



REPUBLIC OF KENYA



KENYA LAW
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**Kiribot v Toroitich (Environment and Land Case Civil Suit
84 of 2017) [2022] KEELC 2469 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE CIVIL SUIT 84 OF 2017**

EO OBAGA, J

JULY 14, 2022

BETWEEN

ERNEST CHERUIYOT KIRIBOT PLAINTIFF

AND

DAVID TOROITICH DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the Defendant in which he claimed the following reliefs: -
 - a) A permanent injunction restraining the Defendants jointly and severally whether by themselves, their agents and/or servants from in any way whatsoever interfere with the Plaintiff's quiet possession and occupation of all that property known as E/Marakwet/ Kapterik/15
 - b) General damages
 - c) Cost of this suit, and
 - d) Any other and/ or further relief the Honourable court deems fit to grant.
2. The Defendant filed a Defence and raised a counter-claim in which he sought for the following reliefs:-
 - a) A Declaration that the suit land herein falls within part of Elgeyo/Marakwet/Kaptarik/2465 which parcel belongs to the Defendant.
 - b) An order of permanent injunction be issued restraining the Plaintiff, his servants, and or other persons from claiming, interfering with and/or in any manner dealing with the suit parcel of land herein against the interest of the Defendant.
 - c) Costs



3. The Plaintiff is the son of Kiriboi Rutto Kirorio (deceased) who died on July 31, 2004. The deceased is the registered owner of LR. No Eldgeyo/Marakwet/Kapterik/15 measuring 0.5 hectares (suit property). The Plaintiff took out limited grant of letters of administration *ad litem* in respect of filing of this suit.
4. The Plaintiff had been residing on the suit property peacefully until on diverse dates between September, 2016 and February, 2017, when the Defendant trespassed on to the suit property and started putting up structures and ploughing the land. The Plaintiff moved to court and obtained orders maintaining status quo. The Defendant was not to continue putting up any more structures on the suit property.
5. On January 29, 2018, the Advocate for the Plaintiff and that of the Defendant recorded a consent in which it was agreed that the County Land Surveyor from Elgeyo Marakwet was to visit the suit property and Elgeyo/Marakwet/2428 and file a report in court within 30 days.
6. The County Surveyor went to the ground and carried out the survey in accordance with the court order. The surveyor who testified as PW2 found that the owner of the Elgeyo/Marakwet/2428 had encroached into the suit property. The homestead of the Defendant was in the suit property. The surveyor found out that the measurements of the suit property in the Registry Index map and the ground tallied.
7. The Defendant testified that he is a neighbour to the Plaintiff. The land he is occupying was given to him by his late grandmother. His uncle Martin Kimaiyo Kiboror showed him the boundaries of the land which was marked by a boundary of a heap of stones. He has been cultivating his land for the past 40 years.
8. The Defendant stated that his land is supposed to stretch from Kerio river all the way upto the escarpment but the Plaintiff has encroached to the upper part of his land together with two others. He stated that he has severally held meetings with elders who have always resolved that the Plaintiff has encroached on to his portion of land. He further stated that the title held by the Plaintiff was fraudulently obtained and that the survey by the County Surveyor from Elgeyo Marakwet was not accurate because the surveyor failed to follow the old boundaries marked by a heap of stones which exist to date.
9. The Defendant called PW2 who is his uncle. He stated that in 2014, he was among the elders who listened to the dispute between the Plaintiff and the Defendant. The elders resolved that the boundary which should prevail is the one which their ancestors put in place using a heap of stones.
10. After the conclusion of hearing, the parties were directed to file written submissions. The Plaintiff filed his submissions on May 16, 2022. The Defendant filed his submissions on May 19, 2022. I have considered the evidence adduced by the Plaintiff as well as that of the Defendants. I have also considered the submissions by the parties. The issues which fall for determination are firstly, whether the Defendant has encroached on to the suit property. Secondly, whether there is any encroachment by the Plaintiff to a property known as Elgeyo/Marakwet/2645. Thirdly, whether the Plaintiff obtained his title fraudulently. Fourthly, are the Plaintiff and that the Defendant entitled to their respective claims in the plaint and counter-claim. Lastly, which order should be made on costs.
11. This suit was filed following the trespass by the Defendant to the suit property. When the plaintiff moved to court for injunctive orders, the court granted orders of maintenance of status quo and directed that the Defendant was not to continue construction of more structures. The Advocates for the parties thereafter agreed to send a surveyor to the ground to ascertain the position.



