



REPUBLIC OF KENYA



KENYA LAW
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**Kiama v Nderitu (Environment & Land Case 314 of 2014)
[2022] KEELC 4917 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 4917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 314 OF 2014
L WAITHAKA, J
JUNE 30, 2022
(FORMERLY NYERI HCC NO. 208 OF 2012)**

BETWEEN

BENSON GATHUNGU KIAMA PLAINTIFF

AND

GEDION THEURI NDERITU DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 3rd October, 2012 and filed on an even date, the plaintiff herein instituted this suit seeking a permanent injunction to restrain the defendant from encroaching on his land to wit Thegenge/Gathuthi/854 (suit land) or in any other way interfering with his quiet possession of the suit land. The plaintiff also sought an order for removal of the structures the defendant had erected on the suit land and costs of the suit.
2. The plaintiff's case is premised on the grounds that he is the registered proprietor of the suit land; that on or about 27th September 2012 the defendant, whose land abuts his, without any justification, cut his fence, encroached on to the suit land and began erecting a stone wall thereon; that earlier on, in November 2011, the defendant had encroached on the suit land and wantonly damaged his crops.
3. Terming the actions of the defendant complained of injurious and damaging to him, the plaintiff seeks the reliefs mentioned in paragraph (1) herein above.
4. In reply and opposition to the plaintiff's claim/case, the defendant through his statement of defence filed on 16th October 2012, states that he is the owner of plot number 14A which he leased from the County Council of Nyeri; denies the plaintiff's contention that his plot abuts the suit property and



states that there are other plots between his plot and that of the plaintiff to wit plots Nos. 14B, 15, 16 and 17.

5. Claiming that the plaintiff is attempting to grab the road reserve of Nyeri Ihithe Tarmac road, the defendant denies the allegations leveled against him and states that the developments he is carrying out are within his plot.
6. Terming the plaintiff's suit frivolous, vexatious and bad in law, the defendant contends that the plaintiff ought to have added the County Council of Nyeri as a party to the suit as it is the owner of Thegenge/Gathuthi/593 from which his plot is derived.

The Plaintiff's Case

7. When the case came up for hearing, the plaintiff informed the court that the defendant is his neighbour, that he owns the suit land while the defendant owns plot No.14A derived from plot No.593 belonging to the County Council of Nyeri. To attest to those facts, the plaintiff produced the title deed for the suit land; certificate of search in respect of the suit land dated 17th August 2012; green card in respect of the suit land and official search in respect of plot No. 593 as Pexbt 1 to 4 respectively.
8. The plaintiff informed the court that he has a common boundary with the defendant but there is no road between their parcels. The plaintiff produced the area Registry Index Map (RIM) as Pexbt 5 and photographs of the wall allegedly erected by the defendant as Pexbt 6(a) to (c).
9. The plaintiff further informed the court that the defendant destroyed his banana crops and that he reported the incident at Giakanja Police Station.
10. Concerning the defendant's contention that the suit land is a road reserve, the plaintiff stated that he is not aware of that fact.
11. In cross examination, the plaintiff maintained that his immediate neighbour is the defendant who has leased part of plot No.593 which he shares a boundary with from the County Council of Nyeri. He maintained that the suit land is not a road reserve.
12. The plaintiff informed the court that he is aware of the letter dated 29th May, 1996 (DMFI 1), that he has a common border with all the plots that is; plots no. 14, 15, 16 and 17 all of which are locked behind his land; that plot No.853 is owned by Terrah and that the Plaintiff had gone to the County Council to complain about the wall erected by the defendant but no action was taken.
13. In re-examination, the plaintiff maintained that the defendant has erected a wall on his land and that he reported the issue to the County Council which failed to take action prompting him to file this suit.
14. Pursuant to an order made by the court requiring the Regional Surveyor, Central Region, to undertake a survey of the suit land, plot No. 854 and plots no. 853 and 593 the Surveyor visited the site and on 14th November, 2014 filed his report. The report is as follows:-

“This office visited the above mentioned land on 10th October, 2014 in the company of the High Court of Kenya. The following observations were made:-

Thegenge/Gathuthi/593 is registered under the County Council of Nyeri which was partitioned to several plots among them 14a and 14b;

Thegenge/Gathithu/784 was subdivided into Thegenge/Gathuthi /583 and 854. The boundary between Thegenge/Gathuthi 853 & 854 is not clearly demarcated on the ground.

