



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 13 OF 2004

WAMBARI MUNG'ARA PLAINTIFF

VERSUS

JOSEPH SITERI AMABUYI DEFENDANT

JUDGEMENT

The Plaintiff Wambari Mung'ara brought this suit against the defendant Joseph Siteri Amabuyi claiming the following reliefs;-

(a) Permanent injunction to restrain the defendant, his agents and/or servants from encroaching and or interfering with Plot No. Kiminini.Kinyoro Block 3/Matisi/370 measuring 25” x 100” feet belonging to the plaintiff.

(b) A declaration that the defendant has no proprietary rights over title No. Kiminini/Kinyoro Block 3/Matisi/370 and for the District Surveyor to rectify the boundaries.

c. Costs

(d) Any other relief.

At the hearing of this suit, the plaintiff testified that he is the proprietor of LR NO. Kiminini/Kinyoro Block 3/Matisi/370. He produced a title deed exhibit 1. He had bought the plot on 30/11/1995 from one Patrick Nyongesa Osembo at a price of Kshs.59,000/=. He produced sale agreement exhibit 2 (a) in Swahili and its translated version into English as exhibit 2(b). On 17/1/2003 the defendant brought in surveyors who excised a portion measuring 25 x 15 feet which he claimed to be his. It is on this basis that he came to court seeking the prayers set out hereinabove.

I have gone through the evidence of the plaintiff as well as the pleadings in this case. The defendant owns a neighbouring plot to the plaintiff's plot. The defendant did not come to court to testify and the defence was deemed closed after the defendant was granted time to present his defence but failed to do so.

The issue for determination in this case was an alleged encroachment by the defendant onto the plaintiff's parcel of land. The plaintiff in his evidence claimed that the defendant had encroached onto his portion of land by 25 x 15 feet. On 5/10/2009 the parties to the dispute agreed by consent that the District Surveyor Trans – Nzoia West do visit the two plots in issue and file a report in court within 30 days. This consent effectively disposed off part of prayers (b) of the plaintiff's reliefs. The District surveyor visited the disputed plots and compiled his report on 7/6/2006 in accordance with the court order. The report revealed that contrary to the plaintiff's allegations, it is actually the plaintiff who had encroached into the

defendant's land parcel No. 368 by a portion of 6 meters square.

The Plaintiff well aware of the District Surveyors report never called the surveyor to testify in this case. The consent recorded by the parties was adopted as an order of the court and as the report was filed in court pursuant to the order, the court cannot over look it in determining the plaintiff's suit. The plaintiff has constructed a semi permanent structure on the encroached portion.

There is no dispute that the plaintiff is owner of plot No. 370. It is therefore superfluous for the court to declare that the defendant has no proprietary interest on the said land. There is no evidence that the defendant has encroached on to the plaintiff's land and as such no injunction can issue. As I have said before in this judgment, it is the plaintiff who has encroached on to the defendant's land. It is therefore clear that the plaintiff's suit is misplaced. The same is hereby dismissed with costs to the defendant. The defendant is at liberty to move and have his portion which is occupied by the plaintiff properly demarcated into his portion.

Dated, signed and delivered at Kitale on this 28th day of November, 2013.

E. OBAGA,

JUDGE

COURT: Judgement delivered in the absence of parties who were aware of today's date. The parties can read the judgement at the registry.

E. OBAGA,

JUDGE

28/11/2013