



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Achola (Environment & Land Case 433 of 2017)
[2022] KEELC 14605 (KLR) (18 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 433 OF 2017
MN KULLOW, J
OCTOBER 18, 2022
(FORMERLY KISII ELC CASE NO. 380 OF 2015)**

BETWEEN

MAURICE OKELLO ONYANGO PLAINTIFF

AND

NELSON OMOLLO ACHOLA DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Complaint dated 15.8.2015; seeking the following Orders against the Defendant: -
 - i. A Declaration that Land Parcel known as No. Kanyamkago/ Kawere II/ 1318 measuring 2.62Ha lawfully and solely belongs to the Plaintiff who is the registered proprietor.
 - ii. A Permanent Order of Injunction restraining the Defendant, his agents, servants and/or any other person from trespassing, encroaching building, interfering, selling and/or alienating Parcel of Land known as Kanyamkago/ Kawere II/ 1318 registered in the names of the Plaintiff.
 - iii. Eviction Order evicting the Defendant and/or any stranger from the said parcel of land.
 - iv. Costs of the suit.
2. The Plaintiff contends that he is the registered and absolute owner of suit parcel No. Kanyamkago/ Kawere II/ 1318 measuring approx. 2.62Ha. That he became the registered owner on 31.01.2006 pursuant to succession proceedings vide Migori Succession Cause No. 209 of 2005.
3. However, he avers that sometimes around July 2014; the Defendant trespassed and/ or encroached onto his parcel of land without any color of right, justification, consent or authority and started building. He outlined the particulars of the said act of trespass by the Defendant.



4. It is therefore his claim that the Defendant has ignored his various attempts to stop him from building and has continued with the acts of trespass blatantly to date.
5. The Defendant filed a Memorandum of Appearance dated 23/09/2015 through the firm of M/S Oguttu Mboya & Co. Advocates and filed a Statement of Defence dated 09/10/2015; denying the averments contained in the Plaint. With regard to the parcel No. Kanyamkago/ Kawere II/ 1318; the Defendant confirmed that the Plaintiff is indeed the registered proprietor of the said parcel but added that the said parcel shared a common boundary with L.R. No. Kanyamkago/ Kawere II/ 2095 which was lawfully registered in the name of Stephen Odongo Bongo.
6. He further averred that he entered into a lawful sale agreement with the said Stephen Odongo Bongo on 20.06.2000 for the sale of a portion of land parcel No. Kanyamkago/ Kawere II/ 2095 measuring approx. 3acres. It is his contention that pursuant to the said sale, parcel of land No. 2095 was subdivided into 2 portions namely; Kanyamkago/ Kawere II/ 3161 & 3162, parcel No. 3162 was subsequently transferred and registered in his name, whereupon he entered and took possession of the said portion of land.
7. The Defendant maintained that parcel No. 3162 lawfully registered in his name does not adjoin and/or share any common boundary with the suit property in any manner howsoever. It is his claim that the activities referred to in the Plaint are lawfully being undertaken on parcel No. 3162 which belongs to him and further that he has confined any activities to his portion of land No. 3162.
8. He dismissed the Plaintiff's suit as being bad in law, misconceived and legally untenable and urged the court to dismiss the same and/or strike it out with costs.

