



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 369 OF 2015

**KENNEDY OMARE NYAKUNDI (suing in his capacity as the authorized attorney by
CHRISTOPHER MBAKA NYAKUNDI)PLAINTIFF**

-VERSUS-

JOSPHINE MORAA OMANWA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a Plaint dated the 29th April, 2015 against the Defendant seeking *inter alia* the following orders;
 - a. Demolition of the Defendant's structures and the unconditional re-opening of the 3-meter access road to land parcel **NO. WEST KITUTU/BOMATARA 1492** registered in the name of the Plaintiff.
 - b. A permanent injunction restraining the Defendant, her agents, servants or any one from claiming through her from trespassing into his land.
 - c. Cost of the suit and interest.
 - d. Any other alternative relief this Honorable court may deem fit to grant
2. The Defendant filed her Defence dated 14th September, 2015 in which she denied all the averments made by the Plaintiff against him.
3. The matter proceeded for hearing and both parties testified and called their witnesses and they both closed their cases on 9th June, 2021.
4. Thereafter the parties were directed to file their written submissions. The Plaintiff filed his submissions on 29th June, 2021 while the Defendant filed her submissions on 8th September, 2021.

PLAINTIFF'S CASE

5. At the hearing of the case Kennedy Omare Nyakundi who was authorized vide a power of attorney dated 5th May, 2015 to file this suit by one Christopher Mbaka Nyakundi (the Plaintiff) testified as PW1. He testified that the Plaintiff was the registered owner of land parcel **L.R NO WEST KITUTU/BOMATARA 1492**. He produced a copy of the title deed as an exhibit.
6. He further testified that the Defendant was the registered owner of the parcel of land **L.R NO. WEST KITUTU/BOMATARA 1491** which was adjacent to land parcel No. 1492 owned by the Plaintiff.
7. It was his testimony that the Defendant had carried out developments on her land and encroached into the Plaintiff's land contrary to the original mutation form which he produced as an exhibit.
8. Kennedy testified that the Plaintiff had engaged a firm of Surveyors known as Olweny and Associates in order to establish the extent of the encroachment. He stated that the said Surveyors established that the Defendant had encroached into the Plaintiff's land and prepared a report which showed the extent of the encroachment. He testified that the encroachment also included the blocking of a portion of the access road leading to the Plaintiff's land.

9. Upon cross-examination, Kennedy confirmed that the Plaintiff was his brother who had been living in the U.S.A since 1978. He told the court that the Complainant was in Kenya when the land was purchased though he did not have a copy of the sale agreement. He stated that the Plaintiff purchased the land on 24th September, 2013 when the Plaintiff came back to the country, although he admitted that he did not have any documentation to show that the Plaintiff was in Kenya at the time. He said he was not present when his brother bought the suit property. It was his testimony that the suit property was a sub-division of land parcel **L.R No. WEST KITUTU/BOMATARA 721** which sub-division was carried out in 1984. He explained that the sub-division also gave rise to parcels number 1491 and 1493. Parcel number 1492 is registered in the name of the Defendant. He stated that when the Surveyor visited the site, the Defendant was not present. He told the court that the Surveyor did not have the beacon certificate in respect of the two parcels in dispute.

10. Upon further cross examination, he stated that the County Surveyor visited the suit property pursuant to a court order and confirmed the encroachment. He however conceded that he did not know when the structures said to have encroached into the Plaintiff's land were constructed. He testified that the measurements of the two properties were not taken.

11. In support of his case the Plaintiff called Solomon Njoga who testified as PW 2. Mr. Njoga testified that he is an Assistant Surveyor at the firm of Olweny and Associates. He stated that in October 2013, he was requested to conduct a survey in respect of two parcels of land known as **LR No. WEST KITUTU/BOMATARA 1491** and 1492. He stated that he carried out the exercise relying on a map and a certified copy of the mutation form.

