



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 95 OF 2016

THOMAS WILCOCK ATSYAYA (as administrator of the estate of

SAMSON CHILAINI OLONYO (Deceased).....PLAINTIFF

VERSUS

DELESINA KHASOHA INDEJE..... DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on 3rd June 2016, through plaint filed by Samson Chilaini Olonyo. He later passed away and was substituted by his son Thomas Wilcock Atsyaya. He averred in the plaint that he was the registered owner of the parcel of land known as L.R No. Isukha/Mugomari/1939 while the defendant was the registered owner of the parcel of land known as L.R No. Isukha/Mugomari/1940. He added that the defendant destroyed the common boundary features between the parcels and also cultivated his parcel.

2. The plaintiff therefore prayed for judgment against the defendant for:

a) An order eviction of the Defendant by herself, her agents, servants and/or anybody acting, and/or claiming for and on her behalf from the plaintiff's parcel of land better known as L.R. NO. ISUKHA/MUKOMARI/1939.

b) An order of restoration of common boundary between the parcels of land better known as LR. NO. ISUKHA/MUGOMARI/1939 and ISUKHA/MUGOMARI/1940.

c) An order of permanent injunction restraining the Defendant by herself, her agents, servants and/or anybody acting and/or claiming for and on her behalf from interfering, alienating, destroying boundary features and or otherwise obstructing the plaintiff from peaceful and quiet occupation of parcel of land better known as L.R. NO. ISUKHA/MUGOMARI/1939.

d) Costs of the suit.

e) Any other relief this Honourable court may deem just and expedient.

3. The defendant filed defence and counterclaim in which she stated that the plaintiff's suit is time barred, that she had been utilizing the parcels of land known as L.R No. Isukha/Mugomari/1939 and L.R No. Isukha/Mugomari/1940 from around 1950 and that the plots were by then known as Isukha/Mugomari/231. That there is no boundary between the plots and that the plaintiff used undue influence to "mutilate" Isukha/Mugomari/231 into two parcels and to register himself as the owner of Isukha/Mugomari/1939.

4. The defendant therefore prayed for judgment against the plaintiff for:

Cancellation of the plaintiff as the registered owner of LAND PARCEL NO. ISUKHA/MUGOMARI/1939 and registration of the defendant as the absolute owner of the aforesaid LAND PARCEL NO. ISUKHA/MUGOMARI/1939.

5. The matter then proceeded to trial. Thomas Wilcock Atsyaya testified as PW1. He adopted his deceased father's witness statement as his evidence in chief. He stated that the defendant was the deceased's sister-in-law, having been married to Fred Indeché, the deceased's brother. That there was a family meeting on 25th February 2003 to decide how parcel of land known as L.R No. Isukha/Mugomari/231 which was then registered in the name of Sabeti Ngesa, the deceased's mother, would be shared out. He added that it was agreed that the land which was measuring approximately 0.80ha (2acres) be shared equally between the deceased and the defendant. That the deceased's mother then transferred the land into the joint names of the defendant and the deceased and the title deed was then issued.

6. PW1 further testified that on 27th July 2012 the defendant and the deceased mutually agreed to invite a surveyor to subdivide the land between them into L.R No. Isukha/Mugomari/1939 which was registered in the deceased's name and L.R No. Isukha/Mugomari/1940 which was registered in the defendant's name and title deeds duly issued to them. He added that after the exercise the defendant reneged on the arrangement, uprooted the boundary features planted by the surveyor between the two parcels, constructed a house on the deceased's portion of land and cultivated the whole of the deceased's portion thus depriving him of rights of ownership and use.

