



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 465 OF 2018

ESTHER GLORIA MWIHAKI BELL.....PLAINTIFF

VERSUS

JANE WANJIKU MWATHI.....1ST DEFENDANT

ANN WANJIRU KAMAU.....2ND DEFENDANT

DAVID NDUNGU KAMAU.....3RD DEFENDANT

MBUGUA NG'ANG'A.....4TH DEFENDANT

RULING

The Plaintiff's claim is that the Defendants, whose parcels of land are adjacent to the Plaintiff's land, encroached on her land being Dagoretti/Riruta/4363. She filed suit on 30/10/2018 seeking to have the Defendants evicted from her land. The 1st, 2nd and 3rd Defendants filed their defence on 10/1/2019 and denied the Plaintiff's claim. The Defendants contended that it was the Plaintiff who had encroached on their land. They averred that the land in dispute was initially known as Dagoretti/Riruta/122 and measured 2.7 acres. The land was divided into three portions being numbers 4362, 4363 and 4364. The Defendants averred that during the subdivision access roads took up 0.21 ha equivalent to 0.5187 acres which had not been taken into consideration. They contended that each party was expected to cede some land to cater for the roads on a pro-rata basis. In their counterclaim, they sought a portion equivalent to 0.192 acres which they claimed was wrongly hived off their land during the initial subdivision. They sought a declaration that they were entitled to part of Dagoretti/Riruta/4363 to the extent of 0.192 acres. In the defence filed in court on 7/12/2018, the 4th Defendant sought an order directing parties to this suit to engage a surveyor to resolve the boundary issue and file the surveyor's report in court.

The 1st, 2nd and 3rd Defendants filed a notice of preliminary objection on 10/1/2018 claiming that the suit violated the Limitation of Actions Act and that it should be struck out with costs.

Parties filed submissions which the court considered. The 1st, 2nd and 3rd Defendants submitted that the cause of action arose on 19/10/1999 when the land was subdivided and that the period prescribed for lodging a suit for recovery of land lapsed in April 2011. They relied on Sections 7 and 9 of the Limitation of Actions Act. The Plaintiff submitted that the preliminary objection raised by the Defendants did not raise a pure point of law. She argued that a preliminary objection cannot be raised where there are facts to be ascertained or where the exercise of judicial discretion was in issue. She maintained that her cause of action was based on the finding by the Regional Surveyor at the Ministry of Lands and Physical Planning dated 14/11/2017 with regard to the encroachment on Dagoretti/Riruta/4363. She pointed out that she purchased the Suit Property in 2006 and that she enjoyed quiet possession until 2017 when a boundary dispute arose.

The firm of Auta Nyakundi and Company Advocates forwarded a surveyor's report to court. The report dated 22/3/2021 which was prepared on behalf of the Provincial Surveyor, Nairobi states that the parcels of land known as Dagoretti/Riruta/4362, 2233, 2235, 5287, 5288, 5289 and 5290 had encroached on Dagoretti/Riruti/4363, which is the Suit Property. The surveyor recommended the re-establishment of the boundaries of Dagoretti/Riruta/4363. He annexed a sketch map showing the relationship between these parcels of land.

The issue for determination is whether the court should strike out the suit for being time barred as the 1st to 3rd Defendants seek. In order to establish when the cause of action arose, the court will have to hear evidence on when the Plaintiff discovered the encroachment or trespass on her land. If indeed the Plaintiff learned of the encroachment in 2017 then the issue of her claim being statute barred will not arise. The court finds no merit in the preliminary objection and dismisses it.

Section 18 of the Land Registration Act bars the court from entertaining proceedings relating to a dispute regarding boundaries of land unless the boundaries have been determined in accordance with that Section. This suit is stayed until a determination is made by the Land Registrar

as to the boundaries of plot number 4363 in accordance with Section 18 of the Land Registration Act.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF MAY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Auta Nyakundi for the Plaintiff

Mr. Mbuthia Kinyanjui for the 1st to 3rd Defendants

Mr. V. Owuor- Court Assistant

No appearance for the 4th Defendant