



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.476 OF 1998

PAUL K. MWANIKI PLAINTIFF

VERSUS

TERESIAH WANGARI NDUNGU DEFENDANT

JUDGMENT

P K (the plaintiff) has filed this suit against T WN seeking the following orders:-

- a. Exhumation and removal of the remains of A I N (the defendant's son) who was buried on plot No.Mau Summit/Molo Block 1/Mutirithia 1641 which belongs to the plaintiff, and that defendant covers a pit latrine she dug on the said plot, and also remove the wire fence she erected to surround the plaintiff's plot.
- b. That defendant do pay for a registered surveyor to re-plant boundary marks of the said plot, and pay general damages for defiling and rendering the plot unclean, and converting it into a graveyard, with an intention to annoy, scare and force the plaintiff to abandon the said plot for her own use.
- c. In the alternative, the plaintiff prays that the defendant be ordered to pay compensation for the plot at the current open market value, and also pay damages for loss of income and user from the date of burying her son there, fencing the plot and digging the pit latrine.
- d. He also prays for costs of the suit and interest thereon.

The hearing of this matter begun on 8/05/2000 before Rimita J and after the testimony of PW1, the parties in the dispute consented to the matter being referred to the District Registrar, Nakuru, to investigate, survey and make a report to the court within 60 days. However the judge left the Judiciary and the matter was heard de novo on 20/9/2004 by Musinga J who left the station before completing the matter. On 17/03/2009 Maraga J then took over the matter from where it had stopped. He proceeded to complete the hearing. However before he could give a date for judgment, he too left the station and on 10/05/2011 Wendoh J recorded a consent by the parties that the District Land Registrar and District Surveyor to appear in court and be examined on their reports and also produce the registry index map and list of the 1st Edition subdivisions of the disputed parcel.

PAUL MWANIKI (PW1) told the trial court that he owns parcel No.1641 in Mutirithia farm, Molo, as he has the original title document for the property and which he produced as exhibit. He explained that the original owner of that property was his mother MWM. To prove this assertion, the plaintiff produced

an abstract copy of the green card as exhibit 2. It was his evidence that no one else has claimed title over the parcel although the defendant currently occupies it and has planted maize on it. It was his evidence that the defendant who is a neighbour moved to occupy the property in 1996, and has carried out activities which are prejudicial to his interests.

On cross-examination PW1 confirmed that he has never occupied the land which became his mother's parcel in 1991, although she was issued with the title on 9/3/1993 and she never occupied the land.

The plaintiff gives the size of the land as 0.928 hectares whilst the respondents' measures 6 acres. He explained that his mother could not have moved to occupy the parcel because she had established a homestead elsewhere and could not leave it to go and occupy the suit property. He denied suggestions that the defendant's husband had owned the land since 1982, although he concedes that before 1986, there were trees plant on the suit land and the same were neither planted by himself of his mother.

It was his further contention that Plot No.1304 which is next to Plot 1641 is undeveloped, and Plot 709 is also not developed. He denied suggestions that the plots were excised from Plot No.46.

The plaintiff further confirmed that he had lodged a caution over the suit land as he feared that the defendant might sub-divide or dispose off the land.

TIMOTY MWANGI NYAGA, who surveyed Mutirithia farm in 1990/91 prepared a surveyor's plan which was registered and approved for issuance of Titles. He referred to the Registered Index Map for Mau Summit/Molo Block 1/Mutirithia farm. He confirms accompanying the plaintiff and the area chief to the land where the plaintiff was shown the boundaries of plot 1641.

On cross-examination he told the court that the matter between the parties was a boundary dispute and he advised the plaintiff to refer the matter to the Land Registrar. He confirmed that the plot had some tress on the land and a grave. He also noted developments on Plots 708, 709 and 1304. According to him plot No.1641 was supposed to be 6 acres but on the ground the person cultivating it as the owner is cultivating a portion land than 6 acres. The directors of Mutirithia had said that each member was entitled to 6 acres and the only exceptions were those neighbouring marshy areas and swamps. Plot No.46 measured 2.99 hectares or 7.25 acres and its title was issued in 1991. He denied suggestions that the plot included 1641, saying plot 1641 and 46 are different.

JOSEPH MULINGE MUNGUTI (PW3) the Assistant Land Registrar, Nakuru had been briefed about this matter by his then boss, Mr. Oluchiri (a Senior Land Registrar) who had retired as at the date of hearing. He referred to a report prepared by Mr. Oluchiri dated 11/8/2000, relating to Mau Summit/Molo Block 1/1641 and 46, touching on a boundary dispute. Mr. Oluchiri made a determination that plot No.46 did encroach into plot No.1641, he determined what the proper boundary ought to be.

