



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC. SUIT NO. 166 OF 2014**

**SHERI NAURIA.....PLAINTIFF**

**= VERSUS =**

**STEPHEN EKIRAPA.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff filed a suit against the defendant vide a plaint dated 27/8/2014 praying for judgment against the defendant for;

**a) Eviction and permanent injunction as per paragraph 5 of the plaint.**

**b) General damages and mesne profits as per paragraph 6 of the plaint.**

**c) Costs.**

**d) Interest.**

**e) Any other relief this Honourable Court deems fit and just to grant.**

2. The plaintiff avers that on or about April 2013 while he was away in Nairobi, the defendant without any colour of right, trespassed onto the plaintiff's parcel of land known as SOUTH TESO/ASINGE/1680.

3. The defendant entered appearance and filed their defence on 21/1/2015 where he averred that he had purchased L.R. NO. SOUTH TESO/ASINGE/614 from OMONGAISE ETYANG ETWANI before and prior to the plaintiff and has put up a home and investments on the suit land. He stated that there is another suit over the same subject matter in BUSIA HC ELC NO. 151 OF 2013 which he sought to have consolidated with this suit. He further avers that L.R. NO. SOUTH TESO/ASINGE/1680 was fraudulently obtained since KARAKACHA ITWANI had passed away before signing the transfer documents. He pleaded the particulars of fraud on paragraph 6 of the defence as;

*i. Transferring L.R. NO. SOUTH TESO/ASINGE/1680 after the demise of the previous registered owner and without the filing of a probate and administration cause.*

*ii. Submitting falsified documents before the Land Control Board and the Land Registrar Busia to effect transfer.*

*iii. Giving false information both to the Land Control Board and the Land Registrar.*

*iv. Backdating transfer documents in favour of himself to obtain title.*

4. The matter proceeded for hearing of the case on various dates between 2015 and 2020. PW1, Sheri Nauria, gave her evidence on 21/4/2015 testifying that on 5<sup>th</sup> July 2013, she got to know the defendant when she found him in her land she had bought the land South Teso /Asinge/1680. She produced her copy of title deed as MF1(1) and a copy of search as MF1(2). After being told the defendant was on her land, she reported to the police and the police asked her to get land documents which she presented. She found the defendant had cultivated on the land and built a semi-permanent house there. He had also removed the surveyor's boundary marks.

5. The plaintiff added that she reported to the assistant chief who called a meeting at the shamba. The person who sold the land to her was also there. The assistant chief directed the defendant to remain on his land and the boundary was replanted but the defendant uprooted it again. She brought the Land Registrar and Surveyor to the land but they did not restore the boundary. She produced a copy of the resolution of

10/3/2014 reached by the Assistant Chief's Committee and the minutes of the same date produced as MF1 (3) and (4) respectively. She prayed for the defendant to be evicted and injunctioned and for costs. She also prays for damages for the land as she has been denied user.

6. On cross-examination, she stated she bought the land from Etyang Joseph and the defendant's land borders hers. The defendant's land is on the lower portion and hers is on the upper portion. Her land was curved from parcel number 614 from which the defendant was also buying a portion. She bought her parcel in 2013 and denied that she obtained the title deed to her parcel using fraudulent means. Though she reported the matter to the Land Surveyor and Registrar, she did not have any report on their findings after hearing the parties and visiting the disputed land.

7. **PW2**, Sylvester Otwane Papata, adopted his witness statement dated 9/1/2015. He testified that on 9/1/2013, the plaintiff called him and asked him to carry out a search at lands office on land she wanted to buy. He carried out a search with Mary Emusungu in the presence of the seller JOSEPH ETYANG OMONGAISE and found the suit land without any problem. In February, the plaintiff came from Nairobi and brought a surveyor who curved out her one acre and planted a sisal boundary. She paid the owner Kshs. 113,000/= being the full purchase price and they made a written agreement in which he was a witness. That the plaintiff later called him in March 2013 to say that she had heard that someone had constructed on her land. when he went to the scene he found that indeed the defendant had constructed a semi-permanent house and pit latrine on L.R.NO SOUTH TESO/ASINGE/1680.

8. The witness further stated that the plaintiff came on 5/7/2013 and reported the matter to the Assistant Chief and the seller. When they went to the site to resolve the issue, they found that the defendant had uprooted the sisal boundary and the defendant left before the meeting ended. Pw2 stated that the seller decided to replant the boundary and the plaintiff reported the matter to the Land Registrar and Surveyor who later visited the scene. That the Land Registrar found the land is the plaintiff's name and removed the caution placed by the defendant and advised the plaintiff to proceed with using the land but the defendant refused to vacate.