Trial

9. Several directions were issued by my predecessors; for the Land Registrar and Surveyor to visit the site and file a report to that effect. A site visit was conducted and a Report dated 23/9/2016 filed. However, as a result of some ambiguity in the first report; on 22/11/2017, Ong'ondo J. issued further directions and ordered for a site revisit for purposes clearly assessing the situation on the ground and involving all the different families living on the suit land as recommended. The same was done by the County Surveyor and a Report dated 4/05/2018 was filed to that effect.
10. The Defendant opposed the proposal to adopt the Report by the County Surveyor dated 4/5/2018 and urged the court to have the matter proceed and be determined on merit.
11. On 20/5/2021; the matter proceeded for hearing of the Plaintiff's case. The Plaintiff testified as PW1, he adopted his witness statement dated 14.08.2015 as his testimony in chief and produced his list of documents evenly dated as PExhibit 1-6 in support of his case. With leave of the court, the Plaintiff also produced a copy of the Grant dated 27/1/2006 in Succession No. 209 of 2005 and a copies of Mutation dated 14.12.2000 & 22/05/1981 respectively as PExhibit 7 – 8.
12. He further stated that the suit land originally belonged to his late father; Francis Onyango Ogot since the year 1981. Having purchased the same from Dominic Ochieng Olima. That even though he does not live on the suit land, his mother and brother lives on the said suit parcel.
13. On cross-examination; he maintained that he is the registered owner of the suit parcel No. 1318 and that the Defendant entered/ trespassed/ encroached into the same sometimes in the year 2015, he refused to vacate the said property and has remained therein since 2015 to date.



14. Upon perusal of the court record, the Plaintiff's List of Documents is dated 07/10/2015; and the same has documents 1-4. Thus, the documents produced as PExhibits by the Plaintiff Exhibits 1-7 were as follows;
 - i. Demand Notice from S.O. Odingo & Co. Advocates - PExhibit 1
 - ii. Copy of Search Certificates- PExhibit 2
 - iii. Copy of Title Deed- PExhibit 3
 - iv. Certified copy of the Original Map- PExhibit 4
 - v. Copy of the Grant dated 27/1/2006 in Succession No. 209 of 2005 - PExhibit 5
 - vi. Copies of Mutation dated 14.12.2000 & 22/05/1981 respectively - PExhibit 6
 - vii. Surveyor's Report dated 25/6/2021 and Map – PExhibit 7 (a), (b), (c) and (d)
 - viii. Copy of the Land Registrar's Report dated 10/6/2021 – PExhibit 8
15. A Surveyor from the National Government Office testified as PW2 on the same day even though he was stood down and directed to avail a report of his findings after visiting the 2 parcels of land in dispute herein. He was recalled as a witness on 28/6/2021, whereupon he produced his report dated 25/6/2021 and a Map containing the various illustrations of the actual position of the 2 parcels of land on the ground and on the Map.
16. It was also his testimony that there is no common boundary between parcel No. 1318 and No. 3162 but the two are separated by many parcels of land on the ground. He however stated that he noted an overlap of parcels of land which were pushed away. He produced the Report dated 25/6/2021 and Map as PExhibit 7 (a), (b), (c) and (d).
17. On cross- examination; he explained the overlapping of grounds on the land and indicated that a map revision is usually done to remove any ambiguity and features in order for the map to conform with the ground.
18. Further, it was his position that the alleged trespass or encroachment does not arise and in addition stated that PW1 was taking advantage of the loophole in the map to claim encroachment. It was his contention that they cannot rely on PExhibit 7 (d) as doing so would cause an overlap of many parcels of land and people numbering 100 or more may be displaced. He however maintained that there was need for revision of the Map as contained in PExhibit 7 (d).
19. On re-examination, he maintained that PW1 does not use the lower portion of the land and that the Plaintiff only demarcated the upper portion of the land and left the lower portion. He further contended that there was an ambiguity on the Map and which called for revision of the same and a subsequent rectification of the title by the Land Registrar upon complying with the necessary steps.
20. Philip Makin, the Land Registrar in charge of Migori County testified as PW3. He indicated that he has the records of the 2 parcels of land in issue, No. 1318 and No. 3162 and the same were captured Registry Map Sheet No. 9 and the Green Cards thereof.
21. He further confirmed that the that PW1 was the registered owner of the suit property having been registered as such on 31.01 2006 pursuant to the Migori succession cause No. 209 of 2005 and a title deed was issued to that effect on 01.02.2006.



