



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 62 OF 2014

JOHN JUMA MUCHELESI.....PLAINTIFF

VERSUS

GRACE MANG'ENI NABUKIYABI.....DEFENDANT

J U D G M E N T

JOHN JUMA MUCHELESI (the plaintiff herein) moved to this Court vide his amended plaint dated 24th March 2014 in which he sought Judgment against **GRACE MANG'ENI NABUKIYABI** (the defendant herein) in the following terms: -

- (a) Eviction from the plaintiff's land parcel NO EAST BUKUSU/SOUTH NALONGO/3675 and a permanent injunction against the defendant, her servants, employees and/or assignees from entering and or remaining on land parcel NO EAST BUKUSU/SOUTH NALONDO/3675.**
- (b) Rectification of register appertaining to land parcel NO EAST BUKUSU/SOUTH NALONDO/3676 for the acreage to read 0.069 Ha.**
- (c) Costs of the suit.**
- (d) Any other relief the Court shall deem just and fit to grant.**

The plaintiff's case is that although the defendant acquired a portion of land measuring 0.069 Ha from the plaintiff's mother **RAZOA NAKHANU**, she has fraudulently registered her portion as measuring 0.07 Ha through fraud or misrepresentation. That on diverse dates commencing 10th March 2014, the defendant without any colour of right trespassed onto the land parcel **NO EAST BUKUSU/SOUTH NALONDO/3675** and started sinking a foundation for permanent structures and delivery building materials sand, ballast and timber without the prior consent of the plaintiff.

The particulars of fraud and misrepresentation on the part of the defendant were pleaded in paragraph **3A** of the amended plaint as follows: -

- 1. Making a false report to the Land Registrar to obtain registration for 0.70 Ha beyond what she purchased.**
- 2. Making a false report to the police that the plaintiff and his mother RAZOA NAKHANU are guilty of interfering with a boundary when she knew it is untrue.**
- 3. Denying and denouncing the report by the Land Registrar and Government Surveyor.**
- 4. Refusing to rectify her land certificate – title deed to read 0.069 Ha in lieu of 0.07 Ha.**

As a result, the plaintiff has suffered loss, damage and the same may aggravate if the plans and schemes of the defendant are carried out to completion.

Together with the plaint, the plaintiff filed two statements the first dated 24th March 2014 and the second dated 19th February 2020 and one statement by her mother **RAZOA NAKHANU (PW 2)** dated 19th February 2020. The plaintiff also filed the following as his documentary exhibits: -

- 1. Sale agreement dated 27th August 2002 between RAZOA MAKHANU and GRACE NABUKIYABI.**

2. Certificate of Search in respect of the land parcel NO EAST BUKUSU/SOUTH NALONDO/3676 in the name of GRACE MANGENI NABUKIYABI showing the approximate area as 0.07 Ha.
3. Certificate of Search in respect of the land parcel NO EAST BUKUSU/SOUTH NALONDO 3675 in the names of JOHN JUMA MUCHELESI showing the approximate area as 0.53 Ha.
4. A Bond and Bail receipt in the names of JOHN JUMA MUCHELESI.
5. Letter dated 14th October 2002 from the District Land Registrar Bungoma.
6. Receipt No 0161703 for Kshs. 3,000/= being survey fees.
7. Letter dated 21st January 2008 from the District Commissioner Bungoma.
8. Letter dated 5th February 2008 from the Provincial Commissioner Western Province.
9. Letter dated 24th September 2008 from the Ministry of Lands.
10. Photographs.
11. Medical documents.

In his two statements, the plaintiff confirms that he is the registered proprietor of the land parcel **NO EAST BUKUSU/SOUTH NALONDO/3675** (the suit land) while the defendant is his neighbour and the proprietor of the land parcel **NO EAST BUKUSU/SOUTH NALONDO/3676**. The defendant has however excised part of the suit land where she has put up building materials for purposes of constructing a building thereon. That using the police and fake surveyors, the defendant has not only interfered with the boundary between the two parcels of land but has also humiliated the plaintiff by having him and his mother and brother arrested and charged in **BUNGOMA CMCC No 2166 of 2016**. This forced the plaintiff to flee to Uganda until 2008. When the plaintiff attempted to have the Land Registrar Bungoma to carry out an official survey, mapping and fixing of the boundary, the defendant instigated the police to go after him. That the defendant never allows any fixed boundary feature to last and uses goons to remove the same. That finally, a full survey mapping and fixing of the boundary was done on 24th September 2008 which showed that the defendant's land measures 0.069 Ha yet the structures constructed by the defendant are situated on the suit land.

