



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HCC NO. 64 OF 1998.

DANIEL KITTY SICHEL..... PLAINTIFF

VERSUS

BISANSIO EMULI OMUNYIN DEFENDANT

JUDGMENT

The plaintiff filed a claim against the defendant seeking a declaration that the defendant is a trespasser on L.R. No. S.Tesso/Osurette/1228 and that an eviction should issue against him. He also prayed for costs of the suit.

The defendant challenged the plaintiff's claim and filed a defence which was amended and filed in court on 26th May 2003.

The parties then proceeded to adduce oral evidence. The plaintiff's case was heard by Mr. learned brother Justice J.K. Seron (as he was). I had the opportunity of hearing the defendant's case. The plaintiff and his witnesses testified on 28th July 2004 and 31st July 2005 respectively. PW1 was the land registrar Busia. He produced proceedings that were prepared by his predecessor Richard Sanya. She stated that L.R.No. S.Tesso/Osurette/1228 in the names of the plaintiffs. He produced green cards showing these entries. The plaintiff was registered on 27th September 1980 and title deed issued on 3rd June 1998.

The defendant got registered as owner of L.R. 1905 on 3rd July 1997. He also produced as exhibit 4 being certified copy of the register that revealed the original owner of L.R. 967 from which both parcels were carved from.

As per the report of the predecessor, it was found that L.R. 1905 had encroached on L.R. 1228. The length of encroachment was estimated between 3 m – 6m. The matter was left for the parties to agree or seek court redress.

On cross examination by Mr. Ocharo for the defendant she stated the report does not contain the size of

the defendant's land. She also stated the report does not give the exact measurement of the encroachment. She was shown a mutation report in respect of L.R. No. S.Tesso/Osurette/1406 DMFI.1 which at page 2 stated the surveyor was to demarcate the boundaries as they exist on the ground. re-examined on the same document, she said the document has no registration date on it neither does it indicate the amount paid or date of presentation or bear signature of land registrar.

PW2 – the plaintiff said he is the owner of L.R. 1228. He produced a copy of the title deed as exhibit 6. He purchased the land from Sebastiano Ekakoro Ejakait in 1980 and the boundaries were marked and fixed. He stated that in 1988, the defendant removed the boundary and put up a permanent structure on a part of his plot. He reported the matter to the authorities.

As a consequence the land registrar gave a date of 12th August 1998 to visit the site. The land registrar came and made findings on the ground in the presence of the defendant. The defendant was advised to negotiate with him but instead put a fence and planted trees. He thereafter filed a suit.

Mr. Ocharo cross examined him. He said he was not aware S.Tesso/Osurette/1905 was carved out of L.R. No. 1406. The report did not indicate acreage of his land. He said he is aware the defendant encroached on his land measuring 3 – 6 metres and that part of the defendant's house will be demolished. He realized the defendant encroaching on his land at the beginning of June 1998 and he came to court on October 1998.

On re-examination he said he is not aware if the defendant has challenged the Land registries report. He wanted the defendant to quit his plot the defendant has encroached. That was the close of the plaintiff's case.

The defendant testified on 25th February 2013. He stated that he's settled on LR no. S.Tesso/Osurette/1905 having purchased it from Maganda Laban on 8th June 1997. He produced sale agreement as exhibit d1. He got title on 3rd July 1995 after subdivision of L.R. No. S.Tesso/Osurette/1406. He was shown land measuring 0.07 ha at the time of purchase. After buying, he started developing it. He said the three neighboring plots are also developed. He produced photographs produced as Ex. D3 (a) & (b) of his house. He said he has not built on the plaintiff's land.

According to him the land registrar only took measurements of L.R. 1228. He admitted the registrar told them to sit and agree.

On cross examination, he said he bought the land with boundaries already marked. He also admitted the photos do not show when the house was completed. He confirmed being present at the time the land registrar visited the site. He did not agree with the report and he did not know when the plaintiff bought his land.

DW2 Selistine Omunyinyi is the father to the defendant. He was a witness at the time the defendant was buying his land. According to him, the dispute came after the defendant had built on this land. This was the end of the defendant's case.

Both parties filed written submissions which I have opportunity of reading through. What is clear from the evidence and the documents produced is that the plaintiff is owner of L.R. No. S.Tesso/Osurette/1228 which neighbours the defendant's parcel L.R. no. S.Tesso/Osurette/1905. The two parcels were originally owned by Sebastian Ejakoro Ejakait in its original no. L.R.

S.Tesso/Osurette/967. It is also clear from the evidence that the plaintiff was the first to occupy his land. The defendant took possession in 1997 several years later after the plaintiff was on this area.

This court is tasked to determine if the defendant has encroached on the plaintiffs parcel no. L.R. 1228.

PW1 produced a report which indicated the defendant had encroached on the plaintiffs land by about 3 – 6 metres. The defendant disputed this report. He said no measurement was taken of his land. He however did not make an application to the court for an order that the land registrar to visit the site again and take measurements of both plots. Neither did he present an independent report to challenge the one produced by PW1. This leaves the court with only one report of the registrar to hold it in determining the case.

During the hearing of the plaintiffs case, a mutation form was shown to PW1 marked as DMFI.1. While questioning the witness, the witness answered the survey was to put boundary demarcations as per the ground. That document was never produced nor its maker called to confirm if he ever put the markings as per what was on the ground. The defendant also did not explain to this court who showed him the boundary when he bought the plot. He has therefore not adduced any evidence to controvert the findings of the land registrar on the site visit made on 12th august 1998. he admits the registrar advised them to meet and negotiate between him and the plaintiff. However no such meeting took place. Admitting they were to meet can only be interpreted that he knew he had encroached on the plaintiff's land.

The plaintiff has referred the court to the case of Muraguri vs. Rukenya [1983] KLR at page 543 where at holding no. 3, the court said that the boundary fixed by the registrar was the boundary the parties ought to recognize and it was not to be interfered with. In the instant case, the boundary as determined as per the report of the land registrar is the boundary this adopts. From that report the district surveyor stated that the encroachment was about 3 – 6 metres. There has been given no reason by the defence why this report is to be doubted. He was present when the land officers made a visit to the disputed site.

The plaintiff also made his complain early as soon as the defendant started construction of his house. The defendant took occupation of the plot in 1997. by mid 1998, the plaintiffs already filed complaint and the registrar visited the site in august 1998 before the defendant completed construction of his house. He therefore completed this house knowing very well the boundary was being disputed by the plaintiff.

This court therefore finds the plaintiff has proved his case within the required standards. The defendant is ordered to remove his structure on the extend of the encroachment as pointed out to the parties during the site visit by the land registrar which is 3 – 6 metres, within a period of 90 days in default the plaintiffs to take lawful means to demolish the structure on his portion of the land.

The defendant is at liberty to negotiate the purchase of the portion with the plaintiff if they can agree. The costs of the suit is awarded to the plaintiff.

JUDGMENT DATED, DELIVERED AND SIGNED In open court this 12th day of June 2013.

A. OMOLLO

JUDGE