



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CASE NO. 14 OF 2014**

**SEFERIO OGOLA NANDWA.....PLAINTIFF**

**= VERSUS =**

**CHAIRMAN BOARD OF MANAGEMENT, COMMITTEE,**

**NAMBALE URBAN SECONDARY SCHOOL.....1<sup>ST</sup> DEFENDANT**

**NAMBALE URBAN SECONDARY SCHOOL.....2<sup>ND</sup> DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff sued the Defendants accusing them of trespassing on his land and prayed for judgement against them for:

**a) An order of eviction from land parcel L.R BUKHAYO/KISOKO/4739;**

**b) Costs of this suit.**

2. The Plaintiff pleaded that he is registered owner of as L.R No. BUKHAYO/KISOKO/4739 measuring 0.45Ha while the Defendants own L.R No. BUKHAYO/KISOKO/5541 which was created on partition of LR No. L.R No. BUKHAYO/KISOKO/4738 that bordered the Plaintiff's parcel of land. That the Defendants in 2009 trespassed onto the Plaintiff's land and have continued to trespass to date denying the Plaintiff quiet and peaceful possession of his land. The Plaintiff's claim is for an order for demolition of all buildings and eviction hence this suit.

3. The Defendants filed their defence through the Attorney General on the 14<sup>th</sup> of April, 2014, denying the claim and in particular that the Defendants had trespassed on the suit land.

4. The hearing commenced on the 7<sup>th</sup> of May, 2015 with the Plaintiff testifying as PW1. He stated that on the 8<sup>th</sup> of January, 1998 he entered into an agreement for sale with Dickson Minya Amukowa for the purchase of an acre out of L.R No. Bukhayo/Kisoko 3992. He paid the agreed consideration and went through the processes of subdivision. That the land was later subdivided into two LR No. Bukhayo/Kisoko/4738 and 4739 and he got his own parcel number 4739 and titled issued on the 3<sup>rd</sup> of March, 1999. That the Defendants' title indicates that their land parcel No. 5541 is a subdivision of land Parcel No. 4738. **PW1** continued further that his land borders parcel 5541.

5. That the Defendant has entered into his land and dug pit latrines in his land as well as two classrooms, a kitchen, a playground and a watchman's shelter. He reiterated that his land was on the map and the Defendant has trespassed thereon. He urged this Court to grant him the claims in the Plaintiff and have the Defendant removed from his land. **PW1** produced mutation form as PEx 1, the map sheet no. 17 as PEx 2, his title deed as PEx 3 and the green card for land parcel No. 4739 as PEx 4.

6. **PW1** was cross-examined by mr. Tarus the State counsel appearing for the Defendants. He stated that he bought the land from Dickson Minya Amukowa and that the Defendants trespassed in the year 2000 but started building in 2009. That the Defendant may have bought the land from the same seller. That the offending structures include the watchman's shelter, toilets, and classrooms. That he was not around when the school was built as he was living in Bungoma at the time. On re-examination, **PW1** reiterated that the Defendant started building in the land in the year 2009. That the surveyor confirmed that the school was built on his land. That parcel number 4738 remained in the seller's name but was later subdivided into parcel number 5540 and 5541 with parcel number 5541 given to the Defendant.

7. Mr. FAUSTIN OMUSUKOTU IMATARI, a private surveyor gave evidence as **PW2**. He is a registered surveyor practising under FEMCO surveyors for close to ten years. That the Plaintiff requested him to survey the land parcel number 4739 and during the exercise he

used map sheet number 17 for land parcel number 3992. **PW2** stated further that when he went to the ground, he located parcel number 4739 but it had no boundaries as they had been removed. That the 2<sup>nd</sup> Defendant was the neighbour and it was the one using the land. That there were 5 toilets, 2 classrooms, a store, a security office, a water pipe line, one borehole tank and a netball field. The structures had occupied the entire parcel.

