



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 741 OF 2014**

**SIMON KIMANI.....PLAINTIFF**

**=VERSUS=**

**GEOFFREY KIMANI GATHIGI.....DEFENDANT**

**COUNTY LAND REGISTRAR, KIAMBU COUNTY.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 10<sup>th</sup> June 2014 the plaintiff prays for judgment against the defendant for:-

*(a) A permanent injunction restraining the 1<sup>st</sup> defendant, his servants, workmen and agents from entering on the plaintiff's said property, or from erecting or causing to be erected any construction thereon, or from in any way interfering with the plaintiff's use and enjoyment of the said property.*

*(b) Demolition of the 1<sup>st</sup> defendant's portion of his development that is encroaching on the plaintiff's property.*

*(c) Declaration of a dispute by the 2<sup>nd</sup> defendant and determination of the boundary between plot number L. R. Dagoretti/Kinoo/2514 and Plot number L. R. No. Dagoretti/Kinoo/2515 by a Land Surveyor.*

*(d) Damages for trespass.*

*(e) Costs of this suit.*

*(f) Interest thereon.*

*(g) Any other relief the court deems fit to grant.*

The suit against the 2<sup>nd</sup> defendant was withdrawn vide a notice of withdrawal of suit dated 6<sup>th</sup> December 2018 and filed on 7<sup>th</sup> December 2018.

2. Upon being served with copies of plaint and summons to enter appearance, the 1<sup>st</sup> defendant entered appearance through the firm of M/S Macharia Kahonge & Co. Advocates on 25<sup>th</sup> June 2014. He also filed a statement of defence and counterclaim dated 11<sup>th</sup> July 2014. In his counterclaim, the 1<sup>st</sup> defendant prays judgment against the plaintiff as follows:-

*(a) A declaration that the 1<sup>st</sup> defendant is the rightful and lawful owner of the parcel of land known as parcel No. L. R. Dagoretti/Kinoo/2515 ("suit land") and measuring 0.055 hectares as was agreed and determined by the sale agreement dated between 1<sup>st</sup> September, 2003 between Peter Ngugi Wangui and Geoffrey Kimani Gathige.*

*(b) A permanent injunction to issue against the plaintiff restraining him, his servants or agents or otherwise howsoever from continuing with the illegal trespass of the suit property.*

*(c) General damages against the said plaintiff for loss of opportunity and damages as a result of stoppage of work in the suit land which resulted from the said plaintiff instituting the present suit and obtaining orders accordingly.*

***(d) Without prejudice to the foregoing, general damages, against the plaintiff for trespass and/or encroachment on the 1<sup>st</sup> defendant's parcel of land known as Plot No. LR Dagoretti/Kinoo/2515 ("suit land") and measuring 0.055 Hectares.***

***(e) A mandatory injunction to compel the plaintiff to remove and/or demolish the encroaching and/or trespassing construction/building into the suit land known as Plot No. L. R Dagoretti/Kinoo/2515 ("suit land") and measuring 0.055 Hectares.***

***(f) Damages.***

***(g) Costs of this suit.***

***(h) Any other or further relief that the honourable court shall deem fit to grant and***

***(i) Costs of the suit and counterclaim and interest thereupon at such rate and for such period of time as this honourable court may deem fit to grant.***

3. PW1 Simon Mbugua Kimani adopted his witness statement dated 20<sup>th</sup> June 2014. He told the court he is the registered owner of Parcel Number Dagoretti/Kinoo/2514. While the defendant is the owner of Dagoretti/Kinoo/2515. The two plots are adjacent to each other. PW1 further stated that he bought the plot from Peter Ngugi in 2002. The said plot measures 0.05 hectares. He then constructed apartments on the said plot. The construction was completed in 2005. He also put up a wall around it. At this time, there was semi-permanent structure on the defendants' plot.

4. Later on when the defendant started construction on his plot he realized he (defendant) had encroached on his plot. A surveyor confirmed this in 2014. He prays that the defendant demolishes part of the building that has encroached on his plot. He also told the court that his tenants have been affected by the defendant's construction as all the balconies and washrooms have been blocked. He produced the copy of the title deed for LR No. Dagoretti/Kinoo/2514 as exhibit P1 and the surveyor's report as exhibit p2. He prays that the defendant be found to have encroached on his plot and that he be granted the prayers in the plaint. He also prays that the counterclaim be dismissed.

5. PW2; Joseph Mucungu, the county surveyor Kiambu told the court he prepared a report in respect of the two plots Dagoretti/Kinoo/2514 and Dagoretti/Kinoo/2511. He visited the site on 23<sup>rd</sup> April 2019 and took measurements of the two plots. He also said they were a subdivision of Dagoretti/Kinoo/1123. Each plot was supposed to measure 0.005 hectares. He found that Dagoretti/Kinoo/2515 was in excess of 0.005 hectares while 2514 was less. He found that 2515 had encroached on 2514. He prepared a report and produced it as exhibit P2.

