



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Civil Suit 140 of 2006**

**KIBIRECH ARAP LEL.....PLAINTIFF**

**=VERSUS=**

**JOEL KIPRONO A. KOSGEI.....DEFENDANT**

**JUDGMENT**

The Plaintiff filed this suit on 22<sup>nd</sup> December ,2006 claiming the following orders against the Defendant:-

- a). A permanent injunction restraining the Defendant, his heirs, assignees, agents and /or servants from interfering with the Plaintiff's quiet possession, use and enjoyment, trespassing, encroaching the Plaintiff's parcel of land and/or to do any act that is inconsistent with the Plaintiff's rights as the proprietor of the Land namely Nandi/Chepkongony/674 measuring 1.53 ha.
- b). An Order authorizing the Nandi District Land Registrar and the District Surveyor to mark the boundary between Land Registration number NANDI/CHEPKONGONY/674, NANDI CHEPKONGONY /730 and 734,
- c). Costs and interest of this suit,
- d). Any other further relief this Honourable Court may deem fit and just to grant.

The said suit was against one Joel Kiprono A. Kosgei. However, by an amended Plaint filed on 17<sup>th</sup> January, 2007 he enjoined four other Defendants but the prayers remained the same.

The said four Defendants were served with copies of the Summons and Plaints but failed to enter appearances or defend the suit. As a result, the Deputy Registrar entered interlocutory judgment against the said 4 Defendants. The first Defendant had filed a Defence on 10<sup>th</sup> January, 2007.

The hearing was initially fixed for 25<sup>th</sup> April 2007. When the matter came before me, the first Defendant did not attend despite having been served with the hearing notice. UPON considering the issues revealed by the pleadings, I concluded that the dispute was a boundary dispute and I made the following orders to ensure a fair and reasonable resolution of the dispute:-

1. That this being a boundary dispute and in order to facilitate just and fair hearing, the Nandi District Land Registrar and the District Surveyor do survey and mark the boundary between Land Registration No. NANDI/CHEPKONGONY/674 and NANDI/CHEPKONGONY 730 and 734.

2. That the Surveyor's report to be submitted to this Court within 45 days from the receipt of this order.
3. That costs of surveying to be borne by the Plaintiff at the first instance.
4. That the hearing of this case to proceed on the 11<sup>th</sup> day of July, 2007.
5. That hearing Notice to be served upon the first Defendant one JOEL KIPRONO A. KOSGEI.

The District Land Registrar duly complied and submitted his Report on 10<sup>th</sup> July, 2007. The Order was implemented by the District Land Registrar and the District Surveyor.

The hearing took place on 11<sup>th</sup> July 2007. The First Defendant did not attend despite being served with the hearing notice. The Plaintiff testified and there were no other witnesses.

The Plaintiff on oath stated that;-

- He was the registered owner of all that parcel of land known as Land Parcel No. NANDI/CHEPKONGONY/674 which measured about 3.8 acres.
- He bought the Land from one Samson Malakwen Chemei who is now deceased.
- The Sale was by way of an exchange of Land. That he owned a piece of land known as land Parcel No. NANDI/CHEPKONGONY/39 which he had bought from one Jonah Kipkoskei Koech.
- The Deceased who owned plots 674 and 675 wished to separate his two wives so that they stayed away from each other.
- The deceased therefore took the Plaintiff's land in exchange of Plot No. 674.
- The deceased subsequently sold his Plot No. 675 to the First Defendant. That there is a dispute between the first Defendant and the Second Defendant who is one of the widows of the Deceased.
- The Plaintiff and the First Defendant share a boundary between Plots 674 and 675.
- The First Defendant has interfered with the boundary of the two Plots as a result of which a portion of the Second Defendant's house is on Plot No. 674.

The Court allowed the Plaintiff to submit the District Land Surveyor's Report in evidence (Exhibit No. 2).

I have considered the pleadings, the testimony of the Plaintiff and the exhibits produced in evidence. I have seen the original title document in respect of Land parcel No. Nandi/Chepkkongony/674. It is registered in the name of Kibirech Arap Lel, the Plaintiff herein. The date of registration is 11<sup>th</sup> May, 1994. None of the Defendants have laid any claim to ownership of the said land or any portion thereof. This means that the ownership of the land is not in question.