22. He gave an undertaking to the court to visit the 2 parcels of land and file a report within 30 days from the date of his testimony. He was therefore stood down and leave was granted to the parties to file any additional documents.
23. He was recalled as a witness on the 28/6/2021. He produced his Report dated 10/6/2021 and relied on the same as part of his testimony. The same was marked as PExhibit 8. It was his testimony that they did the site visit together with PW2, that the ground position differs with the appearance on PExhibit 7 (d) Map. Both parties obtained their respective titles to their parcels of land, that the lower portion of L.R. No.3162 is occupied by the Defendant. It was his finding and conclusion that the Map be revised to conform with the ground position.
24. On cross-examination; he reiterated that there was a variance on the ground position and the Map (PExhibit 7 (d), which not only affected the plaintiff and the defendant but other people as well.
25. He further stated that in determining boundary disputes and/or issues, they do not only rely on Maps but they also use permanent features on the ground and the relevant adjudication records to conclusively determine boundaries. He also added that ground position and the people on the ground also inform his reports on the issue of boundaries.
26. On re-examination he reiterated that the Map - PExhibit 7 (d) is in need for correction and/or revision.
27. Peter Nyakwaka Olima testified as PW4; he asked the court adopted his witness statement dated 08/7/2021 as part of his evidence in court.
28. On cross-examination, it was his testimony that the suit parcel shares a common boundary with that of the defendant. He denied being present during the site visit by the Surveyor and the Land Registrar.
29. Nicholas Okoth Onyango testified as PW4; he adopted his witness statement dated 25/6/2021 as his testimony in chief. He stated that the defendant encroached on the lower part of their parcel of land and efforts to vacate him from the same has borne no fruits.
30. On cross –examination he conceded that the 2 parcels of land in issue do not share any boundary. He however stated that even though he was present during the site visits by the Surveyor on the diverse dates, he did not agree with the findings therein. He also conceded that they had not produced any contrary finding of their independent surveyor to challenge the report filed by the surveyor in the instant case.
31. On re-examination, he reiterated his dissatisfaction with the surveyor’s report and stated that one of the reports indicated that the permanent structure by the defendant is on the suit parcel No. 1318. The Plaintiff thereafter closed their case.
32. The defence hearing was adjourned to 21/2/2022. The Defendant testified as DW1, he adopted his witness statement dated 9/10/2015 as his testimony. He further stated that he does not share any common boundary with the plaintiff and that his land parcel No. Kanyamkago/ Kawere II/ 3162 is about 100-200meters away with other parcels of land between his land and that of the plaintiff No. 1318. He added that the Land Registrar had informed him that parcel No. 3162 which was registered in his name, was not part of L.R. No. Kanyamkago/ Kawere II/ 1318.
33. He produced the documents in his list of documents dated 9/10/2015 and filed on 12/10/2015 and the same be marked as DExhibit1 - 18 in support of his case as follows: -
 - i. A Copy of the Land Sale Agreement dated 20/6/2000 between the Defendant and Stephen Odongo Bongo – DExhibit 1



- ii. Copy of the Application for Land Control Board Consent dated 18/12/2000- DExhibit 2
 - iii. Copy of the Mutation in respect of L.R. No. Kanyamkago/Kawere II/ 2095- DExhibit 3
 - iv. Copy of the Transfer Instrument in respect of L.R. No. Kanyamkago/Kawere II/ 3162 - DExhibit 4
 - v. Copy of the Title Deed in respect of L.R. No. Kanyamkago/Kawere II/ 3162 dated 12.10.2001- DExhibit 5
 - vi. Copy of the Title Deed in respect of L.R. No. Kanyamkago/Kawere II/ 3162 dated 20.09.2011- DExhibit 6
 - vii. Copy of the Certificate of Official Search in respect of L.R. No. Kanyamkago/Kawere II/ 3162 dated 07.08.2014– DExhibit 7
 - viii. Copy of the Green Card in respect of L.R. No. Kanyamkago/Kawere II/ 3162- DExhibit 8
 - ix. Copy of the Registry Index Map Sheet Number 9, (Kawere Registration Section) - DExhibit 9
 - x. Copy of the Complaint vide MIGORI SPMCC NO. 279 of 2014 - DExhibit 10
 - xi. Copy of the Defence vide MIGORI SPMCC NO. 279 of 2014 - DExhibit 11
 - xii. Copy of the Ruling vide MIGORI SPMCC NO. 279 of 2014 - DExhibit 12
 - xiii. Copy of the Decree vide MIGORI SPMCC NO. 279 of 2014 - DExhibit 13
 - xiv. Copy of the Memorandum of Appeal vide KISII HCCA NO. 129 of 2014- DExhibit 14
 - xv. Copy of the Complaint vide Migori SPMCC NO. 1353 of 2015 - DExhibit 15
 - xvi. Copy of the Defence vide Migori SPMCC NO. 1353 of 2015- DExhibit 16
 - xvii. Copy of the Application vide Migori HCC Misc. Application No. 27 of 2015 - DExhibit 17
 - xviii. Bundle of photographs showing the activities undertaken on L.R. No. Kanyamkago/Kawere II/ 3162 by the Defendant - DExhibit 18
34. On cross examination, he stated that the process to purchase the land began in 1999, where he did his search and confirmed that the land belonged to the vendor at the time, he looked at the Map and confirmed the same. He maintained that the 2 parcels of land No. 3162 and No. 1318 are separate and distinct parcels of land that do not share any common boundary.
35. He further maintained that he has restricted his activities of construction, occupation and use to his parcel of land No. 3162 and denied the claims of trespass and/or encroachment into the plaintiff's parcel No. 1318 at all.
36. Monica Awino Odongo testified as DW2; she adopted her witness statement dated 3/11/2021 as part of her testimony in court. She further stated that her late husband sold a piece of land to the defendant measuring approx. 3acres sometimes in the year 1999 and the same was thereafter transferred and registered in the name of the Defendant. The defendant took possession of the said portion sold and has been using the same to date.
37. She maintained that the said parcel of land No. 3162 does not share a common boundary with the plaintiff's parcel No. 1318 and that the parcel No. 3162 is separate, distinct and different and the same belongs to the Defendant.



38. On cross-examination; she reiterated that the parcel No. 3162 belongs to the Defendant and the same is different from the plaintiff's parcel No. 1318 as alleged. The Defence thereafter closed their case.
39. Upon close of the Defence case, I issued directions on the filing of written submissions. Both parties filed their rival submissions together with authorities which I have read and taken into account in arriving at my decision.

Analysis and Disposition

40. It is this court's considered view that the main issue arising for determination is whether the Plaintiff is entitled to the Reliefs sought in the Complaint dated 13.08.2015 on account of:
 - a. Trespass and/or encroachment into parcel No. Kanyamkago/ Kawere II/ 1318 by the Defendant.
 - b. An Order of Permanent Injunction
 - c. Eviction Orders
 - d. Costs of the suit.
41. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
42. It is not in dispute that the Plaintiff is the registered owner of the suit parcel No. Kanyamkago/ Kawere II/ 1318; the same was confirmed by the Land Registrar PW3 and the Defendant together with his witness. The Plaintiff also produced a copy of the Title Deed of parcel No. 1318 as PExhibit 3 as proof of ownership.
43. However, what appears to be in dispute is that the Plaintiff contends that the Defendant encroached onto his parcel of land and further that parcel No. Kanyamkago/ Kawere II/3162 where the Defendant occupies and has developed, is part of parcel No. 1318. The Defendant on the other hand maintains that he is the registered proprietor of Parcel No. Kanyamkago/ Kawere II/ 3162 having duly purchased the same. The Defendant further maintained that all the activities conducted of building permanent structures, planting trees and sugarcane were all done on his land parcel No. 3162 which is separate, distinct and does not share a common boundary with the Plaintiff's portion at all.
44. In order to ascertain whether or not there is trespass and/or encroachment onto another person's parcel of land; the Land Registrar and Surveyor are called upon to determine the boundaries issue between the affected parcels of land. In this case, PW2 and PW3 both testified and confirmed that they visited the site/ location of the 2 parcels of land in dispute being No. 1318 and No. 3162 and they subsequently filed their respective reports which were produced as PExhibit 7 & 8 in support of the Plaintiff's case.
45. A critical look at both Reports dated 25/6/2021 and 10/6/2021 by the Migori County Surveyor and the Migori Land Registrar respectively; I do note that both reports stated that there was no shared common boundary between the plaintiff's parcel No. 1318 and the Defendant's portion No. 3162. As a matter of fact, they both stated that the 2 parcels of land are separate, different and distinct and there were other parcels of land occupied by different persons between the 2 parcels in dispute. This position was reiterated by PW2, PW3 & PW4 who testified in favour of the Plaintiff and further by DW1 & DW2; and they all confirmed that there was no shared boundary between parcel No. 1318 & 3162.



