



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 160 OF 2017

DAVID JUMA AGUNDA.....PLAINTIFF

VERSUS

CHARLES JUMA.....DEFENDANT

J U D G E M E N T

1. The Plaintiff impleaded the Defendant in his plaint dated 13th September 2017 for;

*(a) Encroaching and sub-division of the Plaintiff's parcel of land known as BUKHAYO/BUGENGI/8704 measuring 0.039HA (**the Suit Property**); and*

(b) Trespassing on plaintiff's land in total disregard of the existing common boundaries.

2. The Plaintiff prays for the judgement as against the Defendant for:

(a) an order of permanent injunction against the Defendant, his servants, employees. Assignees and or any other person claiming under him from encroaching and/or annexing any portion from the Plaintiff's land and demolition of any structure erected on the common boundary between the Suit Property and the Defendant's parcel known as BUKHAYO/BUGENGI/7526;

(b) costs of the Suit; and

(c) any other relief that this Honourable Court may deem just and fit to grant.

3. The Defendant filed his Defence and Counterclaim dated 27th September, 2017 denying the Plaintiff's claim and stating that it is the Plaintiff who has encroached and trespassed onto his property BUKHAYO/BUGENGI/7526 and interfered with the boundary of the same. The Defendant also pleaded that the dispute had been referred to the Busia County Land Registrar and Surveyor who were prevented from doing and/or completing their work by the Plaintiff after he became violent and chased the Land Registrar and the Surveyor.

4. In the Defendant's counterclaim, he states that the boundaries of his property, known as BUKHAYO/BUGENGI/7526 be reinstated and the Plaintiff be restrained from trespassing and/or encroaching onto or in any manner interfere with the Defendant's use of his land.

5. The Defendant prays for judgement in his counterclaim for:

(a) The Plaintiff's suit to be dismissed with costs;

(b) The boundary/beacons of land parcel number BUKHAYO/BUGENGI/7526 be restored;

(c) The Plaintiff, his family, agents, servants and any other person claiming on his behalf be restrained from trespassing and encroaching onto land parcel number BUKHAYO/BUGENGI/7526; and

(d) The costs of the counterclaim.

6. On the 14th of May, 2018 when the matter was first listed for hearing, the counsels for both parties recorded a consent that:

(a) The Busia County Land Registrar and Surveyor do visit Land Parcel L.R BUKHAYO/BUGENGI/7526 and

BUKHAYO/BUGENGI/8704 to determine and fix the boundaries between the two parcels; and

(b) The Plaintiff meets the costs of the exercise.

7. The Surveyor & the Land Registrar visited the land and prepared and filed their reports dated 4th of July, 2018 and dated 6th July, 2017 respectively.

8. The hearing commenced with the evidence of Mr. **WILFRED NYANDORO NYANDERI**, the Busia County Land Registrar testifying as **PW1**. The witness produced the Land Registrar's report prepared pursuant to a consent Order issued by the court directing the Registrar's office to visit the disputed parcels of land. He stated that the previous Registrar visited the site on 26th July, 2018 in the presence of both the Plaintiff and the Defendant and observed that Land Parcels L.R BUKHAYO/BUGENGI/7526 and BUKHAYO/BUGENGI/8704 did not share a common boundary. He explained to the Court that from the report the Registrar deduced that L.R No. BUKHAYO/BUGENGI/8704 was created from subdivision of L.R No. BUKHAYO/BUGENGI/7529 but this subdivision had not been amended in the Registry Index Map (RIM).

9. **PW1** concluded that the Surveyor was able to establish boundaries between Land Parcels L.R BUKHAYO/BUGENGI/7526 and BUKHAYO/BUGENGI/7529 which were appearing in the RIM, but the Plaintiff and other protestors objected and defaced the marks by backfilling the soil thus forcing the exercise to stop due to eminent violence. Upon cross examination by Mr. Fwaya counsel for the Defendant, **PW1** clarified that the parties know the position of the boundaries as marked and that they could plant the same at their convenience. **PW1** clarified that the Registrar's role was to only show them the position of their boundaries and that it was only when the features of the boundaries are disputed that the Registrar is required to make a ruling. That in the instant case, there was no dispute as the parties had been shown where the boundaries are.

