



**Gosrani & another v Mageka & another (Environment & Land Case
389 of 2013) [2022] KEELC 14718 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 389 OF 2013
JM ONYANGO, J
NOVEMBER 9, 2022**

BETWEEN

HITESHKUMAR MERAT GOSRANI 1ST PLAINTIFF

NILESHABHAI RAVJUBHAI PATEL 2ND PLAINTIFF

AND

DISMAS NYAKUNDI MAGEKA 1ST DEFENDANT

SALOME GESARE ONCAHRI 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs herein filed suit against the Defendants vide a Plaint dated 18th September, 2013 seeking an order of eviction of the Defendants from a parcel of land known as LR No. Central Kitutu/daraja Mbili/2331 (hereinafter referred to as the suit property) the Plaintiff also sought an order of permanent injunction barring the Defendants either by themselves, their agents, servants assigns and or any other person acting on their behalf from trespassing into the suit property.
2. The Plaintiff claimed that they are the registered proprietors of the suit property. It is their claim that in or about the month of August, 2013, the Defendants trespassed into and remained upon the suit property. Following the said actions of the Defendants, the Plaintiff referred the matter to the local administration for peaceful resolution but to no avail forcing them to file this suit.
3. By the time the case came up for hearing the case against the 2nd Defendant had abated as she had passed away during the pendency of the case.
4. The 1st Defendant filed a Statement of Defence dated 15th October, 2020 in which he denied the allegations against the Defendants. He averred that the suit property originated from a parcel of land known as LR. No. Kitutu Central/daraja Mbili 431 which was registered in the name of the late Onchari Nyakundi Mageka, the 1st Defendant's late father who died in 1976.



5. He further stated that upon the death of Onchari Nyakundi Mageka, the said parcel of land (431) was transmitted to the 2nd Defendant through succession. He stated that the 2nd Defendant who had since died had subdivided parcel 431 into 4 portions namely; parcels 1896, 1897, 1898 and 1897.
6. It was 1st Defendant's case that parcel 1896 was further subdivided into two portions known as parcel 2230 measuring 0.65 Ha and parcel 2231, the suit property herein measuring 0.53Ha. The suit property was eventually sold off to one Elkana Nyanducha Ngaga at a price of Kshs. 32,000.
7. The 1st Defendant contended that the suit property that was eventually sold to the Plaintiff only measures 0.53 Ha. However, the 1st Defendant lamented that the Plaintiffs fraudulently and in conjunction with the Land Registrar got registered as the owners of the whole of parcel 1896 which therefore meant that the suit property was now an amalgamation of parcels 2230 and 2231. The 1st Defendant also lamented that the Plaintiff had demolished a house on the suit property in their bid to take over the whole of parcel 1896. The 1st Defendant prayed that he be given parcel 2230 which was registered in the name of the 1st Defendant.

Plaintiff's case

8. The case proceeded for hearing on 6th November, 2019 when the 2nd Plaintiff testified as PW1. He testified that the suit property was jointly registered in his name and that of the 1st Plaintiff. He testified that the 1st and 2nd Defendants who were well known to him had never owned any portion of the suit property. It was his testimony that the 2nd Defendant who died recently was not buried on the suit property.
9. He further testified that it was only after the death of the 2nd Defendant, that the 1st Defendant started laying claim to the suit property. He told the court that he reported the matter to the area chief who called a meeting which was held outside a temporary house that used to be occupied by the 2nd Defendant. After the said meeting the 2nd Defendant moved out of the temporary house together with all his belongings and thereafter demolished the house.
10. The 2nd Plaintiff denied claims that he occupied a portion that exceeds the acreage of the suit property. He stated that they placed their fence where the beacons had been fixed and none of the Defendants complained when they did so. It was his testimony that they decided to file this suit because the 1st Defendant had trespassed into the suit property and started cutting down trees planted thereon and thus prayed that the 1st Defendant who had since moved out of the suit property be prohibited from ever setting foot thereon.
11. Upon cross-examination, the 2nd Plaintiff, stated that by the time the suit was filed before this court the 2nd Defendant was still alive. He told the court that they bought the suit property from one Oliver Onserio and it only measured 0.53Ha. He confirmed that the suit property was a sub-division of parcel 1896 which measured 1.18Ha. He further testified that they were shown the beacons of the suit property by the surveyor.
12. Upon re-examination, he stated that they did not buy parcel 431 or 1896 but instead they bought parcel 2231 and fenced it off without any complaint from the Defendants. He reiterated that the 1st Defendant having sold the suit property, had no further interest in the same and thus he should desist from trespassing on it.



