



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC NO. 175 OF 2017

HEZEKIAH NJUGUNA MWANGI.....PLAINTIFF

VS

JAMLECK CHEGE KANYI.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant seeking the following orders;

- a. A permanent injunction against the Defendant whether by himself, agents, servants, employees or anybody claiming through him from interfering with the Plaintiff's ownership, possession, right of use, right of ingress and egress in and out of land parcels MAKUYU/KIMORORI/BLOCK 1/2162, 2163, 2164, 2171 and 2172(suit lands).
- b. Damages.
- c. Costs of this suit and interest.
- d. Any other relief this honourable Court may deem fit to grant.

2. The Plaintiff avers that he is the registered owner of the suit lands. The original parcel was MAKUYU/KIMORORI/BLOCK/1545 which measured 1.25 acres or 0.5 ha. The subdivision of the original land yielded 16 subdivisions, 5 of which are the suit lands in this case.

3. The Plaintiff's claim is based on fraudulent encroachment of his suit lands by the Defendant. He claims that the Defendant has encroached on the suit lands causing acts of waste by cutting trees and has converted the suit land into his own use. That the Defendant's actions are actuated by malice, and are unauthorized, fraudulent, illegal and ill advised. He pleaded particulars of fraud under in para 5 of the Plaintiff.

4. In response the Defendant denied the Plaintiff's claim, and in particular, the acts of waste, encroachment and fraud as alleged. Further he asserted that the alleged encroachment was resolved vide the surveyors report dated the 2/11/2009 which was commissioned with the joint consent of the parties and the orders of the Court. In addition, he added that it is the Plaintiff that is encroaching on his land and not the other way around.

5. At the hearing of the case the Plaintiff adopted his written statement and stated that he was the registered owner of MAKUYU/KIMORORI/BLOCK/1545 measuring 0.635 ha. He presented a copy of the title deed registered on the 15/4/88. That in 2007, he subdivided parcel MAKUYU/KIMORORI/BLOCK/1545 into 16 parcels namely No.s

MAKUYU/KIMORORI/BLOCK/2157 – 2172, a copy of the mutation was presented in Court in support of the subdivisions. Subsequently he was issued with title deeds for the 16 sub-parcels in 2008. That sometime in 2009 the Defendant encroached parcel No.s MAKUYU/KIMORORI/BLOCK/2162, 2163, 2164, 2171 and 2172 claiming that it was part of parcel No 1677. That his sub plots exist in the Index Registry Map presented in Court. That the original parcel No 1545 shared a common boundary with parcels MAKUYU/KIMORORI/BLOCK/1546 and 1630, the latter was reserved for coffee mulching and belonged to Ngimu Farm Limited. That parcel MAKUYU/KIMORORI/BLOCK/1677 does not exist on the RIM. He stated that according to the Surveyor's Report dated the 24/9/13, it was reported that the mutation form denoting the subdivision of 1630 cannot be traced in the surveyor's office. He also stated that the decision of the Land Registrar was that the portion MAKUYU/KIMORORI/BLOCK/1677 overlapped with parcels MAKUYU/KIMORORI/BLOCK/1545 and 1546 to the extent of 0.6 ha.

6. At the hearing the Plaintiff led evidence that the title for MAKUYU/KIMORORI/BLOCK/1545 measures 0.5 ha and that according to the mutation forms, the area is stated as 0.635 ha which is in excess of the area shown on the title by 0.135 ha. He confirmed that the boundary between the suit lands and that of the Defendant is a straight line. He confirmed that the Defendant was not present when the surveyor visited the land and prepared the report dated 24/9/13. He stated that according to that report the land that has overlapped his suit land is parcel MAKUYU/KIMORORI/BLOCK/1682. He confirmed that parcel MAKUYU/KIMORORI/BLOCK/1677 does not exist on the RIM presented to Court by the Defendant.

7. The Defendant led evidence and adopted his written statement and stated that he purchased parcel 1677 on 9/12/2008 from Tabitha Wanjiru Gachau. That he was aware that the family of Gachau had a boundary dispute with the Plaintiff in respect to parcel MAKUYU/KIMORORI/BLOCK/1677 and 1545 at the Makuyu LDT. However, he purchased the land after the dispute was concluded. That land parcel MAKUYU/KIMORORI/BLOCK/1677 borders MAKUYU/KIMORORI/BLOCK/1545 and 1546. It is a resultant parcel from MAKUYU/KIMORORI/BLOCK/1630. That in 2013, the Plaintiff encroached onto his land and destroyed his crops and beehives. He reported the matter to the Makuyu Police station under OB No 30/31/1/2013. Thereafter the agricultural and the forest officers both assessed the damage caused by the Plaintiff on his land. He urged the Court to cancel the titles of the Plaintiff as they cannot be accommodated on the ground as shown by the report of the District Surveyor. He stated that parcel No MAKUYU/KIMORORI/BLOCK/1682 that is said to have overlapped the suit land is located quite a distance from the suit lands and therefore it is incapable of overlapping.

8. At the hearing he stated that he did not possess the mutation for parcel MAKUYU/KIMORORI/BLOCK/1630 while the sketch map he produced does not contain the said parcel MAKUYU/KIMORORI/BLOCK/1630. That the survey report dated the 2/11/09 was done in the presence of both parties.

9. The Plaintiff submitted and relied on the survey report dated the 24/9/13 marked as PEX 6. He submitted that according to the decision of the Land Registrar the only land that bordered the Plaintiffs suit parcels after the subdivision of MAKUYU/KIMORORI/BLOCK/1630 is 1682. That there is no mention of the purported MAKUYU/KIMORORI/BLOCK/1677 allegedly owned by the Defendant. That the mutation form for parcel MAKUYU/KIMORORI/BLOCK/1677 that the Defendant purports to own does not exist at the land's registry. Further that the report also noted that parcel MAKUYU/KIMORORI/BLOCK/1682 encroached MAKUYU/KIMORORI/BLOCK/1545 to the extent of 0.60 ha. He submitted that the survey report and the decision of the Land Registrar which states that 1682 encroached onto the Plaintiff's land should be binding on the parties. The Plaintiff faulted the report dated the 2/11/2009 on the ground that it describes the original parcels of land MAKUYU/KIMORORI/BLOCK/1545 and 1677 instead of 1630. It is his opinion that this description has caused confusion and led to the erroneous result. That the surveyor has not disclosed the basis of the measurements he used to arrive at a reduced acreage of parcel MAKUYU/KIMORORI/BLOCK/1545 to 0.409 ha (ground) from 0.5 ha (registered) and increased the size of MAKUYU/KIMORORI/BLOCK/1677 to 0.4375Ha (ground) from 0.5 ha (registered). That the surveyor fell in error by stating that the suit parcels are non-existent. That in so doing he exceeded his mandate by purporting to rectify the Land Register by revoking the titles over the suit lands issued to the Plaintiff, a mandate that is reserved for this Court under section 79 and 80 of the Registered Land Act, repealed.

10. Further he submitted that the Plaintiff has on a balance of probability made out a case of encroachment by the Defendant into the suit lands. He submitted that the illegal encroachment has been going on since 2009 and urged the Court to grant the Plaintiff the sum of Kshs 1.0 million for damages for loss of possession and use.

11. As to who has encroached the land of the other, the Defendant submitted that he is the registered owner of the parcel MAKUYU/KIMORORI/BLOCK/1677. That parcel MAKUYU/KIMORORI/BLOCK/1545 and 1677 share a common boundary. The Plaintiff had filed a dispute before the Makuyu Land Dispute Tribunal upon which the tribunal reached a verdict that each party to respect the original beacons. That the Plaintiff did not challenge the report made by the District Surveyor dated the 2/11/2009. The report confirmed that the ground acreage of MAKUYU/KIMORORI/BLOCK/1545 is 0.0437 ha against the registered acreage of 0.5 ha while the ground acreage for MAKUYU/KIMORORI/BLOCK/1677 is 0.437 ha against the registered acreage of 0.500 ha. That the acreage is at variance on title and on the ground. He faulted the surveyors report dated the 24/9/13 on the ground that it was made in the absence of the Defendant so much so that the Defendant was not afforded an opportunity to be heard in the process.