9. On cross-examination, PW2 stated that parcel 614 was about five acres and PW1 was buying only one acre. The plaintiff's land borders that of the defendant. The dispute is over their common boundary and the land itself. He stated that the Land Registrar and Surveyor did not resolve the boundary dispute between PW1 and the defendant.

10. **PW3**, Faustine Ekisa Gabriel, adopted his written statement dated 9/1/2015 as his evidence in chief. He testified that on 13/2/2013, the plaintiff called to inform him that she had found land to buy and she wanted him to be her witness. He accompanied her to the land and the surveyor later joined them. They agreed on the purchase price at Kshs.113,000/= for one acre. After agreeing, the private surveyor took out measurements for one acre and planted a sisal boundary. PW3 said they were shocked to later learn that the defendant had trespassed and constructed on the plaintiff's land. Pw3 was present when the Land Registrar and the District Surveyor visited the scene and found that the sisal boundary had been uprooted with the defendant still on the plaintiff's land.

11. On cross examination, PW3 confirmed that the defendant's land neighbours that of PW1. He had attended the hearing of the dispute before the Assistant Chief but when going to the suit land, the defendant went away. He did not agree with the chief's report of 10/3/2014 that the defendant had encroached into the plaintiff's land by two steps since the defendant had taken the whole land. The Land Registrar and Surveyor visited the disputed land and he attended on the invitation of the plaintiff. The Land Registrar and surveyor then asked the parties to go to his office. He agreed that the dispute between the plaintiff and the defendant is over the position of the boundary. On re-examination, he stated that even if the boundary between the land of the plaintiff and defendant is resolved, the defendant would need to leave the plaintiff's land.

12. **PW4**, Omangaise Etyang Etwani, testified on 27/9/2017 stating that he knows the plaintiff and in 2013 he had sold the defendant one acre first and subsequently, the plaintiff also bought one acre. That they entered into a land sale agreement when he sold land to the plaintiff and he produced the sale agreement as MFI-4. He gave the plaintiff title and the land was transferred to her. He showed her the boundary and also he had showed the defendant his boundary but the defendant refused to build on the land sold to him instead building on the plaintiff's portion.

13. **PW4** stated he had left a grass thatched house on the plaintiff's land before he went to Uganda which house is the one being used by the defendant. That it was the surveyor who put the boundary and they went to the land control board and obtained consent to transfer. He stated that the defendant built on the plaintiff's portion of the land and is also using it at the same time the defendant is also using his share of land. PW4 continued in evidence that he has not processed the title for the defendant because he refused to stay on the land sold to him. He denied that he sold the plaintiff the same land that he had sold to the defendant. That when the defendant uprooted the boundary, PW3 was called by the area assistant chief to come and put the boundary again.

14. On cross examination, PW4 stated that there was another land case where he has been sued with others in Busia HC 151 of 2013. Those people wanted to get title deeds for their parcel of lands and the plaintiff herein is one of the defendants and the defendant was one of the plaintiffs.

15. PW5, Bernard Oramisi Etyang, who gave his evidence in chief and stated that PW4 is his father who sold the plaintiff one acre of land and also sold the defendant one acre portion of the same piece of land. That the defendant bought his portion first and he was shown his boundaries. That the defendant was sold a portion different from the portion sold to the plaintiff. The plaintiff called the surveyor who demarcated boundaries to her land before the plaintiff and his father appearing to the Land Control Board and the transfer was done and the plaintiff was given title to the land.

16. **PW5** continued in evidence that there was a house of his father on the land. That they later got to know that the defendant had built on the plaintiff's part of the land and he started living there. PW5 stated that they found that the boundary had been destroyed before the boundary was put again in the presence of the area assistant chief and Land Registrar. He stated that he has given evidence in a case involving the parties where the defendant had been charged in court and was found guilty. That case was CR. CASE NO.226/2014. He produced the proceedings as MFI-5.

17. On cross examination, the witness stated they went with the Land Registrar to the land to fix the boundary. He was aware that his father was sued in another case by the defendant and some other people. On re-examination PW5 stated that the boundary was fixed the second time in the presence of very many people. He was not aware if the case where his father was sued has progressed or been decided.

18. **PW6**, Tom Chepkwesi, gave his evidence in chief on 17/4/2018. He is the Land Registrar Busia since 2012 and his duties include keeping records of land. That he had records of land parcel no. South Teso/Asinge/1680, an application for consent and a consent to transfer and a transfer form duly executed and paid for. The transferor was Omongaise Etyang Otwani and the transferee was Sheri Nauria. The size of the land is being transferred was 0.4HA. Pw6 added that he had the title deed for parcel no. 1680 which he produced as PEX 1 and a copy of the official search for that land as PEX 2; the application for consent to transfer produced as PEX 3; the consent produced as PEX 4 and the transfer form that was duly signed by both parties with their photographs was produced as PEX 5. The current proprietor of land parcel no. 1680 is Sheri Nauria.

19. **PW7**, Wycliffe Meresa who is the in-charge of the lower court criminal registry gave his evidence on 13/10/2020. He produced the charge sheet and proceedings/judgment in Busia CR. Case no.226 of 2014. The accused was Stephen Ekirapa (the defendant herein) who was charged with forcible detainer over L.R. SOUTH TESO/ASINGE/1680 while the complainant was Sheri Nauria (the plaintiff). The accused was found guilty and fined Kshs.20,000/= and in default to serve 6 months imprisonment. The charge sheet and proceedings were produced as PEX 9(a-c).

20. **PW1** was recalled on 13/10/2020 to produce a title to her land SOUTH TESO/ASINGE/1680 wherein a copy thereof was produced as Pex.1. She prayed the case be granted with costs. On cross examination, she stated that the defendant is her neighbour and he has his own land and that the defendant came onto her land. That she only brought the surveyor to measure the land at the time of purchase and the Land Registrar came and confirmed it is the defendant who has entered her land.

21. **DW1**, Stephen Ekirapa, gave his evidence in chief and adopted his witness statement dated 21/1/2015. He stated that he does not know the plaintiff and he has never entered into any agreement with the plaintiff. He continued that he resides on LR. NO. SOUTH TESO/ASINGE/1680. He had purchased one acre of land from LR.NO. SOUTH TESO /ASINGE/614 from Omongaise Etyang Etwane (Pw4) on 19/2/2011 and paid him Kshs.72,000/= as the purchase price. He immediately moved on the land and put up a home. That the seller has all along known his position and he was shocked to learn that L.R. NO.SOUTH TESO/ASINGE/614 was sub-divided without his consent. He does not know the plaintiff neither does she reside on the suit land. Land parcel no. 614 belonged to 2 people namely Karakacha Etwani and Etyang Etwani. That Karakacha Etwani died on 26/2/2006 and he could not have signed the transfer form when he was dead making the subdivision and transfer of the suit land to the plaintiff was by way of fraud. He sought that this matter be dismissed with costs and produced the documents in his list of documents as DEX 1-4.

22. On cross examination, the defendant stated that as per his agreement, he bought one acre of land from the seller in 2011. The seller is yet to take him before the Land Control Board for consent to enable him process title for his portion. He admitted being charged with convicted for the offence of forcible detainer and that he did not appeal the conviction. He maintained that the land he is using is the one he bought. The defendant states that the mutation is in the name of Karakacha Otwane while the final burial permit is Seferia Otwane and that both names belong to the same person.

23. Both parties filed their respective submissions wherein the plaintiff filed his submissions on 11<sup>th</sup> March 2021. The plaintiff submitted she is the absolute proprietor to the suit land entitling her to quiet possession and enjoyment of the same by dint of Section 25 and 26 of the Land Registration Act. The defendant filed his submissions on 26<sup>th</sup> March 2021 and submitted that the plaintiff's suit is misplaced as it emerged from the evidence on record that both of them have distinct portions of land which have a common boundary. That the plaintiff's claim turned out to be a boundary dispute which this court has no jurisdiction to determine by dint of Section 18(2) of the Land Registration Act.