6. DW1 Geoffrey Kimani Gathigi, the defendant adopted his witness statement filed on 11<sup>th</sup> July 2014. He told the court that he is the registered owner of Dagoretti/Kinoo/2515. He bought it in 1998 from Peter Nyaga Wangui. It measures 0.005 hectares. He immediately took possession. His sister Rachel Ngendo did small scale vegetable farming on his behalf. The plaintiff bought his plot in 2003 and started construction. The boundary between the two plots was well demarcated by cedar posts. The plaintiff later put up a stone wall. DW1 produced the mutation form prepared in 1998 as exhibit D1, a sale agreement between the plaintiff and Peter Ngugi as exhibit D2, photographs of the scene as exhibit D3.

7. It was not until the defendant commenced construction that the plaintiff complained of encroachment. The construction was then second floor. He further told the court that the design of the plaintiff's building is the genesis of this dispute. He has not encroached on the plaintiff's plot. The original owner Peter Ngugi had to compensate him for the portion taken as a result of a court case. The plaintiff knew where the boundary was. He prays that the plaintiff's suit be dismissed and his counterclaim be allowed.

8. DW2 Rachel Ngendo Mwangi told the court that the defendant bought the plot from Peter Ngugi Wangui in 1998 while the plaintiff bought his in 2003. She was cultivating the defendant's land from 1998. She confirmed that the defendant's portion was increased from the original before the plaintiff bought his plot. She further told the court that the two plots were well demarcated. The plaintiff knew the extent of his plot. She told the court that the defendant has not encroached on the plaintiff's plot. She also confirmed that she resided in the semi-permanent house before it was demolished.

9. DW3 Peter Ngugi Wangui, told the court he was the registered owner of land Parcel Number Dagoretti/Kinoo/1123. He inherited it from his grandmother. He said him and his brother had a dispute which culminated in a suit at Kikuyu Law Courts. He subdivided his portion into Dagorett/Kinoo 2514 and 2515 respectively. Between 2000 and 2001 his brother wanted to sell his portion Dagoreti/Kinoo 1124. The surveyor realized 5 meters was missing from his portion. The said 5 meters was in the portion 2515 which the defendant had bought. It was agreed that he (Peter Ngugi) would compensate the defendant with 3 meters from 2514. He told the court he later sold the other plot 2514 to the plaintiff. The said plot was well defined by cedar posts. He produced the agreement between himself and the plaintiff as exhibit D4, D5. He confirmed that he sold the plaintiff approximately 1/8<sup>th</sup> of a plot or what remained after he had compensated the defendant with the extra 5 meters. He told the court that the plaintiff was aware his plot was not exactly 1/8<sup>th</sup>. He told the court that he showed the plaintiff the boundaries and he agreed to buy. He told the court that the defendants building has not encroached on the plaintiff's plot.

10. At the end of the trial the parties proposed to tender final submissions. The plaintiff has filed. On the 10<sup>th</sup> December 2019 Ms Ngira who was holding brief for Mr Kahonge for the defendant sought seven days to file theirs. As at the time of writing this judgment they had not filed.

11. I have considered the pleadings, the evidence on record and the submissions tendered. The issues for determination are:-

***(i) Whether the defendant's development falls within the plaintiff's property.***

*(ii) Whether there was a court order allowing the alteration of boundaries of LR Dagoretti/Kinoo 2514 and 2515 respectively.*

*(iii) Whether the plaintiff knew the boundaries of LR No. Dagoretti/Kinoo 2514 at the time of purchase.*

*(iv) Is the plaintiff entitled to the reliefs sought?*

*(v) Is the defendants' counterclaim merited?*

*(vi) Who should bear costs?*

12. It is not in doubt that the boundaries of LR Dagoretti/Kinoo/2514 and 2515 were well defined. The two plots are subdivisions of Dagoretti/Kinoo/1123 which was registered in the name of Peter Ngugi Wangui (DW3). He, (Peter Ngugi Wangui) confirmed that he sold Dagoretti/Kinoo/2515 to the defendant in 1998 and later sold the house to him and compensated him with an extra 5 meters in 2001. He later sold the remaining portion of Dagoretti/Kinoo/2514 to the plaintiff in 2003. DW1, the defendant told the court after buying the plot he let his sister (DW2) to occupy it. She lived in the semi permanent house and cultivated vegetables on the said portion. The plaintiff confirmed that when he bought his plot there was a lady residing on the neighbouring plot.

13. The plaintiff told the court that he bought the plot from (DW3) Peter Ngugi. That the said seller gave him an original title deed and he did a search at Kiambu Land Registry before he purchased it. The sale agreement is dated 1<sup>st</sup> September 2003.