46. Both PW2 and PW3, who testified as expert witnesses confirmed that the only issue is the overlap contained in the Map and which portrayed a different picture from what is actually on the ground. They both confirmed that from their site visit, the Plaintiff was not in occupation and possession of parcel No. 3162, belonged and was being used by the Defendant who is the registered owners. PW3 further stated that in determining the issue of boundaries, they do not only confine their search to the relevant Area Map but may also be required to use permanent features on the ground, relevant adjudication records and interviewing various people on the ground hence the site visit. All these finding are then taken into account in making the final conclusion and Report.
47. From the said reports and from the evidence adduced in court, I find no sufficient justification and/or basis to support of the claim of trespass and/or encroachment as alleged by the Plaintiff. I therefore find that there is no trespass into suit parcel L.R. No. Kanyamkago/ Kawere II/ 1318 as alleged or at all. The 2 parcels of land NO. 1318 and 3162 are separate and distinct parcels with both the plaintiff and the defendant holding valid titles to their lands respectively.
48. In view of the foregoing, having found that there was no trespass onto the Plaintiff's parcel of land L.R. No. Kanyamkago/ Kawere II. 1318 as alleged or at all, I therefore find that an order of Permanent Injunction or Eviction as sought cannot issue. The Defendant's use and activities are on his lawful parcel of land No. 3162 which is separate and distinct from parcel No. 1318 and thus cannot be arbitrarily restrained or evicted from the same parcel without a sufficient and justifiable cause. The Plaintiff has not tendered any sufficient evidence challenging the title of the defendant over parcel No. 3162 to warrant the cancellation/ revocation of the said title held by the Defendant.
49. Further, the Defendant did not file any Independent Report, to challenge the reports by the County Surveyor and the Land Registrar dated 25/6/2021 and 10/6/2021 respectively. The said reports thus remain unchallenged and uncontroverted.
50. Consequently, I find that the Plaintiff has failed to prove his case to the on a Balance of Probabilities to warrant the grant of the reliefs sought in the plaint.

Costs

51. It is trite law that costs generally follow the event and in this case, the Plaintiff having failed to prove his case to the required threshold, I find that the Defendant is entitled to costs of the suit to compensate him for the expenses incurred in defending the case against him.

Conclusion

52. In the premises, I find that Plaintiff has failed to prove his case on a balance of probabilities and I thus dismiss the Plaint dated 13th August, 2015 with costs to the Defendant. Further, the Land Registrar and Surveyor are hereby directed to expedite the process of the Map Revision as recommended in the 2 Reports filed by the Land Registrar and the Surveyor to avoid unnecessary litigation.

It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 18TH DAY OF OCTOBER, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of; -



Non-Appearance for the Plaintiff
Non- Appearance for the Defendant
Tom Maurice – Court Assistant

