adduce evidence on the claim.

**DATED and DELIVERED at KISII this 21<sup>st</sup> day of February, 2013**

**RUTH NEKOYE SITATI**  
**JUDGE.**

In the presence of:

Mr. Morintat (present) for the Plaintiff

Mr. S.M. Sagwe for Oguttu-Mboya for the Defendant

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**  
**JUDGE.**