In her statement **RAZOA NAKHANU WAFULA (PW 2)** states that in the year 2001 when her daughter **GENTRIX NASAMBU MUCHELESI** was very sick at the Bungoma hospital, she was introduced to the defendant who was working at the said hospital. That the defendant agreed to help her secure drugs for the treatment of her daughter and in 2002, she informed the plaintiff that she (defendant) needed land equivalent to the value of the drugs which she had procured for the plaintiff. Because of the condition in which her daughter was, the plaintiff agreed to have part of her land excised to meet the costs of the daughter's treatment. However, she never signed any sale agreement nor attended any land Control Board meeting. That the defendant wants to swindle her family of their land and the plaintiff's claim is authentic.

By an amended defence dated 18th November 2014, the defendant denied having trespassed onto the suit land as well as all the allegations of fraud levelled against her. She added that the plaintiff and two others never appealed their conviction and sentence in **BUNGOMA CMCC No 2166 of 2006** and it is therefore preposterous for the plaintiff to allege that the defendant made a false report to the police. That it was the plaintiff and two others who interfered with the boundary features separating the suit land and land parcel **NO EAST BUKUSU/NORTH NALONDO/3676** and were charged and fined Kshs. 2,000/= each or in default serve one (1) month imprisonment.

The defendant pleaded further that the orders sought by the plaintiff are not available to him since the defendant is only occupying what she purchased. The defendant also questioned this Court's jurisdiction to determine this case the same being a boundary dispute and purely within the realm of the District Land Registrar. She therefore asked that the Court dismisses the plaintiff's suit with costs.

The defendant also filed her statement dated 7th April 2014, a list of documents dated 12th April 2015 and a supplementary list of documents dated 24th February 2020.

In her statement dated 7th April 2014, the defendant states that in August 2002, she purchased a portion of land measuring 0.07 Ha comprised in the land parcel **NO EAST BUKUSU/SOUTH NALONDO/2964** from **RAZOA NAKHANU WAFULA (PW 2)** at a consideration of Kshs. 24,000/= which she paid in full before the land was transferred to her. Her land became parcel **NO EAST BUKUSU/SOUTH NALONDO/3676** which borders the suit land. In 2002, she started developing her land by building rental houses and in 2008, she erected a permanent structure on the remaining portion consisting of a shop and a single bedroom house. In 2006, the plaintiff and his mother **RAZOA NAKHANU (PW 2)** and one **WANYONYI** interfered with the boundary features between her land and the suit land. The defendant reported to the police and the three were arrested, charged at Bungoma Court where they were convicted and fined Kshs. 2,000/= or serve one-month imprisonment. That in 2008, the plaintiff informed her that officials from the Land Department would visit on 24th September 2008 to determine the boundary between the two parcels of land. However, the officials never visited and since then, there have been no problems between the parties until the defendant was served with summons in this case. That the defendant has not dug any foundation on the plaintiff's land and the existing boundary was fixed by the District Land Surveyor during the sub – division and not by the Land Registrar as alleged by the plaintiff.

The defendant filed two lists of documentary evidence one dated 12th August 2015 and s supplementary list dated 24th February 2020.

Those lists contained the following documents: -

1. **Title deed for the land parcel NO EAST BUKUSU/SOUTH NALONDO/ 3676.**
2. **Transfer of land form.**
3. **Proceedings in BUNGOMA COURT CRIMINAL CASE No 2166 of 20006.**
4. **Photographs**

The hearing commenced on 3rd November 2020 and the plaintiff testified and called as his witness his mother **RAZOA NAKHANU WAFULA (PW 2)**. They adopted as their evidence their respective statements and also produced the list of documents as their documentary evidence. The defendant also adopted as her evidence the statement filed herein and produced the two lists of documents as her documentary evidence.

Submissions were thereafter filed both by **MR WASWA** instructed by the firm of **WABWILE & COMPANY ADVOCATES** for the plaintiff and by **MR MUSUMBA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by both parties as well as the submissions by Counsel.

The starting point must be whether this Court has the requisite jurisdiction to determine this suit. This is because, in paragraph 8 of the amended defence, the defendant pleaded that: -

“The jurisdiction of this Honourable Court is denied as the matter is purely boundary dispute which falls within the realm of the District Land Registrar.”

An issue of jurisdiction must be determined at the earliest opportunity irrespective of the evidence before the Court. This is because, once the Court finds that it has no jurisdiction, then it must down it's tools and take no further step in the matter – **OWNERS OF THE MOTOR VESSEL “LILLIAN S” .V. CALTEX OIL (KENYA) LTD 1989 KLR 1**.

Section 18 (2) of the Land Registration Act prohibits this Court from determining a dispute relating to boundaries to registered land. It provides that: -

18(2) “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.”

Clearly therefore, a party who has a dispute relating to a boundary must first approach the Land Registrar before moving to Court. In **JOSEPH NJUGUNA MWAURA & OTHERS .V. REPUBLIC C.A CRIMINAL APPEAL No 5 of 2008 (NBI)** the Court stated that: -

“It is incumbent upon any Court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction. The authority of Court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on it's decision making process.”