Measurements were taken from the boundary between Thegenge/Gathuthi 960 and 853;



Point marked (A) to (C) on the sketch is the RIM distance which is 61.5m;

Point marked (A) to (B) on the sketch is the ground distance which is 57.2M hence a deficit of 4.6M on the upperside;

Point marked (D) to (F) on the sketch is the RIM distance which is 60.4M.

Point marked (D) to (E) on the sketch is the ground distance which is 56.0M hence a deficit of 4.5M on the lower side.”

The Defendant’s Case

15. Joseph Ngatia, the Nyeri District Surveyor, who testified as D.W.1 produced the RIM for Thegenge/Thathuthi area as Dexbt 1 and relied on the report mentioned herein above. He informed the court that:-
 - i. Thegenge/Gathuthi/593 is a Trading Centre;
 - ii. That there is a main road-Nyeri-Gathithu Tarmac road;
 - iii. That parcels number 853 and 854 are not part of 593;
 - iv. That the parcels have freehold titles and that the parcels are blocking part of access of 593 to the main road.
16. In cross examination, D.W.1 maintained that parcels 853 and 854 are freehold and not part of 593. He stated that the two parcels have genuine title deeds and that parcel number 593 has 2 access roads- It is accessible on the part where parcels 853 and 854 touch the tarmac.
17. He stated that parcel number 593 does not touch the tarmac road. The County Government which owns number 593 has leased portions thereof to different people and none of the leasees can access the tarmac road through plot number 593. The two parcels, 853 and 854 are legally in place.
18. In re-examination, D.W.1 stated that parcels No. 853 and 854 were curved out of a commercial area; that when carrying out survey in such an area, he is guided by the Physical Planning Act and that it is normal to have a freehold title in a commercial area. He confirmed that the two parcels are blocking part of the front of parcel 593 to the main road.
19. At close of hearing parties filed submissions.

Analysis and Determination

20. From the pleadings filed in this suit, the evidence adduced and the submissions, the sole issue for the court’s determination is whether the plaintiff has made up a case for being granted the orders sought.
21. As pointed out herein above, the plaintiff’s case is premised on the grounds that the defendant cut his fence and encroached on to the suit land and began erecting a stone wall thereon. To prove those allegations, the plaintiff produced photographs allegedly showing the alleged encroachment.
22. Whilst the photographs are able to attest to the fact that the defendant was constructing the impugned structures, they cannot be relied on to prove the contested fact as to whether the fence was being constructed on the plaintiff’s land or on the parcel of land occupied by the defendant.
23. This court on its own motion ordered the Provincial Surveyor to survey the plaintiffs parcel of land; the parcel of land in which the defendant’s plot sits i.e plot No.593 and plot No.853 which is curved from the same parcel of land as the plaintiff parcel and file a report in court.



24. As ordered by the court, the Provincial Surveyor visited the site and filed a report in court. I note that the report does not address the issue of the alleged encroachment of the plaintiff's land by the defendant. The report is to the effect that there is a disparity between the size of the plaintiff's plot on the RIM and on the ground and that the boundaries between plots number 853 and 854 are not clearly demarcated. However, the report does not state what the cause of the reduction in the size of the plaintiff's plot is.
25. In my considered view, for the plaintiff to be said to have proved his case, he needed to tender evidence of the alleged encroachment, which evidence could only be availed by showing that the structures allegedly erected by the defendant are indeed on his parcel of land and not on the parcel of land occupied by the defendant.
26. Having considered the totality of the evidence adduced in this case and cognizance of the burden placed on the plaintiff by Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya, to prove his case and the plaintiff having failed to prove that the activities of the plaintiff complained of were being carried out in his parcel of land, I decline to grant the plaintiff the orders sought.
27. There being no evidence capable of determining the issue raised in the defendant's defence and submissions that the plot owned by the plaintiff is public land and/or was curved out of a public access road, I will not address the issue.
28. The upshot of the foregoing is that the plaintiff has not made up a case for being granted the orders sought. Consequently, I dismiss the suit with costs to the defendant.

DATED AND SIGNED AT ITEN THIS 3RD DAY OF JUNE, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2022.

J. O Olola

JUDGE

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