



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL SUIT NO. 105 OF 2004**

**BENIKE ADHIAMBO OWUOR .....PLAINTIFF**  
**VERSUS**

**IBRAHIM JUMA WASKOKO.....DEFENDANT**

**JUDGMENT**

The claim by the plaintiff, **Benike Adhiambo Owuor**, against the defendant, **Ibrahim Juma Waskoyo** is for a permanent injunction restraining the defendant from trespassing against a common boundary and an order directing the Kisumu District Land Surveyor to set the boundary straight. In her pleadings, the plaintiff avers that she is the registered proprietor of land parcel number **KISUMU /MANYATTA 'A'/1574** bordering parcel number **KISUMU MANYATTA 'A'/1571** belonging to the defendant but at all material times relevant to this suit, the defendant has on more than one occasion destroyed and continues in destroying the common boundary between the two parcels of land by uprooting the same despite several attempts by the plaintiff to replant the boundary. In her testimony, the plaintiff (PW1) produced a title deed (PEX.1) confirming her ownership of the material parcel number **KISUMU /MANYATTA 'A' / 1574**. The title was issued on the 25<sup>th</sup> March 1996. A map showing the plaintiff's parcel of land as well as the defendant's parcel of land was marked for identification (P.MFI 2) without being formally tendered in evidence. It was the plaintiff's testimony that her parcel of land and that of the defendant's share a common boundary but the defendant has trespassed into her portion of land and in doing so, damaged a boundary fence and continues to damage the fence despite several reports made to the authorities.

The plaintiff further testified that the defendant has gone as far as digging a pit latrine on her portion of land and has barred her from approaching the trespassed area.

In his statement of defence, the defendant denies all the allegations made against himself by the plaintiff and contends that the plaintiff is not entitled to the orders sought.

In his testimony, the defendant (DW1) produced a title deed (DEX. 1) confirming his ownership of the material parcel number **KISUMU /MANYATTA 'A' / 1571**. He said he came to know the plaintiff when she reported him to the police that he had fenced a portion of her land. He confirmed that she is his adjoining neighbour but he did not know the description of her portion of land until court papers were served upon him. He contends that she erected a septic tank on his portion of land which the plaintiff claims to be hers and alleges that he is trespassing on it. He further contends that the septic tank is on his portion of land given to him by the Chief and village elders after their visit to the scene and that the portion belonged to him even before the plaintiff purchased her portion of land.

From the pleadings and the testimonies by both parties, the issue arising for determination is whether the plaintiff is entitled to an order of injunction against the defendant.

The prayer for an order directing the Kisumu District Land Surveyor to set the boundary straight appears to be misplaced as the said officer is not a party to the suit. His role on this matter would be to testify either as a witness for the plaintiff or the defendant in support of their respective cases. Be that as it may, the obligation to prove trespass on the part of the defendant lay with the plaintiff. This could be done by evidence showing and identifying the common boundary between the material portions of land. Only then, would it be possible for the court to hold that indeed the defendant has committed acts of trespass against the plaintiff.

A map of the two parcels of land dated 16<sup>th</sup> August 2002 (P.MF1. 2) was not formally tendered in evidence to be accorded evidential value. In the circumstances, the map cannot be given any consideration in this matter.

However, on the 22<sup>nd</sup> April 2010 when the case came up for further hearing, the learned counsel for the

plaintiff, **Mr. K'opot** and the learned counsel for the defendant, **Mr. Odeny** consented to having a report by a surveyor produced in evidence as PEX 3.

The report was therefore treated as part of the plaintiff's evidence in establishing her claim against the defendant.

The report is dated 29<sup>th</sup> August 2008 and signed by a person called **Nicholas Nyanga** on behalf of the District Surveyor. It shows that the site was visited on the 28<sup>th</sup> August 2008 by the surveyor (Nicholas Nyanga) and the land Registrar (Jonathan Koskei). The plaintiff and the defendant were present together with their respective witnesses.

The report indicates that the boundary between the material parcels of land did not exist on the ground. Measurements were taken and an attempt was made to re-establish the boundary as per the map. The findings were that a temporary structure was on the minor access road at its entrance to the major access road and a septic tank was on the boundary line. The boundary line cuts on the middle of the septic tank.

The report indicates that the defendant claimed that the boundary reflected on the map did not conform with the true boundary he knew. In essence, the surveyor report is inconclusive and would not assist in determining whether or not the defendant has trespassed into the plaintiff's parcel of land.

If there was no existing boundary on the ground, it meant that the boundary between the material parcels of land had not been established.

The surveyor as per the report made attempts to re-establish the boundary using a map which was not tendered in evidence. In any event, it was made clear that the defendant did not agree with the boundary reflected on the alleged map.

In the circumstances, it cannot be said even on a balance of probabilities that the defendant has trespassed into the plaintiff's parcel of land as alleged. Consequently, the plaintiff would not be entitled to the orders sought against the defendant as she has failed to prove her case.

The uncertainty or dispute arising between the plaintiff and the defendant as to the position of their common boundary was not resolved by the surveyor's visit to the site on the 28<sup>th</sup> August 2008.

Both parcels of land are duly registered. There must be in existence records held by the land registry pertaining to the parcels of land.

Invariably, the record would include survey records establishing the boundaries. It is therefore for the parties to adhere to what is contained in the record or re-approach the land Registrar to re-establish the boundaries and alter the records accordingly. Until that is done, it would be an exercise in futility for any of the parties to approach the courts for any re-dress.

Otherwise, this case by the plaintiff against the defendant is devoid of merit and is hereby dismissed with costs.

**Delivered, dated and Signed at Kisumu this 16<sup>th</sup> day of November 2010**

**J. R. KARANJA**  
**J U D G E**

In the presence of Mr. B. Odeny for the defendant.

JRK/aao