On cross-examination PW3 stated that the plaintiff combined parcels are said No.707 and 708 on 8/8/96 to form parcel No.1641 which is not part of Plot No.46. These combined parcels to have been owned initially by Marion Wambui Mwaniki.

HABIL OLUCHIRI (PW4) confirmed that he was a retired District Land Registrar who had served in Nakuru District. He visited the suit land and prepared the report which was produced as exhibit. According to this witness he made a determination on the correct boundary between parcel No.1641 and 46. He told the court on cross-examination that the defendant was in occupation of both parcels. Although he did not ascertain the size of parcel No.46, the records from his office showed that it was 2.00 hectares whilst Plot 1641 was 0.0928 Hectares.

The defendant **TW N(DW1)** told the trial court that her late husband owned plot No.Mau Summit/Molo Block 1/46. When her husband died in 1996 he was buried there, and when her son died later on she buried him next to the father. It was her evidence that they moved onto the land in 1981, which she says measures 7 acres. They fenced the land and planted trees on it. DW1 confirmed that the plaintiff's mother was a member of Mutirithia and even attended the burial of her son and never objected to the

burial. She insists that the plaintiff's land and her land are about 1km apart and they do not share a boundary; and she does not know anything about parcel No.1641. She terms the plaintiff's claim as false saying she does not occupy his land.

The defence witness **GIBSON WAHOME WERUGIA** (a licenced Land Surveyor) practising in Nakuru confirmed that he was requested by the defendant to ascertain the acreage of plot Title No.Mau Summit Molo Block 1/46 Mutirithia Farm. He was also requested to ascertain developments which may affect the case. He went onto the land on 6/4/2009 and the boundaries were pointed out to him by the defendant. His evidence is that the parcel measures 2.991 hectares which translates to almost 7.8 acres. He confirmed that on the ground there was a homestead, and at one corner of the land were a plantation of mature blue gum trees, some of which had been harvested. There was also a grave next to the trees. The rest of the land was cultivated and all the boundaries were clearly visible. The land was fenced except for the southern side where there was nappier grass.

He also noted that along the border were several plots touching the fence, some were developed, and they varied in size although he never took any measurements. He used the existing area map to establish that on the ground, the plots did not appear on the RIM and there had been interference on the ground in relation to the plots.

PW2 also confirmed that plot No.1641 borders plot No.46 but insisted that the two did not overlap nor encroach on each other. He disagreed with the findings by the Land Registrar (PW4) which stated that there was an overlap. According to PW3 his report relates to parcel No.46 and many other plots including No.1641 whilst PW4's report dealt with boundary between parcel No.706 and 1641. He contested that report saying what was given as the existing boundary was not the same as his.

On cross-examination, and upon being shown the report, he noted that it showed plots No.46 and 1641 as being part of the RIM and that they adjoin each other.

As a result of the conflicting finding by the surveyor (DW2) and the former Nakuru District Land Registrar (PW4), Maraga J issued orders directing the District Land Registrar and the District Surveyor to visit the suit land and determine:-

1. The boundary between the suit land and plot No.46.
2. On which parcel the contested grave lies.
3. Whether there was encroachment on either parcel.

The report by the District Land Registrar D.K. NYANTIKA dated 15th October 2010 found that the boundary on the ground is marked by cedar posts and barbed wire on one part and cypress on the other part.

- a. There was a beacon along the road marked 'A' on the surveyor's report, which formed a mark along which the defendant fenced.
- b. However, whereas the scaled distance along the line marked A-B on the surveyor's sketch/report by using the area map (RIM) was approximately 154 metres, the ground measurement was 198.5 metres, showing an excess of 44.5 metres.
- c. Further, using the ground measurements, the total area of parcel No.46 was 2.9861 Hectares, but using the scaled distances and the ground distance, the rest of the boundaries had no problem.
- d. Based on the foregoing then parcel No.46 has encroached into parcel No.1641, ceding off a large chunk of land. The grave belonging to the defendant's relative is within parcel No.1641.
- e. The fencing on the ground could have resulted from an assumption that the beacon marked 'A' was the mark defining the boundary of parcel No.46, whereas the RIM defines the boundary otherwise.

- f. The boundary between the two parcels is therefore along D to the corner of the boundary marking parcel on 702 and 46, and not along D-A as shown on the Surveyor's report.

