



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC. CASE NO. 217 OF 2010**

**MARGARET NYARIARA KIMANI..... PLAINTIFF**

**VERSUS**

**JOSEPH NJOGU NGOYA..... DEFENDANT**

**JUDGMENT OF THE COURT**

The Plaintiff filed suit by her Plaintiff filed on 7<sup>th</sup> May 2010 wherein she disclosed that she is the registered proprietor of land parcel Dagoretti/Kangemi/49 while the Defendant is the registered proprietor of land parcel Dagoretti/Kangemi/253. She further disclosed that the two parcels of land share a common boundary and then stated that in January 2009, the Defendant entered and occupied a portion of her parcel of land claiming the same to be a part of his land. The Plaintiff further indicated that she lodged a complaint with the Land Registrar who in conjunction with the Government Surveyor determined that the disputed area was part of her parcel of land stated above. She further indicated that in spite of this finding, the Defendant has continued to trespass onto Land parcel Dagoretti/Kangemi/49 where he has commenced construction works and has not heeded demand and notice of intention to sue. Accordingly, she seeks for judgment to be entered against the Defendant for:

1. A declaration that the disputed portion belongs to her;
2. A permanent injunction restraining the Defendant by himself, his servants or agents from entering, remaining in, developing or occupying a portion of land parcel Dagoretti/Kangemi/49 and the Defendant do remove/demolish construction he has erected on the said parcel of land; and,
3. Costs.

During the trial, evidence was adduced by PW1, Irene Mutai, who is a Land Registrar at the Ministry of Lands that the Defendant filed an application in 2009 at the Lands Ministry seeking determination of the boundary between the aforementioned two parcels of land and that together with a Government Surveyor known as Eunice Wandera (PW2), they went to the two parcels of land and after giving the two parties an opportunity to be heard, and further after PW2 took measurements, she made a finding that the portion of land in contention was part of land parcel Dagoretti/Kangemi/49 which belongs to the Plaintiff. She produced in evidence her said ruling. PW2, Eunice Nyakesa Wandera, a Government surveyor working at the Survey of Kenya, also confirmed the evidence of PW1 when she confirmed having accompanied PW1 to the two parcels of land where she took measurements and from which she deduced that there was an empty space between the two parcels of land which was the cause of the dispute between the Plaintiff and the Defendant. From her measurements, she confirmed that the empty space was part of parcel of land Dagoretti/Kangemi/49 belonging to the Plaintiff. She produced in evidence her report to that effect. PW3 was the Plaintiff herein. She confirmed that after the decision of PW1, the Defendant did not surrender the disputed portion of land to her and that he was still using that portion of land as if it belongs to him.

DW1, Mureithi Mugo, confirmed that he is a registered surveyor and that he was contracted by the Defendant to make a proposal for purposes of subdivision. He disclosed that the Defendant wanted to subdivide his parcel of land Dagoretti/Kangemi/253 into 3 portions. He confirmed having come up with a sketch plan of the subdivisions and produced the same as evidence. He confirmed that he was not hired primarily to resolve the boundary dispute between the Plaintiff and the Defendant. However, he confirmed that the disputed empty space between land parcel Dagoretti/Kangemi/253 and Dagoretti/Kangemi/49 belonged to the Plaintiff. He further stated that he did not see any encroachment by the Defendant onto the Plaintiff's parcel of land. DW2 was the Defendant. He denied that he had encroached on the Plaintiff's parcel of land. He insisted that the empty portion of land between his parcel

of land and the Plaintiff's is still there and it belongs to the Plaintiff. He stated that he has built within his parcel of land. For this reason, he said that there was no use for the Plaintiff to file suit and that the same should be dismissed.

The applicable law is **section 18(2) of the Land Registration Act** which provides as follows:

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

Further, **section 18(3) of the Land Registration Act** provides as follows:

***“Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary.”***

Going by the provisions of the law cited above, the Registrar is conferred with the responsibility of determining boundary disputes of registered land and to receive such evidence as is necessary to enable her to discharge that responsibility. Looking at the instant case, PW1 with the assistance of the Government Surveyor (PW2) did discharge this responsibility in visiting the disputed land and in conducting the necessary measurements and receiving the necessary evidence from both the Plaintiff and the Defendant regarding the boundary dispute. PW1 issued a ruling based on her findings and the findings of PW2, and declared that the disputed portion of land belonged to the Plaintiff. The evidence adduced by DW1 was to the effect that his survey of the Defendant's parcel of land was done for purposes of subdivision and he did not address the issue of the boundary dispute. Further, the Defendant himself, in his testimony, conceded to the finding of PW1 and PW2 and confirmed that the suit was unnecessary as the Plaintiff was free to make use of the disputed portion of land which had been confirmed to belong to her.

In light of the foregoing, I see no good reason to contradict the findings of the Land Registrar (PW1) in this suit as the same was arrived at in compliance with the legal provisions cited above. Further, I do find that even the Defendant has conceded that the disputed portion of land belongs to the Plaintiff and that she is at liberty to make use of it. In light of this, I find that the Plaintiff has proved her case on a balance of probabilities. Accordingly, I hereby enter judgment in her favour as prayed in her Complaint. I also award her the costs of this suit.

**SIGNED AND DELIVERED AT NAIROBI ON THE 20<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**MARY M. GITUMBI**

**JUDGE**