7. Next on the witness stand was Samuel Mullavu Segero who testified as PW2. He stated that he is a resident of Ilesi location, Kakamega County and that he is a retired Senior Chief of Ilesi location having served as chief of Ilesi location for 21 years before retirement. He further testified that he knew the defendant very well as a subject of his area of jurisdiction and that sometimes in the year 2003, the deceased went to his office at Ilesi seeking for assistance for subdivision of L.R No. Isukha/Mugomari/231. That he referred the deceased to the Assistant Chief Malimili sublocation within Ilesi location where the land is located and the Assistant Chief convened a meeting which was attended by the deceased, the defendant, relatives and neighbours. That the deceased and the defendant agreed to look for a surveyor to undertake the subdivision.

8. PW2 further testified that upon subdivision the surveyor erected beacons which were later uprooted by the defendant. That the deceased reported the defendant's actions to PW2's office and PW2 advised the two parties to engage government surveyor. He added that the government surveyor and land registrar went to the land, the defendant was absent though served with attendance summons. That he (PW2) was present as he had been served summons to be present for security purposes and that due to the defendant's absence, no action took place.

9. The plaintiff's case was then closed. Although the plaintiff availed evidence of service of hearing notice, the defendant did not attend court on the date scheduled for defence hearing. Defence case was therefore closed and parties ordered to file written submissions. The defendant did not file any submissions.

10. The plaintiff argued in his submissions that he had established his case and that the defendant's defence is as good as no defence in the absence of evidence by the defence. He prayed that he be granted judgment as prayed together with costs.

11. I have considered the parties' pleadings, the evidence and submissions. As noted earlier, the defendant did not tender any evidence. The plaintiff produced the original of a certificate of search dated 13th May 2015 confirming that the deceased was registered as a proprietor of L.R No. Isukha/Mugomari/1939 on 18th January 2013 and that a title deed was issued to him on 23rd January 2013. Equally, the plaintiff produced the original of a certificate of search dated 3rd July 2018 verifying that the defendant was registered as proprietor of L.R No. Isukha/Mugomari/1940 on 18th January 2013 and that a title deed was issued to her on 23rd January 2013.

12. The plaintiff's allegations that the defendant uprooted the boundary features erected by the surveyor between the two parcels, constructed a house on the deceased's portion of land and cultivated the whole of the deceased's portion remain uncontroverted and I therefore accept them as proven.

13. As a registered proprietor of land, the estate of Samson Chilaini Olonyo (deceased) is entitled to the privileges and benefits under **Section 24** of the **Land Registration Act**. Further, **Section 26** of the Act obligates the court to accept the deceased's certificate of title as conclusive evidence of proprietorship. The said sections provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge ...

14. Further, pursuant to **Section 35 (1)** of the **Land Registration Act**, the certificate of search produced by the plaintiff in respect of L.R No. Isukha/Mugomari/1939 is to be presumed to be the true record as verified by the land registrar.

15. In view of the foregoing discourse, I am satisfied that the plaintiff has established his case on a balance of probabilities. On the other hand, the counterclaim has not been proven and is consequently for dismissal. I therefore make the following orders:

a) The defendant, her agents, servants and/or anybody acting, and/or claiming for and on her behalf to vacate the parcel of land known as L.R. No. Isukha/Mugomari/1939 within 45 (forty-five) days of delivery of this judgment.

b) In default of the defendant complying with (a) above, the defendant her agents, servants and/or anybody acting, and/or claiming for and on her behalf be evicted from the parcel of land known as L.R. No. Isukha/Mugomari/1939.

c) An order of restoration of common boundary between the parcels of land known as L.R. No. Isukha/Mugomari/1939 and Isukha/Mugomari/1940.

d) A permanent injunction is hereby issued restraining the defendant by herself, her agents, servants and/or anybody acting and/or claiming for and on her behalf from interfering, alienating, destroying boundary features and or otherwise obstructing the estate of Samson Chilaini Olonyo (deceased) from peaceful and quiet occupation of parcel of land known as L.R. No. Isukha/Mugomari/1939.

e) The defendant's counterclaim is dismissed.

f) In view of the close family relations between the parties, each party shall bear own costs of the suit.

Dated, signed and delivered at Kakamega this 1st day of February 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Khatashi holding brief for Ms Rauto for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma