



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 93 OF 2015**

**GUERRINO KIMOTHO WAGOKI.....PLAINTIFF**

**VERSUS**

**EDWIN CHELOTI.....1<sup>ST</sup> DEFENDANT**

**MAGDALINE CHELOTI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff vide a plaint dated 22/6/2015 and filed on 1/7/2015 instituted the present suit seeking judgment against the defendants for:

- (a) An order directing that a land surveyor comes to ascertain the boundaries of the plots on the ground.
- (b) Mesne profit.
- (c) Any order declaring that he is the legal owner of all that parcel of land known as KITALE MUNICIPALITY BLOCK 7/145.
- (d) Costs.
- (e) Interest.
- (f) Any other relief that this honourable court shall deem fit to grant.

**PLEADINGS**

**The Plaintiff**

2. The plaintiff's case is that the defendants have encroached on his plot **Kitale Municipality Block 7/145**, to which he has obtained title. The plaintiff avers that the defendant's father filed a suit against him and that the plaintiff obtained an injunctive order in that suit which was withdrawn. He states that the defendants have despite the withdrawal of the said suit continued to construct and carry business on the suit land.

**The Joint Amended Defence and counterclaim**

3. The defendants filed their joint defence on 29/7/2015. They later filed amended defence and defence to counterclaim on 2/3/2017. They admit that they are the children of one **Kenneth Cheloti** (deceased) on whose plot they have lawfully occupied for 17 years and further aver that it is the plaintiff who has trespassed into the said plot. In their counterclaim they claim the portion that they have occupied by way of adverse possession and seek a declaration that they are entitled to be registered as owners thereof.

**Amended Reply to Defence and Defence to Counterclaim**

4. The plaintiff filed amended reply to amended defence to counterclaim on 13/3/2017, reiterating the contents of the plaint in its entirety.

**THE EVIDENCE OF THE PARTIES**

**The Plaintiff's case**

5. The hearing of the suit took place on the **18/7/2017** when the plaintiff **Guerrino Kimotho Wagoki** testified. His evidence is that the two defendants are his neighbours who trespassed onto the suit land which he was allocated by the government. Originally the defendants' father had complained that the suit land was his property; the original allotment letter was thus cancelled and the suit land reduced in size. His plot was allocated the number **145** and the defendant's father's plot was **146**; according to the plaintiff there has been other litigation regarding the suit land being **Kitale Civil Appeal No 95 Of 1997** which was decided but the defendants' father still insisted that the plaintiff was in occupation of his plot and filed another case **Kitale HCCC No 102 Of 2003**; the plaintiff obtained an injunction in that case and the defendants' father later withdrew the suit on **14/7/2005**. However the defendant's father failed to vacate the land; the plaintiff then obtained title to the suit land and continued paying the outgoings in respect thereof; according to him he has stayed on the suit land for more than **12** years. He stated that he only wanted the defendants to remain on their plot while he remained on his.

6. On **24/4/2015** by consent of the parties the surveyor's report which had been marked as **PMFI 3** was proposed to be produced and marked as "**P. Exhibit 3**". The plaintiff then closed his case.

#### **The Defendants' Defence**

7. **DW1, Magdaline Cheloti**, the 2<sup>nd</sup> defendant testified on **16/7/2021**. Her evidence is that the plaintiff is her neighbour and she has letters of administration in respect of her late father's estate; that she and her brother the 1<sup>st</sup> defendant have lived on the suit property since the year **2010** but the structures on the suit land date back to **2002**; that they are still in possession of the area that their late father left them and no boundaries have been altered. She denied having encroached on the plaintiff's land.

8. The defendants' case was closed on **25/2/2021**.

#### **SUBMISSIONS OF THE PARTIES**

9. The plaintiff's written submissions was filed on **23/3/2021** while the defendants filed their submissions on **14/6/2021**.

#### **DETERMINATION**

10. I have considered the plaint, the amended defence and counterclaim and the submissions filed. The main issue arising for determination is whether the defendants have encroached on the plaintiff's land.

11. I note that the parties' claims to the land dates back to the period while the land was not yet surveyed. It appears that after survey each party got their own portion. However the survey came with alteration of boundaries. I find that the defendants are clinging onto the old boundaries of their unsurveyed plot. This can not be tenable because the survey is the one that defines the extent of land that is to be allocated to any person. The defendants do not demonstrate that the survey granted them the land that is claimed by the plaintiff. The plaintiff has already obtained a title to the land allocated to him. That title is based on the survey. There is no other basis of defining the boundaries between the plaintiff and the defendants save that survey. The surveyor's report dated **22/12/2016** has already established that the defendants have encroached on the plot allocated to the plaintiff. The defendants produced no title in their name to enable them establish their claim against the plaintiff who already has a title.

12. It is clear that there has been previous litigation in respect of the suit land dating back to the **1990s** and the defendant's father's allotment letter was issued in the year 1993 and that none of the parties can be said to have been in quiet possession of the suit property which quiet possession is integral to establishing adverse possession. Therefore I find that I do not even require to investigate whether the other factors needed to establish adverse possession.

13. The upshot of the foregoing is that I find that the plaintiff has established his claim on a balance of probabilities while the defendants have failed to establish their counterclaim on a balance probabilities.

14. Consequently the plaintiff's claim has merit and is allowed and the defendant's counterclaim is dismissed and this court issues the following final orders:

**a. The boundaries to the plot owned by the plaintiff shall be as identified in the surveyor's report dated 22/12/2016 produced as evidence in this suit.**

**b. The county surveyor shall visit the suit land and fix the beacons in accordance with the surveyor's report dated 22/12/2016 to mark the actual boundaries of plot number Kitale Municipality Block 7/145 on the ground**

**c. The defendants shall remove themselves and their property from all that plot of land known as Kitale Municipality Block 7/145 immediately the beacons are affixed by the county surveyor and the plaintiff shall take possession of the suit land in whole.**

**d. The parties' claims to their respective parcels are subject to the orders issued in the judgment of this court issued in Kitale Petition No 5 of 2018.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC.,**