The report presented on behalf of the District Surveyor by C. Kotut, dated 6/10/2010 found that:-

1. All measures were to scale in relation to plot 46, except on one side where there was a big difference of 44.5 metres. He pointed out that the beacon existing defined the road and parcel 702, and not the beacon defining parcel No.46/702 which when scaled gives approximately 154m.
2. The area enclosed by the existing boundary marking parcel No.46 as computed using measured distances was approximately 2.986 Hectares, when the area list and map scaled the distances as 2.565 Hectares.

This means that the area of the existing fenced ground is more by 0.421 Ha. The conclusion was that parcel No.46 used the wrong beacon to form its boundary and there was an excess portion included in its portion.

Subsequent to these findings, the plaintiff's counsel Mr. Mwaniki, submitted that the report and testimony of the plaintiff clearly showed that parcel No.46 had encroached into parcel No.161 and the **"offending"** grave relating to the defendant's interest was within parcel No.1641.

He referred to the provisions of **section 23** of the **Registered land Act** (now repealed) which provides that a proprietor of land is supposed to maintain a boundary **"pursuant to an order of the Registrar. . . ."** He submitted that the report by H. Oluchiri, the Land Registrar Nakuru, was to the effect that the parties had **"been shown the newly marked boundary and requested to maintain and respect the same"**, and it was clear that the defendant had refused to comply.

It is argued that the very same boundary was marked by the current District Land Registrar (Nyantika) and the District Surveyor, so it cannot be a coincidence that all the officers have come up with a similar report. They are described as the custodians of government records relating to land and experts in their respective fields, and are best placed to determine issues relating to boundary disputes.

Counsel has also referred to material published by the Ministry of Lands and Housing entitled **Handbook on Land Use Planning, Administration and Development Procedures 1991** at pg 57 which provides:-

"In the event of a dispute between land owners over the position of a boundary, it is the duty of the Land Registrar to determine its position once an application is made to him by an interested party and a fixed fee is payable by the party. He does so on such evidence as he considers relevant, including the evidence of a surveyor. The party aggrieved by the determination of the position of the boundary may challenge it in the High Court."

It is also contended that, although Section 28 of the Registered Land Act protects the sanctity of title, this is subject to the Provisions of the Act. It is the same Act which at **Section 21** vests powers on the Land Registrar to determine disputes relating to boundary. It is counsel's argument that **Section 28** is subject to **Section 21**.

It is further argued that in determining a boundary dispute the Land Registrar has considered all relevant matter including the evidence of a surveyor, the area list prepared by the surveyor being one of the relevant matters. He urges this court that in light of the reports filed, orders should be made to remedy the situation by directing that the boundary be rectified as proposed by the District Land Registrar.

The plaintiff's counsel submits that **Section 28** of the **Registered Land Act** is, not absolute and this was addressed in the case of **M'Mboroki V Chief Conservator of Forests and Another (2006) KLR 290** where Nyamu J (as he then was) had this to say at pg 292:-

“On issues concerning boundaries under Registered Land Act transactions the relevant law is Section 21 and Section 22 of the Registered Land Act. It is not contended by the applicant that this procedure had been invoked.

In addition, the mere fact that Section 28 of the Registered Land Act . . . gives a proprietor indefeasible title, does not, on a prima facie basis give him a title that is beyond any challenge including a constitutional challenge.”

Counsel further submits that although the defendant’s **“mistake”** in encroaching onto the plaintiff’s land was not deliberate, and she is this protected by **Section 143** of the **Registered Land Act (repealed)** and the current **Section 80** of the **Land Restriction Act, 2012**, her testimony seems to suggest otherwise. This is because she claimed that:-

“Our farms are about 1km apart. We do not share a boundary. . . . I do not know anything about parcel No.1641.”

Counsel’s contention is that this statement does not demonstrate good faith and cannot be considered as being made by a party who had no knowledge of the omissions, fraud or mistake – they were intended to mislead and defendant is described as not being truthful.

On the other hand, the respondent’s counsel submits that the reports by the District Land Officer and the District Surveyor did not help the court to understand the situation on the ground because the correct position is that the defendant is in possession of plot No.46 which measures 2.99 hectares, where she in fact buried her son.