8. Upon cross-examination, **PW2** stated that he visited the land parcel in 2017 after the case was filed and he found the Defendants occupying the Plaintiff's land. He stated that he did not compile a report for his site visit however, the Defendant, the land registrar and the Plaintiff were present when he visited the land. That the Plaintiff had informed him he was unhappy with the Land Registrar's findings and he wanted **PW2** to visit the site. **PW2** stated that he had never done any other work for the Plaintiff. That the beacons of the land had been destroyed when he visited the land. That the Defendant's parcel number came from number 4738.

9. On re-examination, **PW2** stated that he had not been shown the Land Registrar's report making it difficult for him to know what it contains. That he was present when the Land Registrar visited the suit parcel and he made a report concluding that parcel number 4739 belonging to the Plaintiff while parcel number 4738 belonged to the school were different but the school had occupied both parcels of land.

10. This marked the close of the Plaintiff's case and the defence case was scheduled for the 10<sup>th</sup> of June, 2019. **DW1** was **JOSEPH ROBERT ONYANGO**, the principal of Nambale Urban Secondary School who adopted his statement dated the 22<sup>nd</sup> of July, 2015. In the statement, he stated that the school had not trespassed into the Plaintiff's land as the school bought 4.25 acres of land from Dickson Amukowa Anindo and paid him KShs.140,000/=. That the school owns land parcel number 5541 and not 5841 as claimed by the Plaintiff and the structures he has mentioned are on the school's land. That the Plaintiff's land borders the school on the northern part while the structures are on the southern part of the school compound. That the Plaintiff was even present when the school bought the land and even participated in building the land. That there is no encroachment on the Plaintiff's land as he claims. **DW1** urged the Court to dismiss the Plaintiff's suit with costs.

11. On cross-examination by Fwaya advocate for the Plaintiff **DW1** stated that he went to Nambale Secondary School in the year 2014 and that although he is talking of things that happened earlier, he is the custodian of the documents pertaining to what happened. He stated that he had not availed the documents in Court although they were filed earlier. That the land parcel is 5541 although he has availed neither the deed nor the search. That the said parcel is a subdivision of land parcel number 4738 and it borders land parcel number 4739. That he is not aware that land parcel number 5541 has another case HCCC No. 124 of 2013. That it is only the surveyor who can determine encroachment and the Plaintiff availed the Surveyor who said that the school had encroached into the Plaintiff's land.

12. On re-examination, **DW1** stated that the private surveyor only came to Court but he never saw him at the school. That he had not been shown the documents for case number HCCC No. 124 of 2013. He stated that the present case is not about ownership but trespass and that they were not claiming ownership of the Plaintiff's parcel number 4739.

13. On 5<sup>th</sup> of July, 2021 **TOM CHEPKWESI**, the then Land Registrar testified as **DW2**. He stated that he served as the Land Registrar of BUSIA County from the year 2012 to 2019. That in 2014 the Court issued an order requiring the Land Registrar and Surveyor to visit the parcel numbers 4739 and 5541 to determine their boundaries. That they conducted the exercise on the 9<sup>th</sup> of May, 2017 and made a report which was filed in 20<sup>th</sup> of July, 2017 which report was produced as Dex 1. **DW2** stated that his findings were that parcel number 4739 was misplaced as it does not exist on the ground. There was therefore no encroachment in the Plaintiff's parcel. He concluded by stating that the Plaintiff was present during the exercise and that the Seller who owned land parcel 5541 confirmed selling the suit parcel to the Defendant.

14. Upon cross-examination, **DW2** stated that the surveyor is the expert in matters of positions of parcels and/or boundaries and that he is also in charge of the subdivision of land. That he is unable to tell which parcel of land created 4739 and cannot tell whether parcel number 4739 and 5541 originated from the same number. He confirmed that there was a register for 4739 and it was also on RIM. **DW2** confirmed that the title owner does not play any role in creating a map or a green card. That the mutation was approved erroneously and when they discovered the error at the time of investigation when they were served with the Court order. That 5541 is on the ground where it is correctly and 4739 is part of parcel number 1322. The ownership of LR No. 1322 is not given in his report.