10. **JAMES ONDIM ONYINKWA**, the surveyor from the Busia County Surveyor's office gave evidence as **PW2**. He explained that he visited the site on the 26th of June, 2018 and both the Defendant and the Plaintiff were present during the visit. He made his report dated 4/7/2018, which was produced as **Pex 2**. **PW2** also produced the map for BUKHAYO/BUGENGI/21 and copies of mutations that created subdivision of parcel number BUKHAYO/BUGENGI/7526 which parcel of land measures 30m by 15m (50 x 100 ft) fronting the Busia-Kisumu Highway. He continued that BUKHAYO/BUGENGI/8704 is a product of subdivision from BUKHAYO/BUGENGI/7529 and that BUKHAYO/BUGENGI/8704 and BUKHAYO/BUGENGI/7526 did not share a common boundary as there are plots in between them (7754, 7527 & 7528). **PW2** confirmed that the boundaries were shown to the parties.

11. On cross-examination by Ms. Nabulindo, advocate for the Plaintiff **PW2** confirmed that L.R No. 7529 was registered in the plaintiff's name before the subdivision and L.R BUKHAYO/BUGENGI/8704 was curved out of L.R No. 7529. He clarified that there was no physical boundary between BUKHAYO/BUGENGI/8704 and BUKHAYO/BUGENGI/7526 and that he pointed out the boundary between the two parcels of land. He stated that there was a pit hole existing around the disputed area and part of the hole was in L.R No. 7526 and that the other part is on L.R No. 7529.

12. Upon cross examination by Mr. Fwaya advocate, **PW2** stated that the Survey Office had visited the site thrice to try and resolve the issue and that the office of the Registrar in receipt of a complaint from either party can visit the disputed land. He stated that the effort was made to resolve the issue at the Registrar's office but there was a dissatisfaction which made the parties file the present case.

13. **PW2** stated that the parcels bordering L.R No. 8704 are L.R No. 7754, L.R No. 7528 and L.R No. 7527. That L.R No. 8704 and L.R No. 7526 do not share a common boundary. He said that he did not know who own the parcels between L.R No. 8704 and L.R No. 7526 and that the owners of these parcels did not have issues with the owners of L.R. No. 7526. **PW2** concluded that there can only be encroachment on L.R No. 8704 by the owners of L.R No. 7528 and L.R No. 7754.

14. The Plaintiff testified as **PW3** stating that he inherited LR. No. 7529 from his father. He stated that the road was expanded into the Defendant's land in 2017 and the Defendant in turn extended into his land. He stated that he had not sold any land to the Defendant and is not aware how the Defendant acquired his land title no Bukhay/Bugengi/7526. **PW3** continued in testimony that an old tree served as a boundary between his and the Defendant's land and that he had had no boundary dispute with the person who sold the land to the Defendant. That the Defendant had encroached on his land by about twenty (20) feet, planted maize on his side and that he even cut his nappier grass.

15. On cross examination, he stated that L.R 8704 was his land even though he did not have the title to show that it is his land. He stated that the County Land Registrar and the Surveyor visited the disputed place on the 26th of July, 2018 and the Surveyor measured the defendant's land in his presence. That all plots from L.R No. 7524 to L.R No. 7528 are on a straight line and are on the map. **PW3** added that he never read the Surveyor's report, never called the Surveyor as his witness and does not agree with the report although he did not have an alternative survey report. He stated that the Surveyor pointed out to the Defendant where his land reaches but he did not agree with the boundary showed to them since he had been shown his land by his father. The witness confirmed that L.R No. 8704 is a subdivision of L.R No. 7529 and that according to the map, L.R No. 7529 is the plot neighbouring L.R No. 7524 to L.R No. 7528.

16. Upon re-examination, **PW3** stated that he indeed had the title for his land confirming the size of his land to be 0.039HA and the said title was annexed as Plaintiff Exhibit 3. **PW3** confirmed that the Surveyor came but was measuring the Defendant's land and while at it got into his land yet there was a boundary mark of an old tree and a toilet. **PW3** stated that the Defendant had encroached on his land beyond the straight line, and that the Defendant's land was reduced by the road and the Defendant should have sued the road's office instead of encroaching on his land.