The Court then went on to add that: -

“In our understanding, Courts have no jurisdiction in matters over which other arms of Government have been vested with jurisdiction to act.”

That was of course a criminal case but the principles apply with equal force to any other litigation.

Finally, in **SPEAKER OF THE NATIONAL ASSEMBLY .V. JAMES NJENGA KARUME 1992 eKLR**, the Court of Appeal observed that: -

“ there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed.”

The issue of jurisdiction is so paramount that it can be raised and determined by the Court on its own motion. It is on the basis of the above legal provision and precedents that this Court must first determine if it is seized with the jurisdiction to determine this dispute.

Among the documents produced by the plaintiff in support of his case is a report dated 24th September 2008 prepared by **K.E.M. BOSIRE** the **DISTRICT LAND REGISTRAR BUNGOMA**.

It is headed: -

“BOUNDARY DISPUTE BETWEEN LAND PARCEL – E. BUKUSU/S. NALONDO/3675 .V. E. BUKUSU/S. NALONDO/3676 held on 24TH SEPTEMBER 2008”

The report contains the list of those present, their testimonies, the Registrars findings and the decision/finding. For purposes of this Judgment, I shall only capture the full findings and decision/Judgment. These are: -

“FINDINGS: -

- 1. Land parcel E. BUKUSU/S/NALONDO/3675 shares a boundary with E. BUKUSU/S. NALONDO/3676.**
- 2. Both the complainant and the respondent purchaser have valid title deeds.**
- 3. The complainant informed the Lands Office Bungoma in 2002 of the incursion by the purchaser.**
- 4. The sale agreement shows the purchaser bought 0.069 Ha.**

DECISION/JUDGMENT

Surveyors have remarked the boundary between E. BUKUSU/S. NALONDO/3675 and E. BUKUSU/S. NALONDO/3676 restoring the original boundary using cartography from the Provincial Surveyor. The complainant is advised to seek rectification of the register so that land parcel E. BUKUSU/S. NALONDO/3676 register and parcel file reads acreage of 0.069 Ha.

Any aggrieved party has a right to appeal for 30 days from the date hereof to the Chief Land Registrar and or the High Court of Kenya.

K. E. M. BOSIRE

DISTRICT LAND REGISTRAR

BUNGOMA & MT ELGON” Emphasis added.

The plaintiff was the complainant while the defendant was the Respondent. The report has been admitted in evidence without question. It is clear therefore that the boundaries between the suit land and land parcel **NO EAST BUKUSU/SOUTH NALONDO/3676** had already been determined by the Land Registrar on 24th September 2008 before this suit was filed on 24th March 2014 in accordance with the provisions of Section 18 of the Land Registration Act. That report was not challenged by the defendant. She however suggested in paragraph 14 of her statement that it was prepared without her in – put. This is what she states: -

14 “That sometime in the month of September 2008, I was informed by the plaintiff herein that the officials from the Land Department will come on 24.9.08 to determine the boundary between my land and his but the said officials never turned up.”

That cannot be true because the report of the Land Registrar dated 24th September 2008 shows that not only was the defendant present during the exercise but that she addressed the Land Registrar before he arrived at his decision.

Clearly therefore, the objection to this Court’s jurisdiction is not well taken and must be dismissed.

Having settled the issue of jurisdiction, it is not in dispute that the plaintiff is the registered proprietor of the suit land while the defendant is the proprietor of the neighbouring land parcel **NO EAST BUKUSU/SOUTH NALONDO/3676**. It is also common ground that the defendant purchased her land from **RAZOA NAKHANU WAFULA (PW 2)** the defendant’s mother. It is the plaintiff’s case however that the defendant has trespassed onto the suit land and is putting up constructions thereon. He has also pleaded fraud on the part of the defendant that although she purchased a portion measuring 0.069 Ha from **RAZOA NAKHANU WAFULA (PW 2)**, she registered herself as proprietor of a land parcel measuring 0.07 Ha which is beyond what she purchased.

It is not in dispute that the defendant, as per the agreement between her and **RAZOA NAKHANU WAFULA (PW 2)**, purchased a parcel of land measuring 0.069 Ha. She admitted as much when cross – examined by **MR WASWA** and said: -

“I purchased 0.07 Ha. The agreement talks of 0.069 Ha but when I was given the title deed, they rounded it to 0.07 Ha. When I asked, the Lands Officer told me they usually estimate the size to the nearest whole figure.”