15. **DW2** continued to state further that he could not say with certainty that parcel number 5541 had been added in the RIM. That they used the mutations when they were carrying out the identification of the parcels. That he may not know whether the mutation of 4739 has been acted upon as he was no longer working in Busia and that he did not look at the documents that created LR. 5541 but the survey indicated the size of 5541 on the ground. On re-examination, **DW2** stated that the court order set out what they were to do. That they did not find that the Defendant was in trespass as they were occupying their parcel of land. That the seller of the parcel to the Defendant and the Plaintiff gave evidence which is part of his report.

16. The Plaintiff filed his submissions on the 26<sup>th</sup> of November, 2021 and reiterated the facts in the pleadings and those adduced during trial. He submitted that the Land Registrar made conclusions that were outside his scope and they are therefore irrelevant. That the Land Registrar's evidence was biased and coached to divert the issues in dispute to assist the Defendant and that he neither disowned or challenged his documents that were produced as evidence, which evidence showed that he was the owner of land parcel number Bukhayo/Kisoko/4739. He concluded by stating that he had proved his case and was therefore entitled to the reliefs sought in the plaint.

17. The Defendants filed their submissions on the 16<sup>th</sup> of September, 2021 also reiterating the facts of the case and the evidence adduced during trial. They further submitted that the Land Registrar's evidence concluded that the Plaintiff's parcel of land was not on the position it was mapped at and the same was different from the ground positions. That both the Plaintiff's and the Defendants' parcels of land all trace their subdivision to land parcel no. Bukhayo/Kisoko/1680 which was subject to this Court's judgement in Busia ELC No. 124 of 2013, between Horace Awori vs. Dickson Minya Amukowa, Seferio Okello Nandwa (the Plaintiff herein) & 11 others where the Court cancelled all the subdivisions including the Plaintiff's and Defendant's land parcels. That although both the Plaintiff and the Defendant were duped by one Dickson Minya Amukowa into buying an absentee landlord parcel of land as evidenced in the Court's judgement in Busia ELC No. 124

of 2013, it is still not sufficient proof that the Defendants have encroached on the Plaintiff's parcel of land. That the Plaintiff has failed to prove his case and the same should be dismissed with costs.

18. After considering the parties' pleadings, evidence and the submissions, the issues that arise for determination are as follows:

**a) Whether the Defendant has encroached into the Plaintiff's parcel of land and whether eviction and permanent injunction should issue; and**

**b) Who bears the costs of the suit?**

19. The Plaintiff's suit parcel is L.R No. Bukhayo/Kisoko/4739 and the Defendant's parcel is L.R No. Bukhayo/Kisoko/5541 all trace their root from subdivision of L.R No. Bukhayo/Kisoko/3992. The question is whether the Defendant indeed encroached on his land. **PW1 testified that he bought land parcel number 4739 from one Dickson Minya Amukowa who later sold the remainder subdivision to the Defendant. He stated that the Defendant had built a toilet, two classrooms, a shelter a borehole and a tank on this suit portion of the land. DW1 on his part stated that encroachment cannot happen because the Plaintiff's land was to the north of their land and the structures built were on the southern part of their land number 5541.**

20. From the evidence adduced, the plaintiff has shown that he was issued with a title deed for parcel number 4739 measuring 0.45ha. It also appears that he had not taken possession from the time of purchase. Similarly, the Defendants own parcel number 5541 which was curved out of parcel no 4378 and which is said to measure 4.25 acres. As exhibited in the mutation form and map produced as *Pex1* and *Pex2*, the two parcels 4738 and 4739 existed at least on paper during the subdivision. In the mutation form (*Pex1*) for parcel number 3992 which measured 3.11ha, there were only two subdivisions, numbers 4738 and 4739 plus a road. The parcel number 4738 was bigger in size at 2.63ha before it was also later subdivided into parcel numbers 5540 and 5541.