12. As to whether the Plaintiff is entitled to damages, the Defendant submitted that he has never encroached on to the Plaintiff's lands as alleged and avers that it is the Plaintiff that has encroached on his land instead.

13. From the above evidence in the case, it is clear that:

a. The suit parcels No. MAKUYU/KIMORORI/BLOCK/2162-2164 and 2171 and 2172 came from subdivision of Parcel No. 1545 which all belongs to the plaintiff while and parcel MAKUYU/KIMORORI/BLOCK/1677 came from 1630.

b. That the Defendant purchased MAKUYU/KIMORORI/BLOCK/1677 in 2008 from John Gachau Njuguna and Tabitha Gachau.

c. The Land Dispute Tribunal dealt with parcel MAKUYU/KIMORORI/BLOCK/1545, 1546 and 1677 where parties were advised to stay on their respective parcels and within their boundaries. The vendors (Gachau's) were parties to that suit while the plaintiff was not.

d. The surveyor and the Land Registrar had registered their findings on the boundary dispute before Court.

e. The Defendants land could not be denoted from the RIM and the respective mutation that caused subdivisions of MAKUYU/KIMORORI/BLOCK/1630 could not be traced (an anomaly). As per letter surveyors report dated 29/9/13.

f. The land Parcel No. MAKUYU/KIMORORI/BLOCK/1682 also came from Parcel 1630 and is said to have overlapped the parcel MAKUYU/KIMORORI/BLOCK/1545 and 1546 and encroaches 0.60 ha onto the Plaintiff's land.

g. The Plaintiff's subsequent parcels are said to be excess in acreage thus cannot be accommodated on the ground and they do not exist (See report dated 2/11/09).

h. The beacons forming common boundaries of MAKUYU /KIMORORI /BLOCK/1545 and MAKUYU/KIMORORI/BLOCK/1677 are missing as per the said report.

i. The tribunal advised parties to remain in the parcels, the Land Registrar also made similar finding that the original common boundary between MAKUYU/KIMORORI/BLOCK/1630, 1545 and 1546 should be honoured as the true position and the common boundary be shared by the three parcels. Also, that the marked out and placed beacons were intact.

j. The subdivision of Parcel MAKUYU/KIMORORI/BLOCK/1630 was done in 1994 while the plaintiff's subdivisions and subsequent parcels were created in 2007.

14. The issues for determination are;

- a. Whether the Plaintiff has proved fraudulent encroachment onto his land by the Defendant?
- b. Whether the Plaintiff is entitled to damages?
- c. Who meets the cost of the suit?

Whether the Plaintiff has proved fraudulent encroachment by the Defendant

15. The background of the suit is that the Plaintiff was the registered owner of the parcel No. MAKUYU/KIMORORI/BLOCK/1545. Parcel MAKUYU/KIMORORI/BLOCK/1545 bordered 1630 and 1546. In 2007 the Plaintiff subdivided his parcel MAKUYU/KIMORORI/BLOCK/1545 into 16 parcels namely MAKUYU/KIMORORI/BLOCK/2157-2172. Out of these subdivisions, it is the Plaintiffs case that sometimes in 2009 the Defendant without authority and justification invaded and trespassed onto parcel Nos MAKUYU/KIMORORI/BLOCK/2162, 2163, 2164 2171 and 2172, carrying out acts of waste and destruction of trees and illegal possession.

16. On the other hand, the Defendant is the registered owner of MAKUYU/KIMORORI/BLOCK/1677. See copy of title issued on 23/7/2010. The Defendant has denied the Plaintiff's claim.

17. The original title for MAKUYU/KIMORORI/BLOCK/1545 measures 0.5 ha or 1.235 acres. The mutation form dated 29/12/2006 states the acreage of parcel MAKUYU/KIMORORI/BLOCK/1545 to be 0.635 ha or 1.569 acres. The difference in the two documents is 0.135 or 0.333 acres. The parcel MAKUYU/KIMORORI/BLOCK/1545 was subdivided into 16 parcels namely parcels MAKUYU/KIMORORI/BLOCK/2157-2172 ranging from 0.033 ha – 0.035 ha each. The total acreage for the 16 parcels is 0.558 ha or 1.37 ha. This is in excess of the acreage of the original parcel MAKUYU/KIMORORI/BLOCK/1545 which was 0.500 ha (1.235 acres). Add the size of the road which 0.11 ha the total area is 0.668 ha. Page 3 of the said mutation has drawn the discrepancy by stating that the surveyed area is 0.635 ha while the registered area of the title is 0.500 ha giving the variance of 0.135 ha. When the road measuring 0.11 ha is added, the acreage gets distorted even further. The total acreage for the suit lands alleged to have been trespassed onto by the Defendant is 0.106 ha or 0.2619 acres.

