



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL SUIT 67 OF 2004**

**THOMAS NYAOMA ONGONDO ..... PLAINTIFF**

**VERSUS**

**1. THE DISTRICT LAND REGISTRAR, NYAMIRA)**

**2. THE DISTRICT LAND SURVEYOR, NYAMIRA)**

**3. STEPHEN MABEYA ARIERI..... DEFENDANTS**

**JUDGMENT**

The plaintiff filed this suit by virtue of a Power of Attorney given to him by his father, Alexander Ongondo Ongondo, the registered proprietor of Land Parcel No. **Borabu/Manga/254**. He claimed that sometimes in the year 2004, the first defendant notified the plaintiff that he would visit that parcel of land and the neighbouring parcel known as **Borabu/Manga/255** owned by the 3<sup>rd</sup> defendant to resolve a boundary dispute between the two proprietors of the aforesaid parcels of land. The plaintiff wrote to the 1<sup>st</sup> defendant and proposed another date but he received a reply subsequently from the 1<sup>st</sup> defendant alleging that the boundary dispute had been resolved on 26<sup>th</sup> February 2004 and ordered the plaintiff to observe the new boundary features. The plaintiff alleged that the purported demarcation of the boundary was illegal as he was not aware of it and neither did he participate in the exercise. He urged the court to make a declaration to that effect. He also prayed for an order requiring the first and second defendants to produce original demarcation maps so as to ascertain the proper boundary between the two parcels of land.

The 3<sup>rd</sup> defendant filed a statement of defence and counter-claim. He denied the plaintiff's claim in toto and stated that the plaintiff had no *locus standi* to bring the suit. By way of a counter claim, he stated that he is the registered proprietor of a parcel of land known as Manga Settlement Scheme/255 measuring 6.6 hectares. He further stated that on diverse dates since the year 2002, the plaintiff, who resides on the neighbouring land parcel No. Manga Settlement Scheme/254 destroyed the common boundary between the two parcels of land and entered into his land, cultivated a part of it and destroyed his cabbages planted thereon. He went on to state that the dispute had been arbitrated upon by the District Land Registrar and Surveyor at the instance and request of the plaintiff. It was found that the plaintiff had encroached onto his land. The 3<sup>rd</sup> defendant prayed for an order of injunction to restrain the plaintiff from interfering with the common boundary in any manner whatsoever. He also prayed for general damages for trespass.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint statement of defence and denied the plaintiff's claim. They stated that the boundary dispute was duly determined in accordance with the procedure prescribed by law in the presence of all the parties.

The plaintiff's suit was dismissed with costs for want of prosecution on 15<sup>th</sup> March 2006. His effort to reinstate the suit was unsuccessful as the Power of Attorney vide which the suit had been filed was revoked by his father, the registered proprietor of Manga Settlement Scheme/254.

Upon dismissal of the plaintiff's suit, the 3<sup>rd</sup> defendant proceeded with his counter claim pursuant to the provisions of **Order VII Rule 12** of the **Civil Procedure Rules**.

The 3<sup>rd</sup> defendant testified and produced the Green Card in respect of land parcel No. Manga Settlement Scheme/255 to prove that the said parcel of land is registered in his name. He further stated that the plaintiff trespassed onto his land sometimes in the year 2002. He destroyed a common boundary and unlawfully occupied about one acre of his land. He is planting crops thereon. The Land Registrar came to the land on 26<sup>th</sup> February 2004 at the invitation of the plaintiff's father. The Land Registrar established that the plaintiff had encroached on to his land and he fixed the boundary at the right place. He planted gum tree beacons on the right boundary. The Land Registrar was accompanied by the District Surveyor. The plaintiff removed the beacons and continued to use the 3<sup>rd</sup> defendant's land unlawfully.

The 3<sup>rd</sup> defendant wrote to the District Land Registrar and informed him that the plaintiff had removed the beacons. The Land Registrar returned to the site on 12<sup>th</sup> May 2009 at the invitation of Alexander Ongondo and returned the beacons that had been removed. He urged the court to issue an injunction to restrain the plaintiff from trespassing to his land. The 3<sup>rd</sup> defendant further stated that he used to plant cabbages, maize and beans on the one acre of land that the plaintiff has been occupying unlawfully. He alleged that he used to get returns of about Kshs. 70,000/= per year. He therefore urged the court to award general damages for trespass.

**Machora Hezekiah Oira Mongare**, the District Land Registrar, Kisii, formerly District Land Registrar, Nyamira, testified that he had fixed the boundary between the two parcels of land. He was accompanied by the District Surveyor and he produced a report dated 13<sup>th</sup> May 2009 together with a report done by the District Surveyor. It was established that the plaintiff had trespassed onto the 3<sup>rd</sup> defendant's parcel of land and unlawfully occupied a portion measuring 0.153 hectares (0.4 acres).

The 3<sup>rd</sup> defendant's evidence was not controverted at all as the plaintiff did not attend court following dismissal of his suit. From the evidence adduced by the 3<sup>rd</sup> defendant and the District Land Registrar, there is no dispute that the plaintiff unlawfully encroached onto the 3<sup>rd</sup> defendant's parcel of land, having destroyed the common boundary between the two parcels of land. He has been in unlawfully possession and occupation of the 3<sup>rd</sup> defendant's parcel of land as a result of which the 3<sup>rd</sup> defendant was prevented from growing cabbages, maize and other crops as he used to.

In the circumstances, the order of a permanent injunction as sought by the 3<sup>rd</sup> defendant is hereby issued restraining the plaintiff, his servants and/or agents from trespassing and/or interfering in any manner whatsoever with the 3<sup>rd</sup> defendant's parcel of land known as Manga Settlement Scheme/255. Although the 3<sup>rd</sup> defendant did not strictly prove that he was earning a sum of Kshs. 70,000/= per year from the use of his portion of land, which was unlawfully occupied by the plaintiff, I am satisfied that an award of general damages ought to be made. The plaintiff is awarded general damages for trespass and loss of use of his land in the sum of Kshs. 250,000/=. If the plaintiff is still in unlawful occupation of the 3<sup>rd</sup> defendant's land he should vacate forthwith failing which he shall be forcefully evicted. The 3<sup>rd</sup> defendant shall have costs of the counter claim. Costs of the plaintiff's suit had already been awarded to the 3<sup>rd</sup> defendant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>th</sup> DAY OF JULY, 2009.**

**D. MUSINGA**

**JUDGE.**

**28/7/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Minda for Mrs. Asati for the Plaintiff.

N/A for the Defendant.

**COURT:** Judgment delivered in open court.

**D. MUSINGA**

**JUDGE.**