21. The burden was on the plaintiff to show that although they each have separate titles on the ground, the Defendant had encroached on to his portion which according to him, the Defendant is occupying entirely. The plaintiff does not bring out through his evidence what boundary marks were put to identify his portion when his parcel number 4379 was marked out for him although his witness tried to assert that those boundary marks had been removed. The Defendants' size of land is given on the title as 1.7ha. There is no evidence adduced or presented to ascertain that the Defendants are occupying more land than their title deed reads. The order issued by this court on 13<sup>th</sup> October 2014 required of the Land Registrar Busia to determine *inter alia*:

- i) The acreage of each parcel
- ii) The boundaries of each parcel
- iii) The party in occupation of each.

22. During his testimony, DW2 produced a report which stated that he visited the land on the 9<sup>th</sup> of May, 2015 and made the following observations:

- a) The parcel in dispute BUKHAYO/KISOKO/4739 is fully developed and used by Nambale Urban School;
- b) The Plaintiff is not in actual possession of BUKHAYO/KISOKO/4739 but is in actual possession of part of BUKHAYO/KISOKO/1322 while holding title for BUKHAYO/KISOKO/4739;
- c) Parcel no. BUKHAYO/KISOKO/1322 was illegally sold to the Plaintiff herein together with other people by Dickson Minya Amukowa and that all buyers are in actual possession of part of that land;
- d) That Dickson Minya Amukowa has denied ever selling to the Plaintiff parcel no. BUKHAYO/KISOKO/4739 as captured in the map but admits selling to him the current position he is in actual occupation of BUKHAYO/KISOKO/1322;
- e) The purported mutation that created parcel number BUKHAYO/KISOKO/4739 was disowned by the then owner Dickson Minya Amukowa since the document bore thumb prints marks yet he used to officially sign with a pen.

23. DW2 arrived at the following conclusion:

**“The Plaintiff and other persons not in Court irregularly transacted with Dickson Minya Amukowa over absentee landlord's land which bordered the parcels in dispute. The seller, Dickson Minya Amukowa sold his neighbours' land while using the now disputed parcel no. BUKHAYO/KISOKO/3992 for documentation purposes. Parcels number BUKHAYO/KISOKO/4739 has never existed in its mapped position.”**

24. As it is, the report did not address part (i) and (ii) of the order for site visit and instead the Registrar introduced a new angle to the plaintiff's suit that what he was sold and that which he was in occupation of was parcel number 1322. According to Dw2, the plaintiff's land number 4739 was non-existent as its ground position was inside the Defendant's land. Pw2 also confirmed that the Plaintiff's parcel as indicated on the map occupies the ground position that is under the use by the Defendants. Pw2 did not as well ascertain whether the Defendants were occupying more land than they were entitled to. It is in the opinion of this court that this piece of information was necessary because if Pw1 was shown the wrong land during subdivision which formed part of L.R. 1322 as stated by the Dw2 and as was found by this court in Busia ELC 124 of 2013, then there was a need to shift positions in the mutation (*Pex1*) to reflect that the Defendants' land would be

comprised in B and the plaintiff's land moves to A.

25. In the absence of evidence that the Defendants are occupying more than 1.7ha, it will be irregular for this court to order for eviction where it is clear the mutation form for parcel number 3992 which created the two numbers 4738 and 4739 did not reflect the correct ground position. The Plaintiff's remedy in my view lie against the person who sold him the land to show and demarcate to him the land sold and not shift blame on the Defendant who bought after him, took possession and fenced off the plot shown to them.

26. In view of the foregoing analysis, I am persuaded that the Plaintiff's case has not been proved. Consequently, the Plaintiffs suit is dismissed with an order that each party bear their respective costs.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF APRIL, 2022.**

**A. OMOLLO**

**JUDGE**