18. The question that one would ask is whether the registered acreage of the land measuring 0.500 ha could contain the 17 subdivisions comprising of the 16 parcels together with the access road measuring 0.11 ha. The Plaintiff has not explained the variance between the registered acreage and the surveyed acreage. This remains curious because the Plaintiff has titles for all the 16 parcels. The Registry Index Map marked PEX No 3 shows the 17 subdivisions on the map. Do the parcels exist on the ground? This is a question that could have been determined by the Surveyors by taking the actual measurements of the parcels on the ground.

19. I shall turn to the survey reports presented by the parties.

20. The survey report presented by the Plaintiff dated the 24/9/13 prepared by one W W Kibiru, the District Surveyor, Murang'a stated that MAKUYU/KIMORORI/BLOCK/1545, 1546 and 1630 were registered in the names of the Plaintiff, John Waweru Kamau and Ngimu Farm Limited respectively. In 2007, parcel MAKUYU/KIMORORI/BLOCK/1545 was subdivided into 16 parcels namely MAKUYU/KIMORORI/BLOCK/2157-2172 and are reflected in the Registry Index Map. Parcel MAKUYU/KIMORORI/BLOCK/1546 was subdivided in 2007 into 2183-2194 and are reflected in the Registry Index Map. Parcel MAKUYU/KIMORORI/BLOCK/1630 was subdivided in 1994 into 1665-1698 sub parcels and are not reflected in the RIM. Its mutation forms cannot be traced at the Survey office. That 1682 a resultant parcel from MAKUYU/KIMORORI/BLOCK/1630 overlaps both MAKUYU/KIMORORI/BLOCK/1545 and 1546 to the extent of 0.60 ha. That the beacons in respect to

1545 and 1546 are intact on the ground. It recommended that parcel 1682 should be placed or depicted in the Registry Index Map as part of MAKUYU/KIMORORI/BLOCK/1630, which is its original parcel prior to subdivision.

21. The Land Registrar in his undated decision signed by one FM Wanjama, confirmed that parcel MAKUYU/KIMORORI/BLOCK/1630 was subdivided in 1994 into MAKUYU/KIMORORI/BLOCK/1665-1698 but the mutation forms effecting the transaction cannot be traced in the office and therefore the RIM has not been amended to reflect the subdivisions. He reported that the beacons depicting the subdivisions of MAKUYU/KIMORORI/BLOCK/1545 and 1546 were intact. This statement may be correct but does not offer a solution to the findings of the Court in respect to the variance between the ground/registered acreage and the mutation acreage which would mean that the sub parcels arising out of MAKUYU/KIMORORI/BLOCK/1545 were in excess of the registered acreage on the original title.

22. Further the report states that parcel No MAKUYU/KIMORORI/BLOCK/1682 which is the resultant subdivision from MAKUYU/KIMORORI/BLOCK/1630 overlaps parcel MAKUYU/KIMORORI/BLOCK/1545 and 1546 to the extent of 0.600 ha. This finding is preposterous. I say so because the total acreage of MAKUYU/KIMORORI/BLOCK/1545 is 0.500. The report does not state how much MAKUYU/KIMORORI/BLOCK/1682 overlaps MAKUYU/KIMORORI/BLOCK/1545. Further, that the said parcel MAKUYU/KIMORORI/BLOCK/1682 is farther away from the suit lands and incapable of overlapping the suit lands. This is depicted from the sketch map contained to the Defendants list of documents. This document was not challenged by the Plaintiff.

23. There is evidence on record presented by the Defendant that parcel No MAKUYU/KIMORORI/BLOCK/ 1682 belongs to a Mr John Ndungu Mubea. The Court notes that the said John Ndungu Mubea has not been made a party to the suit. The parties did not present any official search to show who the registered owner of parcel MAKUYU/KIMORORI/BLOCK/1682 is. If indeed the said John Ndungu Mubea is the owner of the said MAKUYU/KIMORORI/BLOCK/1682, then, determining the suit in the state that it is will mean that the party will be condemned unheard. The Land Registrar concluded that the original common boundary shared by parcels MAKUYU/KIMORORI/BLOCK/1545, 1546 and 1630 be respected as the true position. If the boundary between MAKUYU/KIMORORI/BLOCK/1630 and 1545 is intact where is the encroachment? This has not been explained.

24. This recommendation does not resolve the dispute which is that parcel MAKUYU/KIMORORI/BLOCK/1677 has encroached onto the suit lands. The two reports does not state where the parcel MAKUYU/KIMORORI/BLOCK/1677 which is alleged to be owned by the Defendant is. The sketch produced and the RIM (PEX No 3) depicts the parcel MAKUYU/KIMORORI/BLOCK/1630 and not 1677. Parcel No MAKUYU/KIMORORI/BLOCK/1682 is also not shown on the Registry Index Map.

25. I shall now turn to the survey report dated the 2/11/2009 presented by the Defendant. It is signed by Z. G Kinyua, the District Surveyor, Muranga. The site visit upon which the survey report was prepared is stated to have been done in the presence of both parties. That the suit lands are subdivisions of parcel MAKUYU/KIMORORI/BLOCK/1545 which borders MAKUYU/KIMORORI/BLOCK/1677. Parcel MAKUYU/KIMORORI/BLOCK/1677 is a subdivision of the original MAKUYU/KIMORORI/BLOCK/1630. That the acreage of MAKUYU/KIMORORI/BLOCK/1545 is 0.437 ha against he registered acreage of 0.5 ha while the ground acreage of 0.437 against the registered acreage of 0.5 ha. According to the copy of the title for parcel MAKUYU/KIMORORI/BLOCK/ 1677, the acreage is 0.505 ha. The sketch map attached to the report shows parcel MAKUYU/KIMORORI/BLOCK/1677. The surveyor has not explained why this parcel is not depicted on the RIM presented to Court and marked PEX No 3. Parcel 1630 is depicted on the RIM but its purported subdivisions are omitted and yet the subdivision of MAKUYU/KIMORORI/BLOCK/1630 took place in 1994, much earlier than that of parcel No MAKUYU/KIMORORI/BLOCK/1545. This is depicted in the title of MAKUYU/KIMORORI/BLOCK/1677. Neither the Plaintiff nor the surveyors reports on record have offered any cogent explanation on the state of affairs as far as the Registry Index Map is concerned

save to state that the mutation forms in respect to subdivision of MAKUYU/KIMORORI/BLOCK/1630 are missing.

26. According to this report beacon Nos ABC and F to J are said to exist while D and E are missing. This is the boundary between MAKUYU/KIMORORI/BLOCK/1545 and 1677 as per the sketch map. The surveyor went ahead to put a caveat that since the boundaries are general boundaries, the existing boundaries should be maintained. The report concluded that the suit lands do not exist on the ground and that parcel MAKUYU/KIMORORI/BLOCK/1677 should read 0.437 ha and not 0.500 ha. The variance is 0.068 ha. Even if this is rectified, it does not resolve the problem in my view because the variance in the sub-parcels arising out of MAKUYU/KIMORORI/BLOCK/1545 was 0.135 ha.

27. The parties did not call the surveyors to present the survey reports and explain the differences in acreage, the Registry Index Map's showing the suit land vis-à-vis parcel MAKUYU/KIMORORI/BLOCK/1677 on the ground. In the case of **Prafulla Enterprises Limited v Norlake Investments Limited & another [2014] eKLR** the Court of appeal Justices Kantai Azangalala and Otieno JJA held that;

“..the fact that documents are produced by consent of the parties to a suit is not in itself proof of the contents of these documents. It only means that parties agree that those are the documents the contents of which are to be canvassed, or are in controversy but as to the proof of the same contents, witnesses are required to be produced and to be examined and cross-examined on the same contents unless the parties categorically admit the contents. Here the contents as to which was fake survey plan map and which was genuine were not admitted and so had to be proved and such proof never met the required standard”.

28. It is trite that the acreage depicted on the title should be reflected on the ground especially in fixed boundaries. Though it has not been explained whether the boundaries of the parcels MAKUYU/KIMORORI/BLOCK/1545 and 1677 are fixed or general, it can safely be assumed that the boundaries are general boundaries going by the report of the surveyors. In the case of **Samuel Wangau Vs. AG & 2 others (2009) eKLR**, it was held as follows:

“However, it is common ground that such maps (Registry Index Map) are not authorities on boundaries. Both the District Land Registrar and the District Land Surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the Registry Index Map in solving the dispute.”

29. The District surveyor advises that the mutations could not be traced. The reason why they were not captured in the Registry Index Map as at time of the report is not known. The surveyor's reports did not account for the unavailability of the proper Registry Index Map nor could they claim that the survey data for parcel MAKUYU/KIMORORI/BLOCK/1630 and the right Registry Index Map the subdivision of MAKUYU/KIMORORI/BLOCK/1630 to include MAKUYU/KIMORORI/BLOCK/1677 was not available. The custodian of the records is vested in the Director of surveys and his office.

30. The Survey Act (Cap 299, Laws of Kenya), Section 22 of that Act provides thus:

“Any survey of land for the purposes of any written law for the time being in force relating to the registration of transactions in or of title to land (other than the first registration of the title to any land made in accordance with the provisions of the Land Consolidation Act (Cap. 283) or the Land Adjudication Act (Cap.284)) shall be carried out under and in accordance with the directions of the Director.”

31. The Survey Act authorizes the Director of Surveys to delegate his or her powers to another officer or officers, though this by no means divests him or her of such powers. Section 3 (3) thus provides:

“The Director may delegate in writing all or any of his powers, duties or functions under the

provisions of this Act, or of any regulations made thereunder, either generally or specially to any officer appointed under subsection (1) of this Section and may at any time revoke or vary any such delegation:

Provided that no such delegation shall be deemed to divest the Director of all or any of his powers, duties or functions, and he may, if he thinks fit, exercise and perform such powers, duties and functions notwithstanding the fact that he has so delegated them.”

32. Section 7 of Land Registration Act requires that a land registry be maintained in every registration unit, in which a land register is to be kept, together with other relevant documents. The relevant provision thus reads:

“There shall be maintained in each registration unit, a land registry in which there shall be kept—

(a) a land register, in the form to be determined by the Commission...”

33. In relation to the creation of registration units, Section 6 (1) of the Act thus provides:

“For the purposes of this Act, the Commission in consultation with National and County Governments may, by order in the Gazette, constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units.”

34. . Section 6(4) thus provides:

“The office or authority responsible for land survey may, at any time, cause registration Sections or blocks to be combined or divided, or cause their boundaries to be varied, and immediately inform the Registrar of the changes.”

35. It is unfortunate the Land Surveyor and the Land Registrar have continued to give conflicting reports on the parcels of land under dispute.

36. Going by the report of the surveyor dated the 24/9/13 presented by the Plaintiff the boundary is intact. The Plaintiff has not demonstrated any encroachment by parcel No 1677. The Court does not have the benefit of a Registry Index Map which clearly shows the positioning of parcel MAKUYU/KIMORORI/BLOCK/1677. If MAKUYU/KIMORORI/BLOCK/1677 does exist on the Registry Index Map then the report dated 24/9/13 as regarding the boundaries shows that there is no encroachment.

37. The Plaintiff did not discharge the burden of proof as stated in section 107(1) of the Evidence Act which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The Plaintiff too has not proved fraud on the part of the Defendant.

38. Having reached the findings stated in the preceding paras, the Plaintiff is not entitled to damages. The same have not been proved.

39. I dismiss the Plaintiffs claim with costs in favour of the Defendant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 4TH DAY OF JULY 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Wamuyu HB for Juma for the Plaintiff

Ms Ndege HB for Muthomi for the Defendant

Irene and Njeri, Court Assistants