Has any of the Defendants trespassed or encroached upon the Plaintiff's land. I have carefully considered the report and recommendations of the District Land Registrar and the District Land Surveyor. What comes out is that the First Defendant after acquiring Parcel land No. 675 subdivided the same into eight portions. He subsequently sold six of the subdivisions and retained two namely, parcels Nos. 730 and 734. The boundaries of the eight Parcels have been uprooted by the Second – Fifth Defendants who appear to have a dispute with the First Defendant in respect of the Original Plot 675.

As a result of the said interference with the boundaries of the eight subdivisions, the Surveyor was unable

to identify the boundaries thereof on the ground. The map in existence is also not of much assistance since it was not amended after the subdivisions and the mutation form that was prepared creating the new numbers was not done to scale. The District Land Registrar and the District Land Surveyor recommend that a fresh survey be carried out so that the boundaries and positions of Parcels 730 and 734 can be marked on the ground.

From the report of the District Land Registrar which was prepared with the assistance of the District land Surveyor, the Plaintiff and Defendant just like the Second, Third and 5<sup>th</sup> Defendants were present during the inspection. The Plaintiff and First Defendant were in agreement to resolve the boundary dispute amicably by sharing the deficits in their respective plots resulting from the situation on the ground. However, the proposed boundary could not be marked since the Second Defendant has an existing house on the First Defendant's lands and 3/4s (three quarters) thereof abuts onto the Plaintiff's land.

The Report recommends as that:-

1. The house constructed by the Second Defendant to be demolished and the Plaintiff and the 1<sup>st</sup> Defendant to mark the boundary as shown to them.
2. The position of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants is left to the Court to decide.
3. The subdivision of Land Parcel Nandi/Chepkongony/675 to be nullified and fresh subdivision to be carried out.

Upon consideration of the foregoing and the evidence before Court and on a balance of probability, I do find that the Defendants jointly and severally have trespassed upon the Plaintiff's property Land No. Nandi/Chepkongony/674. These acts and conduct are in violation of the Plaintiff's right to enjoy his property and which right is protected by the Constitution of Kenya

ther written laws. This Court must protect that right to the hilt and more so since the Defendants have not made any lawful claims on the said property.

In order to ensure that there is peace and harmony between the Plaintiff and First Defendant, I am inclined to order a resurvey and marking of the boundary between land registrations no. Nandi/Chepkongony/674 and Nandi/Chepkongony 730/734 as recommended by the District Land Registrar and the District Land Surveyor in their report dated 5<sup>th</sup> July 2007.

I therefore do hereby grant a permanent injunction against the Defendants as prayed in prayer (aa) of the Amended Plaint dated 17<sup>th</sup> January, 2007. I also do hereby grant prayers (b) of the said Amended plaint with an addition that the boundary to be marked in accordance with the recommendation in the Report and the agreement of the Plaintiff and the First Defendant. The cost of the new Survey and marking of the boundary shall be borne by the First Defendant as the Plaintiff paid for the costs of the survey ordered by the Court. In the event that the First Defendant does not pay for the said survey and boundary marking, then the Plaintiff shall be at liberty to pay the said costs and the Plaintiff shall summarily recover the same from the Defendant by an appropriate application to this court or include the same in his party and party bill of costs which will be awarded to him in this suit.

The survey and boundary marking shall be carried out within the next 45 days.

In order to make the injunctive orders of this Court effectual, I do hereby order the demolition of the Second Defendant's house and/or structures which are encroaching on the Plaintiff's land and such an order to be supervised by the Officer –In-Charge of the nearest Police Station to the suit premises to ensure that there is security during the said exercise.

This Court declines to order nullification of the sub-division of Land Parcel Nandi/Chepkongony/675 since six of the sub-divisions are said to have been purchased by third parties who are not parties in this

suit. This Court cannot give orders against a party who has not been enjoined or given the opportunity to be heard in accordance with the law.

The Defendants shall jointly and severally pay the costs of this suit to the Plaintiff.

DATED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF OCTOBER, 2007.

M.K. IBRAHIM

JUDGE