24. From the above, the issues for determination before this court are;

*a. Whether the court has jurisdiction to determine the matter before it.*

*b. Whether the plaintiff is entitled to the prayers sought in plaint.*

*c. Who should pay costs?*

25. On the first issue, the plaintiff admitted that her and the defendant share a common boundary as their parcels of land neighbour each other. PW4 stated in evidence that he first sold the defendant 1 acre from parcel no. 614 then later on sold one (1) acre to the plaintiff. That he had shown both parties their boundaries and it is the defendant who has invaded the plaintiff's land and had uprooted the sisal boundaries. The defendant however stated that he resides on his portion of the land and denied using the plaintiff's portion. Section 18(2) of the Land Registrar Act No. 3 of 2012 provides as follows: -

**(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.**

26. From the evidence on record, it is admitted that the plaintiff and defendant share a common boundary. However, the plaintiff has stated that the defendant has taken over the entire suit land no S.Teso/Asinge/1680 and is using it thus denying her the right to use the land as the registered proprietor. Thus the plaintiff's claim is not limited to boundary issue. The plaintiff also produced criminal proceedings in which the defendant was charged with and convicted for forcible detainer on her portion of the land and despite the criminal process, the defendant is still using the entire suit land to date. According to the defendant, his defence is that the plaintiff was sold the same portion of the land he had earlier purchased thus confirming that their dispute is not just on the boundary only. Consequently, I find that the issue before court is both a boundary issue and ownership which twin issues this court has jurisdiction to determine.

26. On the second issue, the plaintiff has prayed for orders of eviction and permanent injunction against the defendant. The plaintiff has stated that she is the registered proprietor of the suit land and she produced a copy of title as Pex 1. The plaintiff produced a sale agreement executed between her and PW4 for purchase of the suit land; the Land Control Board consent to transfer and the duly executed transfer of land form. It is her further evidence that they engaged surveyor who marked out the boundaries by planting sisal along its boundaries. The plaintiff's evidence was corroborated by that of her witnesses.

27. The defendant in his defence stated that he entered into a sale agreement with PW4 in 2011 for the suit land and he has been living on the said parcel since then. He pleaded particulars of fraud on the part of the plaintiff in paragraph 6 of his defence by stating that L.R. NO. 614 was registered in the names of two people and one of them was deceased and could not have transferred the suit land to the plaintiff.

In **RG PATEL VS LALJI MAKANJI (1957) EA 314** the court expressed itself as follows:

*“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”*

28. The position in law is that evidence of especially high quality and strength is required to prove fraud in civil matters. It is a daunting and burdensome task to prove fraud in any civil case which burden was vested upon the defendant. I have considered the defendant's testimony and the exhibits he produced that included sale agreement, burial permit, copy of a mutation form subdividing L.R No. 614, copy of burial permit for the late Seferio Otwane and copy of the District Officer's letter as proof of the fraud. PW4 has not denied selling a portion of his land to the defendant but the witness added that he sold a distinct portion to the plaintiff.

29. The defendant claimed that the subdivision was unlawful because his consent was not obtained prior to the subdivision. However, because the defendant was not the registered owner of the land being subdivided, I believe this complaint is misplaced and unsupported. Furthermore, the mutation was signed by Karakacha Itwani and Etyang Itwani, and the defendant made no connection between the signatures on the mutation form and that of the deceased Seferio Otwane Mwajone. Despite the defendant's assertion during cross-examination that Seferio Otwane Mwajone was also known as Karakacha Itwani, no evidence was presented to the court to support this assumption.

30. The defendant put reliance on the letter dated 10<sup>th</sup> July 2013 drawn by the District Officer, Chakol and addressed to the District Land Registrar, Busia. The letter simply stated that the parcel numbers S.Teso/Asinge/1679, 1680 and 1681 had been sold to the current occupants listed in that letter and yet those registered have been subdividing and selling hence creating conflict. The letter was asking the Land Registrar to place a restriction on behalf of the named person. In essence, the defendant's documents do not demonstrate fraud on their face. He was required to state the fraud and prove it, but in this case, I find that he failed to discharge the burden of demonstrating the plaintiff's fraud up to the required standards.

31. The defendant defence of fraud fails to satisfy the provisions of section 26 of the Land Registration Act which provides as follows;

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

32. The upshot of the foregoing analysis is that I find the plaintiff's case as proved. Accordingly, I enter judgment for the plaintiff against the defendant as follows;

**a) The defendant directed to surrender vacant possession of land parcel no. SOUTH TESO/ASINGE/1680 within sixty (60) days from the date of this judgement. In default, an eviction order does issue against the defendant.**

**b) A permanent injunction does issue against the defendant from land parcel no. SOUTH TESO/ASINGE/1680 effective from the date of surrender of vacant possession and or eviction from the said parcel.**

**c) General damages of Kshs. 50,000/= awarded to the plaintiff for loss of user for the period the defendant invaded the suit land.**

**d) The plaintiff is awarded the costs of the suit.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF SEPTEMBER 2021.**

**A. OMOLLO**

**JUDGE**