He argues that boundary in issue is a general boundary and under **Section 21** of the **Registered Land Act**, the court or Registry may in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it thinks fit. Counsel contends that under **Section 23** of the **Registered Land Act**, the plaintiff ought to have pointed to the District Land Registrar and the surveyor, his boundary features so that they could tell where his boundary was. In course the defendant showed the officers her boundary features of her plot being:-

- a. Cedar posts
- b. Barbed wire
- c. Cypress fence
- d. Beacons

It is further submitted that the acreage on the ground is similar to that entered on the Title Deed and Green Card and **Section 28 Registered Land Act** gives the defendant indefeasible proprietary rights as that was the first registration. **Section 25** of the **Land Registration Act**, has similar provisions.

The defendant’s counsel submits that the claim here cannot succeed because the plaintiff does not claim that the defendant hold plot No.46 in trust nor did the plaintiff claim any overriding interests as provided in **Section 30** of the **Registered Land Act**. It is argued that if the court were to hold that plot No.46 encroached on Plot No.1641, then it will be violating **Section 28** of the **Registered Land Act** as the proprietor of plot No.46 will not be insulated from all claims by other persons, so the interest of justice will be served better by dismissing this claim.

Counsel further argues that an order for rectification of the register so as to reflect the correct acreage in favour of the plaintiff, will violate **Section 143(2) RLA** which provides that:-

“Subject to sub-section (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration has been obtained, made or omitted by fraud or mistake.)

2. **The Register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or change for valuable consideration unless such proprietor had knowledge of the omission, fraud, or mistake, in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”**

It is argued that there is no evidence that the defendant’s husband obtained registration of the plot measuring 2.99 Hectares by fraud or mistake.

From the evidence presented before this court, there is no doubt that the existing boundary between Plot No.1641 and Plot No.46, is not the correct reflection of what ought to be the position. The correct boundary has been confirmed by three different witnesses who visited the locus in quo. It is also apparent that the “**offending**” grave complained of by the plaintiff lies within parcel No.1641, so parcel No.46 has encroached into parcel 1641.

The Land Registrar Mr. Oluchiri, had found as much and even ordered the parties to respect that boundary, but the defendant refused to comply, and instead got a surveyor (who is the only lone voice) to confirm to her that she was on the right path. The bonafides of the defendant is feigned ignorance, there can be no honest mistake or her part, when she out rightly claims not to ever share a boundary with plot 1641. The inference I draw is there was no innocent mistake that deliberate misrepresentation here. Whereas Section 28 of the Registered Land Act gives a proprietor an indefeasible title, I wonder what remedy a party who stands to lose a portion of their land, through no fault of theirs has with regard to one’s constitutional right to ownership and protection of property.

This is where I would draw from the observation made by Nyamu J in the **M’Mboroki case** (supra) that the mere fact that Section 28 of the Registered Land Act gives a proprietor an indefeasible title, does not on a *prima facie* basis give him a title that is beyond any challenge.

What the plaintiff seeks is not to own the entire plot 46, in fact he does not claim ownership of that plot. He claims, and in my view, rightly so, that the defendant has encroached into his portion by virtue of extending her boundary and obtaining a large acreage than she ought to have. All he asks is for rectification of the boundary, which is provided for under Section 21.

Would this rectification offend Section 143 of the Registered Land Act? As observed earlier I am persuaded that the purported mistake in acreage was not a mistake, but a design well within the defendant’s knowledge.

The submissions by the defence counsel that should the court grant the prayers sought, it will be offending **Section 28 and 143 Registered Land Act** cannot hold. The orders will in effect be making a realization of the provisions of Section 21 and 143 (2). Consequently judgment is entered in favour of the plaintiff to the effect that the defendant has encroached onto his portion.

I recognise that the defendant has remains of her son in the grave that encroaches on plot 1641. She may not wish to disturb his rest. In that case I will give her an option of paying compensation to the plaintiff for the encroached portion. The parties are directed to engage services of a valuer to assess and file a valuation report within 60 days, so that the court may give appropriate orders on the sum to be paid as compensation. In the event that parties disagree then;

I direct that:-

1. The defendant do exhume the remains of her son AIN buried on Plot No.Mau Summit/Molo Block 1/Mutirithia/1641 which belongs to the plaintiff, and fill and remove the wire fence erected as joining the boundary between her plot No.46 and Plot No.1641 within 60 days thereafter.
2. The Land Registrar, Nakuru to rectify the register to reflect the correct acreage as shown in the reports filed by Mr. Nyantika and Mr. Kotut herein.

3. The District Surveyor to re-plant boundary marks as shown in the above mentioned reports. The respondent will bear the costs of this activity.
4. The defendant shall bear the costs of this suit.

Delivered and dated this 14th day of June, 2013 at Nakuru.

H.A. OMONDI

JUDGE