*Clause 1 states;*

*“The vendor is the registered proprietor of all that parcel of land known as Dagoretti/Kinoo/2514 measuring approximately 1/8 of acre.....Ha situated within Kinoo in the republic of Kenya”.*

*Special condition*

*Clause 4, states*

*“The purchaser has inspected and the vendor has pointed out the beacons and agreed to take the property subject to such state and condition. And the vendor will not be called to repair, improve or renew the said property”*

In my view the plaintiff inspected the plot and was satisfied as to its boundaries before purchasing it. As per clause 1 of the agreement the portion he was buying was approximately 1/8 of an acre. The measurements are not given as 0.05 hectares or at all. The plaintiff ought to have conducted due diligence to know the exact portion he was buying. If the portion is less than what it ought to be, then his case ought to be against the seller (DW3) not the defendant).

14. From the agreement between the defendant and Peter Ngugi Wangui dated 10<sup>th</sup> April 2001, the vendor agreed to compensate the defendant with a parcel of land from his LR No. Dagoretti/Kinoo/2514. The remaining portion of 2514 became 0.046 Ha and not 0.05 Ha. This is what was available for sale to the plaintiff. DW3 has confirmed in his testimony in court which evidence was not challenged. This therefore means that what PW2, the county surveyor told the court is true only to the extent of records existing in the land registry. The records at the registry did not reflect the changes effected after a portion of 2514 was hived off to compensate the defendant in 2515. It can be said the alteration of the boundaries was done by the registered owner himself before he sold the remaining portion to the plaintiff. As stated earlier the plaintiff bought the remaining portion upon being shown the boundaries and he was satisfied. It was upon him to ensure that measurements were undertaken to confirm what he was buying. The plaintiff confirmed there was a semi-permanent structure on 2515 and that there was clear demarcation between the two plots. DW2 Rachel Ngendo confirmed that before the plaintiff put up a stone wall there were cedar posts which marked the boundary between the two plots. Further that the plaintiff always knew where the boundary was. The survey report by J. G. Njiiri trading as Arcplan Services shows that Dagoretti/Kinoo/2514 measures 0.046 hectares while 2515 measures 0.05 hectares. He further stated that the Registry Index Map Sheet No. 6 has not been amended to reflect the new subdivision. He recommended that the registration of the mutation forms be done to facilitate the amendment of the Registry Index Map to reflect the two parcels as they exist in the ground.

15. I have gone through the photographs of the scene. It is clear that the balconies of the plaintiff's building are constructed in such a way that they are hanging over the defendant's plot. In my view the plaintiff did not leave any space between the two parcels while undertaking his construction. The photographs speak for themselves. I find that the plaintiff has failed to prove his case against the defendant on a balance of probabilities. If the plaintiff has any claim it should be against the seller, Peter Ngugi Wangui and not the defendant. The photographs also show the defendant's construction is on his portion. I find that the plaintiff's case against the defendant fails and the suit is dismissed with costs to the defendant. On the other hand I find that the defendant has proved that he bought LR No. Dagoretti/Kinoo/2515 as it exists on the ground. The defendant is entitled to damages for loss of opportunity as a result of the stopping of construction after the plaintiff obtained orders of injunction. I award the same at Kshs.500,000/- which I think is reasonable. The plaintiff cannot be said to be liable for trespass on the defendant's plot as the seller may have misled the plaintiff. And as stated earlier the plaintiff claim if any is against the seller. The plaintiff therefore ought to remove and/or demolish parts which are encroaching on the defendant's plot.

16. Accordingly I find that the defendant has proved his case as against the plaintiff on a balance of probabilities. I enter judgment in his favor as follows:-

*(a) A declaration is hereby issued that the defendant (now plaintiff) is the rightful and lawful owner of the parcel of land known as parcel No. L. R. Dagoretti/Kinoo/2515 measuring 0.055 hectares as was agreed in the sale agreement dated 10<sup>th</sup> April 2001*

*between Peter Ngugi Wangui and Geoffrey Kimani Gathige. The mutation form ought to be registered in order for the Registry Index Map to be amended accordingly.*

*(b) A permanent injunction is hereby issue restraining the plaintiff (now defendant), his servants and/or agents from continuing with the illegal trespass of LR NO. Dagoretti/Kinoo/2515.*

*(c) General damages for Kshs500,000/-*

*(d) A mandatory injunction is hereby issued to compel the plaintiff (now defendant) to remove and/or demolish part of his building that is encroaching and/or trespassing on to the LR No. Dagoretti/Kinoo/2515.*

*(e) The defendant (now plaintiff) will have costs to the suit and interest.*

It is so ordered.

**Dated, signed and delivered in Nairobi on this 5TH day of MAY 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant