



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI (NAIROBI)

CASE NO 715 OF 2013

HARRISON KANYONI MWAI.....PLAINTIFF

VERSUS

MARGARET NJOKI GICHANA.....DEFENDANT

JUDGEMENT

Pleadings

Plaintiff filed this suit on 8.6.13 claiming that he is the registered owner of land parcel no. KIAMBU/LARI/264 while defendant owns an adjacent parcel no. KIAMBU/LARI/121. Plaintiff further pleads that in or around year 2000, defendant purported to subdivide her parcel no. 121 to create a new parcel no. 1678. The mutation forms for the alleged subdivisions were apparently not registered with the director of survey as the purported subdivision had encroached on plaintiff's parcel no. 264 and another adjacent parcel no. 107.

In year 2008 defendant again attempted to have the said mutations registered to no avail. However defendant went ahead and purported to excise a portion of the plaintiff's parcel no. 264. Plaintiff avers that on several occasions he has tried to have the dispute resolved by the district land registrar and surveyor to no avail. He therefore prays for judgement in the following terms:

1. A permanent injunction restraining the defendant by herself, her servant or agent from entering, remaining in, developing, annexing, excising or occupying a portion of Land parcel no. KIAMBU/LARI/264.
2. An order directed at the Land Registrar Kiambu and the District Surveyor accompanied by a surveyor(s) appointed by the parties to visit the suit premises and establish boundary between land parcel no. KIAMBU/LARI/264 and KIAMBU/LARI/121.
3. Costs.

The statement of defence was filed on 5.8.13, whereby defendant denies that she subdivided parcel no. 121, or that she encroached on parcel no. 264 and 107 or that she created parcel no. 1678. She however admits that the mutation forms for the subdivision are yet to be registered. She also admits that there was a boundary dispute between parcels no.121 and 107. She desires that plaintiff's suit be dismissed, with costs.

Plaintiff's case

Plaintiff testified and also adopted as evidence his statement filed on 18.6.13. He did not call any witnesses. His case is that he bought his land parcel no. Kiambu/Lari/ 264 in 1996 from one Kariuki Kamau. The land was five acres and was transferred to him. He was also shown the extent of his land but not the beacons. The portion of the land bordering that of the defendant was swampy and bushy and hence the boundary was not discernible. In the year 2000 he learnt that there was a problem as defendant was claiming 1 ¼ acres from parcel No. Kiambu/Lari/264. He also came to learn that defendant had subdivided her land and had assigned the disputed portion a number.

Apparently, plaintiff had learnt that the boundary dispute had been there even before he bought the land.

All that plaintiff desires is to have his 5 acres of land reflected in the title to be ascertained on the ground. Plaintiff also avers that he did seek assistance from the land registrar Kiambu but it appears the dispute was not resolved because the defendant declined to participate, that is why he still wants the land registrar and county surveyor to straighten the boundary.

In support of his case plaintiff produced the following documents as his exhibits, (Found in his list filed on 18th June 2013 and 23rd March 2015):

1. Title deed for parcel No. Kiambu/Lari/264

2. Certificate of official search for parcel No. Kiambu/Lari/264
3. Letter dated 13/10/2000
4. Mutation forms
5. Letter dated 8th August 2000
6. Registry index map(RIM)
7. Demand letter
8. Survey plan- Lari settlement scheme
9. Surveyor sketch plans

Defence Case

Defendant gave oral evidence and she also adapted her statement dated 1st August 2013 as her evidence. She did not call any witnesses. She admits that plaintiff is her immediate neighbor. She avers that there was a boundary dispute between her husband (who originally owned parcel no 121) and the person who sold land to plaintiff, but that the dispute was resolved in year 2000. She also admits that where the two parcels of land border each other, the land was marshy but it is now dry.

Defendant is also aware that the plaintiff had brought the land registrar to the land to resolve the dispute but she claims that she was not notified of the visit. She further stated that her land was 14 acres and she has subdivided the same into 8 portions whereby some of the portions were sold by her husband. She claims that for the disputed portion, the land is intact and it is no. 1787.

Defendant has no problem if plaintiff's land is measured on the ground to ascertain that it is 5 acres. However she was not keen to have her land measured to ascertain that the same is 14 acres.

In support of her case defendant produced the following documents as her exhibits (to be found in her amended list dated 10th April 2015):

1. Copy of the title deed for LR NO. KIAMBU/LARI/121
2. Copy of the title deed for LR NO. KIAMBU/LARI/1678
3. Copy of mutation form used to subdivide LR NO KIAMBU/LARI/121
4. Copy of green card for LR. NO. KIAMBU/LARI/121
5. Photographs showing the boundary
6. Letter dated 13th February 2012 from Gachoka Mwangi & Company Advocates
7. Letter dated 24th February 2012
8. Statement by a surveyor

Determination

I have no doubts that the dispute herein is a boundary one, where by the dispute existed even before plaintiff bought his land. Defendant admits that much. Defendant avers that the dispute was settled in year 2000 but she has not given any evidence regarding this settlement. It is also apparent that defendant has tried to, or has already subdivided her original parcel no. 121 notwithstanding the fact that the boundary dispute has never been resolved.

Plaintiff has availed a copy of the title to show that he owns land parcel no. KIAMBU/LARI/204 Whereby the land measures 5 acres.

The title deed of the plaintiff was issued on 22nd May 1996. On the other hand the records of ownership for defendants land are messy and hence not discernible. In defendant's list of documents dated 10th April 2015, item 1 is supposed to be a copy of title deed for KIAMBU/LARI/121, but no such document was actually availed in that list. Item 4 in the said list is a green card containing the history of parcel no. KIAMBU/LARI/121 whereby the first registration was on 5th February 1977. This land was 5.87 hectares. The land was subdivided but the resultant parcels are not clearly indicated. There is also an indication that restrictions were registered in respect of this land but the land continued to be alienated despite those restrictions. Entry no 9 in the green card shows that the title was closed on 30th May 2008 upon sub-partitioning of new numbers which are no. 1671 and no.1678. Defendant has not clarified as to how the suit land came to be No. 1787.

Interestingly, defendant in her statement dated 1/8/2013 is claiming the disputed portion of land through adverse possession. However, she did not give further and better particulars regarding this claim considering that the land was for a long time marshy and hence was not being utilized.

The law applicable on boundary dispute is captured under section 18 (2) of the land registration act where it is stipulated that “ **The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.**” This provisos is a replica of what was contained in section 21(4) of the now repealed registered lands act cap 300 laws of Kenya.

In the case of **Andrew Marigwa vs Josphat Ondieki Kebati Kisii ELC no.1163 of 2016 (formerly HCCC 82 of 2011)**, the court while dealing with a boundary dispute stated as follows; “**Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made reference of the matter to the land registrar and county surveyor who are the persons mandated under the act to deal with disputes related to boundaries. The land registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the land registration act 2012**”.

Likewise in the instant case it is the land registrar and surveyor who have the technical expertise to resolve this dispute. It is rather surprising that defendant does not want to have her land measured on the ground to ascertain the acreage as 14 acres. However, she has no problem if plaintiff’s land is measured on the ground to ascertain that it is five acres. In the circumstances, I proceed to give Final orders as follows;

Plaintiff’s claim is allowed in the following terms.

1. An order is hereby issued to the Kiambu County Land Registrar and Kiambu County land surveyor to visit the suit land premises and establish the correct boundary between parcel no KIAMBU/LARI/264 and KIAMBU/LARI/121 and to ascertain that land parcel no KIAMBU/LARI/264 is 5 acres on the ground.
2. The parties are at liberty to be accompanied by their own surveyors when the above mentioned exercise is being undertaken.
3. The exercise mentioned in order 1 above is to be undertaken with or without the presence of the parties as long as the land registrar notifies the parties as to when the exercise will be undertaken.
4. Plaintiff is to meet the scene visit expenses in order to facilitate the smooth implementation of this Judgment but he is to recover such expenses as part of costs of the suit from the plaintiff.
5. A permanent injunction is hereby issued restraining the defendant by herself, her servants or agents from entering, remaining in, developing, annexing, excising or occupying any portion of land parcel no KIAMBU/LARI/264.
6. Any title deed issued in respect of land within parcel no. Kiambu/Lari/264, be it no Kiambu/Lari/ 1678, 1787, or any other number, is to be cancelled forthwith and the land is to revert back to parcel no. 264.
7. The relevant registry index map is to be amended accordingly once the boundary is marked out.
8. Defendant is condemned to pay costs of the suit.

DATED AND SIGNED AT MERU THIS 18TH DAY OF SEPTEMBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

DELIVERED AT NAIROBI ELC COURT THIS 4TH DAY OF OCTOBER, 2018

S.OKONG’O

ELC JUDGE - MILIMANI