Defendants' Case

13. The Defendants' case was heard on 15th May, 2021 when the 1st Defendant testified as DWI. He relied on his statement dated 27th January, 2020 and filed in court on 4th February, 2020 as his evidence before this court. He produced the documents in his list of documents as his exhibits. He testified that the 2nd Defendant (deceased) who was his mother, was the registered owner of parcel 431 which she had inherited from her late father. It was his testimony that his mother later sub-divided parcel 431 into 4 portions known as parcels 1896, 1897, 1898 and 1899. His mother immediately sold off three portions and remained with parcel 1896. They continued to stay on parcel 1896 until his mother decided to sell the upper portion of parcel 1896 to one Elkana Nyangucha Nyaaga while they remained on the lower portion of the said parcel.
14. It was his further testimony that the Plaintiff bought the suit land from the son of Elkana Nyangucha and not from them. He testified that by the time the Plaintiff bought the suit property from Nyangucha's, son his mother was alive. He maintained that the portion that had been sold off by his mother was the upper portion of parcel 1896. He stated that the Plaintiffs who were only entitled to the lower portion which measured 0.53 Ha should surrender the remaining portion to him.
15. During cross-examination the Plaintiff confirmed that the 4 subdivisions including parcel 1896 which gave rise to parcels 2230 and 2231 were registered in his late mother's name and that he had not taken out any grant to administer her estate. He stated that in his Defence, he had indicated that parcel 2231 had been transferred to the Plaintiffs. He also confirmed that the Plaintiffs were not present when his mother sold the suit property to Elkana.
16. He however indicated that he had evidence that the Plaintiffs conspired with Elkana to get the whole of parcel 1896. He stated his evidence was based on the acreage of parcels 1896, 2231 and 2230.
17. He told the court that his main complaint was that the Plaintiffs had fenced off the whole of parcel 1896 including his 0.65 Ha. He said he had no problem with the Plaintiffs fencing off their portion which measures 0.53 Ha but they should leave out the portion measuring 0.65Ha so that it reverts to him.
18. In order to get a clear picture of the situation on the ground so as to make an informed decision, the court visited the locus in quo on 15th October, 2021 in the presence of the parties, the Land Registrar and the County Surveyor., Kisii County. The County Surveyor subsequently filed a report dated 26th October, 2021.
19. The findings in the report are as follows:
 - a) Parcel 431 is an adjudication number registered on 9th August, 1973 then registered under Onchari Mageka.
 - b) Parcel 431 was later transmitted to Salome Gesare Onchari who later subdivided it into parcels 1896, 1897, 1898 and 1899 on 24th October, 1992.
 - c) Parcel 1896 (1.18 Ha) was further subdivided on 28th September, 1993 into parcels 2230 and 2231 measuring 0.65Ha and 0.53Ha respectively.
 - d) Measurements of parcels 2230 and 2231 taken on the ground were recorded on the mutation subdividing parcel 1986
 - e) A road of access measuring 4 meters wide running westwards along parcel 2230 exists on the ground but not in the records and is hence part of parcels 2230 and 2231.