12. The surveyor found that the homestead of the Defendant lay on the suit property. The surveyor used the Registry index map whose measurement were in agreement with the ground measurement. The suit property was registered in the Plaintiff's father's name on September 1, 1993. Title was only processed on January 12, 2014.
13. The report by the County Surveyor showed the encroached portion. This report was produced as exhibit 5(a). The County Surveyor also prepared a sketch plan showing the encroached area which was produced as exhibit 5(b).
14. The Defendant argued that this Survey reports was not accurate as the same ought to have followed the boundary markings of the heap of stones which were put in place by their ancestors. As seen from the time the suit property was registered, it is clear that the survey did not follow the boundaries fixed by stones which were allegedly put up by their ancestors. The Defendant is arguing that the plaintiff has encroached on to two other persons' land. He produced minutes of an elders meeting held on May 13, 2014 which includes a sketch map which shows that the suit property has cut across three properties at the upper part including the one held by the Defendant. This elders sketch plan has no force of law. It cannot supersede a legally surveyed property which is held by the Lands office and survey of Kenya. I therefore find that the Defendant has encroached on to the suit property.
15. The Defendant in his counter-claim has claimed that the Plaintiff has encroached on to his property known as Eldgeyo/Marakwet/2645. There was no evidence adduced to show that the Defendant owns LR. No ELgeyo/Marakwet/2645. There was also no evidence adduced to show that the Plaintiff has encroached on to this property. Even the sketch plan drawn by the elders which was produced by the Defendant does not show the existence of LR. No ELgeyo/Marakwet/2645. In fact, what is only shown is LR. No. Elgeyo/Marakwet/2428. If this was a typing error, then the error should not have been repeated even in his submissions. Even if this was to be the case, there is absolutely no evidence to show that the Plaintiff has encroached on to the Defendant's land.
16. The Defendant claimed that the Plaintiff obtained his title through fraudulent means. There were no particulars of fraud stated in the counter-claim. The evidence adduced by the Plaintiff show that the suit property is registered in his father's name. As I have indicated hereinabove, the suit property was registered in the name of the deceased on 1st September, 1993. It is only the title which was processed on May 12, 2015.
17. Section 107(1) of the *Evidence Act* provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
18. In the case of *Moses Theuri Ndumia -vs- I.G Transporters Limited* (2018) eKLR the Court of Appeal cited with approval the Civil Appeal No. 315 of 2012 *Kenya Power & Lighting Co. Ltd -vs- Pamela Awino Ogunyo* where it was stated as follows:-

“...a party who asserts or alleges that certain facts exist has a legal burden to prove those claims –sections 107 – 109 of the *Evidence Act* which place a legal burden of proof or what may be called evidential burden of proof on the party making the assertion. In Janet Kaphiphe Ouma & another v Marie stopes International Kenya (Kisumu) HCCC No. 68 of 2007 Ali-Aroni, J citing Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 had this to say of the said provisions of the *Evidence Act*:



In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence...”

19. The allegations by the Defendant that the Plaintiff obtained title fraudulently are mere allegations which are not supported by any evidence. There is no basis upon which the Plaintiff’s title can be cancelled as prayed for in the evidence by the Defendant.
20. As the Plaintiff has proved that the Defendant has encroached on to the suit property, the Plaintiff is entitled to a permanent injunction restraining the Defendant and or his agents from interfering with his quiet possession of the suit property.
21. The Plaintiff has also proved that the Defendant trespassed on to the suit property. The trespass occurred on diverse dates between September 2016 and February, 2017. In the case of *Park Towers Ltd -Vs- John Mithamo Njika & 2 others* (2014) eKLR, Justice Mutungi stated as follows:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case....”
22. Further in the case of *Duncan Nderitu Ndegwa -v- Kenya Power and Lighting Co. Limited & another* (2013) eKLR. Justice Nyamweya (as he then was) stated as follows:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant’s trespass.”
23. The Defendant trespassed on to the suit property between September 2016 and February, 2017. He has since remained on the portion trespassed on. The Plaintiff is entitled to general damages which I assess at Kshs 50,000/ considering that the portion encroached to is small.
24. I therefore find that the Plaintiff has proved his claim on a balance of probabilities. I allow the Plaintiff’s claim in terms of prayer (a) and (c) in addition to general damages of Kshs 50,000/= On the other hand, I find that the Defendant has failed to prove his counter-claim which is hereby dismissed with costs to the Plaintiff. General damages shall attract interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF JULY, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Ms. Kemboi for Mr. Kiplagat for Defendant.

Ms. Kinyua for Mr. Kibii for Plaintiff.

Court Assistant -Albert



E. OBAGA

JUDGE

14TH JULY, 2022