17. **MARY GENDA AGUNDA**, the Plaintiff's mother testified as **PW4**. She stated that the Plaintiff inherited the land from his father and that Margaret (PW5) is the one who sold the land to the Defendant. That when the Defendant came to the land, he started building on his plot. **PW4** stated that the Defendant accused the Plaintiff of encroaching on his land yet there is an old tree separating the Plaintiff's and the Defendant's plots. That the Defendant had encroached on the Plaintiff's land by twenty (20) feet. That the matter had been reported to the

Chief but the Defendant refused to submit to the Chief's authority.

18. Upon cross-examination by Mr. Fwaya, **PW4** stated that she was not present when the Registrar and the Surveyor visited the land and that Margaret (PW5) was the only one who knew the issue of the boundary between the two plots. On re-examination, the witness answered that the Defendant bought his land from Margaret (PW5) and that she knew the boundary of their land.

19. **PW5** was **MARGARET ADIKINYI BARASA**. She stated that she bought land parcel LR No. 7526 from FREDRICK MUSALE (deceased) in 1992 and that the plot was initially 50 x 100 feet but the road reduced it to 80 x 50 feet. That her daughter was using the plot until she sold it to the Defendant who took possession and developed it.

20. She stated that the boundary of the plot was marked by a '*Lusiola*' tree which tree is still there to date. That the Defendant was aware of this and never complained about the size of the plot sold. That she had not gotten a title for the plot but the Defendant got it in 2011 and she has never looked at the said title and does not comprehend how the Defendant got a title for 50 x 100 feet. She further stated that the boundary dispute had been heard before the D.O and the Chief.

21. Upon cross-examination by Mr. Fwaya the Defendant's advocate, PW5 stated that she knew where the Plaintiff's land reached but did not know its title number nor the Defendant's parcel number. She stated an agreement for sale existed between her and the Defendant which she executed. That they agreed the purchase price for the land was Kshs.55,000 and the agreement stated the size of the plot sold was 50 x 100 feet but maintained that at the time she was selling the plot it was 50 x 80 feet.

22. She stated that she was at the site when the Registrar and the Surveyor visited and she was called upon to indicate the boundary. That the Surveyor and the Registrar did not do anything on the land because the public objected once they began taking measurements because they were encroaching on another parcel. She further stated that she did not hear the Surveyor state that the Plaintiff's and The Defendant's land did not share a boundary. That she was aware that the Kisumu Busia road was expanded in 1970 and she had no clue whether the people whose land was acquired were ever compensated. That besides the acquisition in 1970, there has been no other road expansion.

23. On being questioned about the meetings at the D.O and Chief, she stated that she had no record of the minutes of the meetings held there. That the Plaintiff complained during the Registrar's and Surveyor's visit because he saw people getting into his land. That the Plaintiff did not plant maize on the Defendant's land because the Plaintiff has a big land and it is the Defendant who keeps trespassing onto the Plaintiff's property. That the Defendant's plot was created from a different title other than that of the Plaintiff.

24. In re-examination, **PW5** said that she knew both the Defendant's and Plaintiff's plots and that she planted the '*Lusiola*' tree to mark the boundary. She further reiterated that the sale agreement between her and the Defendant was prepared by the Defendant. That she showed the Surveyor where the boundary of the plot was and when he started measuring people jumped on the wire and started complaining that that was the Plaintiff's land.

25. **DW1** stated that he is a retired nurse and went ahead to adopt his witness statement signed on the 28th of September, 2017. He also filed a list of documents which documents were produced as Defence Exhibits 1-6 respectively. He informed the court that he was the owner of plot number BUKHAYO/BUGENGI/7526. He stated that the Plaintiff's plot was initially L.R No. 7529 before it was subdivided and that his plot did not share a common boundary with the said plot L.R No. 8704. That it was the Plaintiff who requested for a court order that the Registrar and the Surveyor visit the disputed parcels. He confirmed that he is satisfied with the way the survey exercise was conducted as well as the Surveyors report.

26. The defendant stated that he counterclaimed against the Plaintiff because he had planted nappier grass on his plot and the plaintiff only stopped after the visit by the D.O and the Surveyor. That he had not encroached on the Plaintiff's land and has never been to the said land so the injunction even if granted will serve no purpose. According to the defendant, the toilet is on his land. He further stated that since he bought the plot in 2003, he had not seen the Kenya National Highways Authority (KeNHA) come to measure or expand the road and that the last expansion was done in 1970.

27. On cross-examination by Mr. Omeri learned counsel for the Plaintiff, **DW1** stated that he did due diligence when he bought the land and that his plot touches the road/highway. He reiterated that when he bought the plot it was measured 100 x 50 feet from the centre of the road and it is where the measurement stopped. He stated that the '*Lusiola*' tree was on his land and that it was not a boundary mark. He confirmed that his plot was sold to him by PW5 and that the toilet is built behind his house on his plot. That the transfer of title of the plot was done by Mshale in 2005 and he is not aware when the said Mshale died. He added that the sale agreement was prepared by a secretary in his and PW5's presence. That the land was a bush as PW5 was not living or using it.

28. In re-examination, **DW1** reiterated that he bought the plot from PW5 measuring 50 x 100 feet and has not seen any agreement that states the plot was 50 x 80 feet. That the person who executed the transfer documents was Fredrick Mshale and the '*Lusiola*' tree is on his land. He further stated that he knows the plot he bought and he has not built anything on the Plaintiff's land as all his developments are on his land.

29. The Plaintiff's and the Defendant's submissions were filed on the 14th of December, 2020 and 11th of December, 2020 respectively. The Plaintiff averred that the Defendant had failed to prove his counterclaim as required by law hence it should fail. He also submitted that boundary disputes are issues handled by the Land Registrar and the Surveyor before being referred to Court. The Plaintiff submits that the survey report before the court does not support the counter-claim. He urged the court to find in his favour. The Defendant submitted that they were satisfied with the Surveyor's report and that the Plaintiff though disputing the said report did not have an alternative report to displace what is on record and thus his case should be dismissed. That the Court should make a finding that the Plaintiff had indeed encroached on the Defendant's land.

30. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arising for determination are:

a. Does Land Parcels L.R BUKHAYO/BUGENGI/7526 and BUKHAYO/BUGENGI/8704 share a common boundary?

b. Whether or not the Defendant has encroached on the Plaintiff's land

OR

c. Whether or not the Plaintiff has encroached of the Defendant's land;

d. Who pays the costs of the suit?

31. Section 18 of the Land Registration Act, No. 3 of 2012 gives the Registrar power to determine disputes in relation to general boundaries. The Registrar is required to work in conjunction with the Survey Office to determine any uncertain boundary in accordance to the Survey Act, Cap 299, Laws of Kenya. After the filing of this suit, the parties recorded a consent to have the Registrar and the Surveyor visit the disputed parcels of land and prepare reports on the same.

32. From the evidence adduced before this Court, it is evident that the matter had initially been handled by the Land Registrar before the Plaintiff escalated it to Court after being dissatisfied with the Registrar's and Surveyor's decision sometime in 2017. Both the Registrar (PW1) and the County Surveyor (PW2) confirmed visiting the site on the 6th of June, 2018 pursuant to the Consent order of this Court dated 21st May, 2018. They both concluded that they had indicated to the parties where the boundaries were and according to Pw1, there was therefore no dispute between the parties.

33. According to the Surveyor's report (PEX2) and his evidence in Court the two suit parcels do not share a common boundary. He said thus in the report,

“P.No. 8704 is a product of subdivision of P.No. 7529. From the mutation document it also touches on the same highway. It therefore implies that P.No. 7526 and P.No. 8704 do not share a common boundary.... The boundary establishment was then based on the boundary between P.No. 7526 and P.No. 7529.”

34. The Land Registrar testified as PW1 and produced his report (PEX1). The report contains some background, history and antecedents surrounding its compilation. The Registrar observed that, **“BUKHAYO/BUGENGI/7526 and L.R No. BUKHAYO/BUGENGI/8704 do not share a common boundary as the latter parcel number was created as a subdivision of parcel No. BUKHAYO/BUGENGI/7529 and the subdivision had not been amended in the RIM.**

It was then only practical to establish a boundary against parcel No. BUKHAYO/BUGENGI/7529 which was the only number appearing in the RIM and which too was subdivided by the Plaintiff being the owner of that same parcel.”