- f) Measurements recorded on the mutation form subdividing parcel 1896 into parcels 2230 and 2231 were effected on the ground and subsequently the ground was marked.
 - g) Parcel 431 was subdivided to give rise to parcel 1896 and thus the same does not exist as a title.
 - h) There is a physical boundary existing which does not conform to the recorded measurements at the time of subdivision hence effecting the said measurements negates acreage of parcel 2231 by 0.06 Ha i.e. 11.3%.
20. In Consideration of the above findings and upon the analysis of the ground measurements, the mutation forms, map and physical features, an approximate boundary was marked clearly defining the boundary of parcel 2231 the suit property herein.
21. After the site visit the court directed the parties to file their submissions incorporating their comments on the report of the County Surveyor relating to the site visit. Both parties subsequently filed their submissions which I have considered.
22. Learned counsel for the Plaintiffs submitted that he agreed with the findings in the Survey report. He contended that the Plaintiff had tendered sufficient and uncontroverted evidence that he was the registered owner of the suit property (parcel 2231). It was his submission that the Plaintiffs had established a prima facie case that the 1st Defendant had trespassed into the suit property and they were therefore entitled to the reliefs sought in the plaint.
23. Counsel further submitted that the Defendants had failed to prove their claim of fraud to the required standard which is higher than on a balance of probabilities. He argued too that the 1st Defendant lacked locus standi to agitate for any interest which vested in the estate of his late mother who was sued as the 2nd Defendant since she had died intestate and the 1st Defendant had not obtained a Grant of Letters of Administration in respect of her estate.
24. Counsel contended that from the documents obtained from the Land Registrar it was evident that the suit property had been sold to Elkana Nyangucha Nyaaga by the 2nd Defendant during her lifetime and that the Plaintiffs bought it from one Oliver Onserio Nyaaga, who was Elkana's son. It was his contention that since Oliver Onserio was not made a party to the suit, it was difficult for the court to make a determination that the Plaintiffs had obtained the property through fraud.
25. On his part, learned counsel for the Defendant reiterated the contents of the survey report and urged the court to adopt the same as the judgment of the court. He further urged the court to direct that a title be issued to the 1st Defendant with respect to parcel 2230 measuring 0.65Ha as proposed in the survey report. He submitted that the 1st Defendant did not have any problem with the Plaintiffs remaining in possession of parcel 2231 measuring 0.53Ha.

Issues for determination

26. Having considered the pleadings and evidence on record, including the Survey Report prepared after the site visit by the court on 15th October, 2021, the issues for determination are as follows;
- a. Whether the plaintiffs have proved their case on a balance of probabilities.
 - b. Whether the court should adopt the surveyor's report pursuant to the site visit by the court as the judgment of the court



- c. Whether the Defendant is entitled to be issued with a title deed for parcel 2230.

Analysis and determination

27. The first issue for determination is whether the plaintiffs have established their case on a balance of probabilities. In as much as the Plaintiffs have proved that they are the registered owners of the suit property, it is clear that they have encroached into parcel 2230 which is registered in the name of the 2nd Defendant by 0.06 Ha. The court is therefore unable to establish trespass on the part of the Defendants if any, given that the 1st Defendant still holds a beneficial interest in the portion being claimed by the Plaintiffs.
28. With regards to the second issue, it is not in dispute that an approximate boundary was finally marked, clearly defining the boundary of the suit property to the satisfaction of both parties. To the extent that the parties are in agreement regarding the boundaries of the suit property, the report of the County Surveyor is hereby adopted as the judgment of the court.
29. However, the 1st Defendant's claim that the Plaintiffs acquired the suit property fraudulently has not been proved to the required standard. Infact the 1st Defendant appears to have abandoned his claim in his submissions as he urged the court to allow the Plaintiff to retain possession of the suit property.
30. Regarding the 1st Defendant's prayer to be registered as the owner of parcel 2230, the same cannot be granted as the 1st Defendant lacks legal capacity to lay any claim in interest in any of the properties herein. The death of his mother who was the 2nd Defendant herein and who was the registered owner of parcel 2230 means that his interest in the same can only be registered in his name after he has obtained a Grant of Letters of Administration.
31. In the final analysis, the joint survey report dated 26th October, 2021 is hereby adopted as the judgment of this court only to the extent that the boundaries for parcel No. 2231 shall remain as marked and fixed by the County Surveyor.
32. The Land Registrar shall rectify the register and titles No. 2231 and 2230 to reflect the correct acreage.
33. Since none of the parties has fully proved his claim against the other each party shall bear their own costs.

DATED, SIGNED AND VIRTUALLY THIS 9TH DAY OF NOVEMBER 2022.

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J.M ONYANGO

JUDGE