That notwithstanding, the title deed issued to the defendant in respect to her land parcel **NO EAST BUKUSU/SOUTH NALONDO/3676** reads that the **“approximate area (is) 0.07 Ha.”** Ordinarily, such a small difference in the size of land purchased should not be a cause for alarm. Indeed, this Court takes judicial notice of the fact that the sizes of land parcels are usually described as **“approximate.”** However, in a situation such as this where the bone of contention is the 0.001 Ha on which the plaintiff claims the defendant is putting up buildings, this Court must intervene. One cannot enter into an agreement to purchase a bicycle and at the same time, use the same agreement to acquire a motor cycle. He would have to enter into a completely new agreement. And since the defendant purchased only 0.069 Ha from **RAZOA NAKHANU WAFULA**, she was only entitled to that acreage of land. Nothing more and nothing less. The record shows that when the parties appeared before the Land Registrar on 24th September 2008, the plaintiff complained that the defendant excised land from her side.

The defendant denied that allegation claiming that the plaintiff was only “jealous of (her) development.” The Land Registrar, as is now clear from his Judgment, agreed with the plaintiff and advised him to seek rectification of the register so that the acreage of the land parcel **NO EAST BUKUSU/SOUTH NALONDO/3676** reads 0.069 Ha. That is clear evidence of encroachment.

In his submissions, Counsel made heavy weather of the fact that the plaintiff and others who included his mother **RAZOA NAKHANU WAFULA (PW 2)** were convicted in **BUNGOMA COURT CRIMINAL CASE No 2166 of 2006** for interfering with boundary features and therefore, by dint of the provisions of **Section 47A** of the **Evidence Act**, that conviction is conclusive evidence that the plaintiff was guilty as charged. That is a correct exposition of the law and this Court must abide by the decision of the trial Magistrate in that case. In any event, there is no appeal before me against that decision and besides, this Court would not be seized of the jurisdiction to over – turn that conviction. The less I comment about that Judgment, the better. But it is not lost to this Court that neither the Land Registrar nor Land Surveyor were witnesses in the criminal trial to confirm where exactly the boundary between the two parcels of land was. And since there was no evidence placed before me that the boundaries between the two parcel of land had been determined in accordance with the provisions of **Section 18** of the **Land Registration Act** prior to 9th July 2007 when the plaintiff was convicted in **BUNGOMA CRIMINAL CASE No 2166 of 2006**, this Court must therefore arrive at a finding, which I hereby do, that it was not until 24th September 2008 when the Land Registrar in exercise of his powers under **Section 18** of the **Land Registration Act** determined the boundary and advised the plaintiff to apply for rectification of the register. And that is among the remedies that the plaintiff seeks from this Court.

The defendant’s Counsel also made the following submission: -

“The defendant submits that her title is approximately 0.07 Ha and no evidence was led by the plaintiff to prove that indeed the defendant’s land is in excess of 0.001 Ha.”

However, such proof is found, firstly, in the fact that although the defendant purchased a portion measuring 0.069 Ha, her title reads approximately 0.070 Ha a difference of 0.001 Ha. Secondly, the report by the District Land Registrar **MR K. E. M. BOSIRE** confirms as much and advised the plaintiff to seek rectification of the register. That is the evidence of an expert witness and there is no reason why this Court should ignore it.

Counsel for the defendant submitted finally, that the defendant, by virtue of being the registered proprietor of the land parcel **NO EAST BUKUSU/SOUTH NALONDO/3676** is entitled to the protection provided by **Section 24(a)** of the **Land Registration Act** and is therefore entitled to all the rights and privileges appurtenant thereto. That again is a correct statement of the law. However, such title must be a true reflection of what the title holder bargained for. And that is why **Section 80** of the **Land Registration Act** donates to this Court the power to order for rectification of any register if satisfied that any registration was obtained through fraud or mistake. In the circumstances of this case, I am so satisfied. And in a case such as this where the Land Registrar recommends a rectification of the register to reflect the proper acreage, this Court must defer to such finding by the expert witness.

Ultimately therefore and having considered the evidence by both parties, this Court is satisfied that the plaintiff has proved his case as required in law.

There shall be Judgment for the plaintiff as against the defendant in the following terms: -

- 1. The defendant has trespassed onto the land parcel NO EAST BUKUSU/SOUTH NALONDO/3675 and specifically a portion measuring 0.001 Ha.**
- 2. The defendant shall within three (3) months of this Judgment vacate from the said portion or in default, be evicted therefrom.**
- 3. An order of permanent injunction is hereby issued restraining the defendant, her servants, employees and/or assignees from entering or remaining on the said portion of land.**
- 4. The Land Registrar Bungoma is directed to rectify the register to land parcel NO EAST BUKUSU/SOUTH NALONDO/3676 to read 0.069 Ha instead of 0.07 Ha.**
- 5. The defendant shall meet the plaintiff’s costs of this suit.**

BOAZ N. OLAO

J U D G E

21st July 2021.

Judgment dated, signed and delivered at **BUNGOMA** on this 21st day of July 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

BOAZ N. OLAO

J U D G E

21st July 2021.