35. The Land Registrar concluded that, **“The Surveyor was able to establish the boundary between the plaintiff's land and that of the defendant. The Plaintiff and other people protested to the marking of the boundaries and defaced the points that had been dug as boundaries by filling back the soil. Due to imminent danger of violence despite the presence of security officers, the exercise was stopped before any explanation was offered to the parties.”**

36. The Plaintiff confirmed that the Land Registrar and the Surveyor indeed visited the site and even proceeded to establish boundaries which he was not agreeable to. He however did not produce an alternative Survey report to challenge the PW2's report. Neither did he contest the mutation used to sub-divide his original parcel No. 7529 which showed the position of one of the new numbers created i.e. 8704.

37. I have looked at the mutation (dex3) that subdivided parcel no 7529 to create 5 parcels *inter alia* L.R No. BUKHAYO/BUGENGI/8704. Between the sub plots A, B, C & D on the mutation map, there is an access road provided and its size is given on page 1 of the mutation as 0.07ha. The access road separates these new plots with the other existing plots that are touching the main road. Sub plot **“E” (8704)** also touching the main road/highway is sandwiched between parcel no **7754 & 7528**. The plaintiff did not deny that it is this mutation form he used to create the current title in dispute. This answers the first question that the two suit plots going by the evidence on record do not share a common boundary.

38. The second question is whether the plaintiff has proved that there is encroachment alleged against the defendant. In proving his case, the plaintiff relied on his evidence and the evidence of Pw4 & Pw5. According to him, the defendant had encroached on to his plot by about 20ft. He had nothing in court to corroborate this assertion. In fact, he stated that he relies on the boundaries as shown to him by father. Pw4's evidence added no value to the plaintiff's case as she merely said the land had been encroached. Pw5 did not deny selling land to the defendant. She also did not deny her signature on the sale agreement which gave the size of land sold was 50ft by 100ft. Her evidence of the *lusiola* tree being the boundary mark hangs with no legs to stand on in the absence a survey report to corroborate it. Neither was she aware that there had been sub-division of original No. 7529.

39. In view of the observations and analysis made herein above I safely conclude that the alleged encroachment levelled against the defendant has not been proved. As clearly stated in the evidence of the Land Registrar, the parties were already shown the boundaries of their respective parcels of land which they need to respect.

40. The provisions of the Land Registration Act clearly indicate that the Land Registrar and the Surveyor have the mandate to deal with the issues of boundaries of registered land in Kenya. See holding in *Azzuri Limited vs. Pink Properties, (2018) eKLR, Sangale Ole Langas vs. Stephen Mishish & Another (2018) eKLR* and *Jane Njeri Arthur vs. Joseph Mwaura Njoroge (2019) eKLR*. The boundary of Plot No. 7529 and 7526 have already been identified in accordance with the RIM. The plaintiff ought to have pursued the amendment of the RIM to include the resulting numbers from his sub-division before registering his complaint. As it is the complaint/suit was prematurely filed.

41. The issue of whether the Plaintiff encroached on the Defendant's land was also canvassed during the hearing. The Defendant informed the Court that the Plaintiff had planted nappier grass on his parcel but had he since stopped after the Surveyor and DO intervened. This had also been a basis of his counterclaim for encroachment and the said prayer had since been spent. The court shall however issue an order in terms of prayer (c) of the c-claim to avoid any possible repeat of the interference.

42. In conclusion, I make the following orders;

(a) The plaintiffs suit is dismissed for being premature and lacking in merit.

(b) The Plaintiff, his family, agents, servants and any other person claiming through him be and are hereby restrained from trespassing and encroaching onto the defendant's land parcel number BUKHAYO/BUGENGI/7526; and

(c) Parties to respect the boundaries as shown to them on 26th June 2018 by the Land Registrar and the Surveyor.

(d) The Defendants is awarded costs of the suit.

Dated, signed and delivered at BUSIA this 10th day of March, 2021.

A. OMOLLO

JUDGE