



**Kirui v Kipchirchir (Environment & Land Case 424 of 2012)
[2025] KEELC 372 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 424 OF 2012
EO OBAGA, J
FEBRUARY 6, 2025**

BETWEEN

RUSY JESEREM KIRUI PLAINTIFF

AND

FRANCIS CHEPSIROR KIPCHIRCHIR DEFENDANT

JUDGMENT

Background

1. The Plaintiff is the registered owner of LR. No. Moi's Bridge/Sirikwa Block 2 (Ziwa) 540. The Defendant is the registered owner of LR. No. Moi's Bridge/Sirikwa Block 2 (Ziwa)339. On 12th May, 2008, the Plaintiff filed a suit against the Defendant in which she alleged that the Defendant had encroached on to her land by half an acre.
2. The case was heard *ex parte* and a judgment was delivered on 20th June, 2013. The Plaintiff extracted a decree and proceeded to execute it. The Defendant's houses which were on the disputed portion were demolished. The Defendant later filed an application to set aside the *ex parte* judgment. The application was allowed and judgment was set aside. The Defendant filed a defence.
3. Before the case was heard, the court directed that the Land Registrar goes to the ground and ascertains the acreage of the two parcels and file a report on whether there was any encroachment on either of the parcels. The Land Registrar went to the ground and determined the boundaries of the two parcels. A report dated 22nd January, 2022 was filed in court.

Plaintiff's Case

4. It is the Plaintiff's contention that in 2004, the Defendant forcefully encroached onto her land and occupied half an acre thereof. She therefore filed the case seeking an eviction order from her land, a



permanent injunction against the Defendant restraining him from interfering with her land and mesne profits.

5. The Plaintiff pleaded that she could have got 15 bags per year from the $\frac{1}{2}$ acre which the Defendant occupied. The 15 bags could have fetched 15,000 shillings. The period for which she lost what she would have gotten is planting season for 2004/2005, 2005/2006, 2006/2007 and 2007/2008.
6. The Plaintiff testified through David Kiprotich to whom she had donated a power of attorney for purposes of prosecuting this case. The witness stated that there were a number of reports prepared by the surveyors who went to the ground and that he did not agree with the report of 24th January, 2022. He stated that this report differed from the other reports which had been prepared earlier on.

Defendant's Case

7. The Defendant denied that he had encroached on to the Plaintiff's land. He stated that he purchased his land and was shown the boundaries. He put up his houses which were demolished by the Plaintiff in 2015. He stated that he had a boundary dispute with the Plaintiff which dispute was resolved by the chief and elders. He called his neighbours who confirmed that there was no overlap between the his land and the Plaintiff's land.

Submissions

8. The parties restated the evidence adduced in their submissions. The Plaintiff urged the court to determine whether there was trespass by the Defendant on the Plaintiff's land. The Plaintiff relied on the case of *M'mukanya -Vs- M'mbijiwe* (1984) KLR where the court of Appeal held as follows:

“Trespass is a violation of the right to possession and the Plaintiff must prove that he has a right to immediate and exclusive possession of land which is different from ownership”.

9. The Defendant submitted that the bone of contention between the Plaintiff and the Defendant was one of a boundary dispute. On 22nd April, 2021 the court ordered the issue to be settled by the Land Registrar and a report be filed in court. The Land Registrar complied with the court order and a report was filed on 24th January, 2022. He asked the court to adopt the report.
10. The Defendant relied on the case of *Francis Wanjohi Methu - Vs- David Mbutia Karogo* (2016) eKLR.

Analysis and Determination

11. I have considered the evidence adduced by the Plaintiff and the Defendant and the submissions filed. The issue which is for determination is whether the Defendant has encroached on to the Plaintiff's land. In her pleadings, the Plaintiff claimed that the Defendant had encroached into her land by $\frac{1}{2}$ an acre. However in her witness statement which was adopted as her evidence in chief, she claimed that the Defendant had encroached on to her land by $\frac{3}{4}$ of an acre.
12. As the matter was pending in court, the parties agreed to have a surveyor go to the ground to ascertain the position. In at least three sessions, the surveyor went to the ground but was only able to measure the Plaintiff's land. The Defendant's land was not measured as he resisted the move by the surveyor.
13. In the report of 2nd December, 2021 and that of 19th September, 2017, the Plaintiff's land was found to be more than what she was entitled to. When the court noticed that what was in issue was a boundary dispute, the court ordered the Land Registrar to go and determine the boundary dispute and file a report in court. The Land Registrar filed a report in court dated 24th January, 2022. In this report, it



was found that the ground area for Moi's Bridge/Sirikwa Block 2 (Ziwa) 339 was 1.50 acres against the 1.88 acres on the title without taking into account the disputed area. The disputed area marked "A" on the sketch drawn by the surveyor and Registry index map (RIM) is 0.224 (0.553 acres). The total acreage of parcel 339 plus the disputed portion is 0.8294 hectares (2.05 acres).

14. The total ground area for Moi's Bridge/Sirikwa Block 2 (Ziwa) 540 was found to be 2.5395 hectares against the 2.49 hectares on the title deed, without taking into account the disputed area. It was thus bigger than the acreage indicated on the title deed.
15. The findings of the survey were that there was no overlap between the parcels and no parcel encroaches into the other as per the ground dimensions. It was found that parcel 540 is larger than its dimensions in the RIM and parcel 339 was smaller than its dimensions in the RIM. The surveyor recommended that parcel 339 be enlarged as the enlargement will not cause any overlap or encroachment on parcel 540. It was recommended that the ground dimensions be adopted and the respective parties surrender their title deeds to enable the amendment of the records as appropriate.
16. It is clear from the report of 24th January, 2022 that the Defendant has not encroached on to the Plaintiff's land. The report of 24th January, 2022 was produced by Elizabeth Nyakundi who was called by both the Plaintiff and the Defendant as a witness. This witness also produced the green card for parcel 540 and 339. This witness stated that if the disputed area is made part of parcel 339, this will cure the dispute between the RIM and ground area and will not affect parcel 540.
17. There was no evidence adduced in support of the claim for mesne profits. Even if evidence of the mesne profits was to be given, it will not help as the Defendant has been found not to have encroached on the Plaintiff's land. Infact the Defendant's evidence was that when he purchased his land, the seller told him that it was two acres but when title came out, it turned out to be 1.88 acres. The survey carried out has now identified what the problem is.

Disposition

From the above analysis, I find that the Plaintiff has failed to prove her case. The same is dismissed with costs to the Defendant. To put a closure to this matter, the parties should comply with the recommendations of the report of 22nd January, 2022 to which the court agrees with and adopts it for purposes of bringing a closure to this litigation which has been going on for 17 years.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MAKUENI
THIS 6TH DAY OF FEBRUARY, 2025.**

HON. E. O. OBAGA

JUDGE

In the presence of:

Dr. Chebii for Plaintiff.

Mr. Sambu for Defendant.

Court assistant - Steve Musyoki