12. He told the court that he carried out the exercise in the presence of the Plaintiff. It was his testimony that parcel 1492 which was supposed to be 30 meters wide according to the map and the mutation form had been encroached by the Defendant's land by 16.3 meters. He further stated that there was supposed to be a 3-meter access road between parcel 1492 and 1491 but the same had been blocked by the structures and a fence established by the Defendant.

13. During cross-examination, Mr. Njoga conceded that when he went to carry out the survey exercise, the Defendant was not present. He also stated that the mutation form that he used contained 3 parcels of land although he only ascertained the measurements of parcel numbers 1491 and 1492. He admitted that he did not find any beacons in place.

14. The County Surveyor, Mr. Philip Wafula testified as PW3. In his testimony Mr. Wafula stated that he received a court order requiring him to visit land parcels No **WEST/KITUTU/BOMATARA/1492** and **1491** in order to establish the boundary between the two properties and open an access road. He stated that he honoured the court order by visiting the suit property on 5th November, 2019 after which he prepared a report dated 28th November, 2021 which was filed in court.

15. He stated that in his findings which are captured in his report, the Defendant who is the owner of parcel number 1491 had encroached into parcel 1492 which belongs to Plaintiff to the extent of 18 metres by 18.6 meters.

16. He stated that there was 3-meter-wide and 23-meter-long access road between parcels 1491 and 1492 which had been partially blocked by the perimeter wall and a portion of the road had narrowed to 1.5 meters. It was Mr. Wafula's testimony that inside the perimeter wall were structures which would be affected if the beacons marking the boundary between the two properties were to be put in place. He confirmed that the structures belonged to the Defendant.

17. Upon cross-examination, he confirmed that the sub-division of the original parcel, 721 was done in 1984 and parcel 1492 was registered in the Plaintiff's name in 2013. He explained that parcel 1492 was registered in the Plaintiff's name in 2013 after being transferred from one Benson Nyakundi who had bought the same from Peter Nyachiro. On the other hand, parcel 1491 was first registered in the name of Meshack Onchagwa Nyakundo before it was transferred to the Defendant in 1999. He confirmed that there had been no dispute concerning the two properties between 1984 and 1999. He admitted that he did not consider the said history of the land in his report. He also admitted that he did not take the measurements of parcel 1493 even though he agreed that it would have been necessary to do so in order to establish where the mistake arose. He told the court that there was a discrepancy between the measurements in the mutation form and the ground measurements as the ground dimensions were bigger than what was on the map.

DEFENDANT'S CASE

18. The Defendant testified as DW1. She testified that she is the registered owner of parcel No. **WEST KITUTU/BOMATARA/1491** which shares a boundary with parcels 1492 and 1493. She told the court that she bought her property from KCB Bank through a public auction in 1999. She produced a copy of the Transfer by Chargee as her exhibit. It was her testimony that by the time she bought the property, it was already developed with a concrete fence and 3 structures.

19. She stated that since she bought the property, she had not had any dispute with the previous owner of parcel 1491 regarding the boundary. It was her testimony that her property was bigger than that of the Plaintiff. She testified that before filing this case the Plaintiff had never complained that she was occupying a bigger portion than she was entitled to.

20. During cross-examination, the Defendant confirmed that Benson Nyakundi who was the previous owner of parcel no. 1492 had filed a case against her and Nyabururu Girls High School vide Kisii HCCC No. 50 of 2003 but the said case was dismissed for want of prosecution.

ISSUES FOR DETERMINATION

21. From my analysis of the pleadings, oral and documentary evidence as well as the submissions filed by both parties, the following issues arise for determination;

- a. Whether this court has the jurisdiction to hear and determine this case.

b. Whether the suit by the Plaintiff is time barred.

c. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

Whether this Court has jurisdiction to hear and determine this case.

22. Learned counsel for the Plaintiff submitted that this court has jurisdiction to hear and determine this suit by dint of Article 162 (2) (b) of the Constitution as read with section 13 of the Environment and Land Court Act. He submitted Section 13 sets out the jurisdiction of the court as follows

Section 13. Jurisdiction of the Court

(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 2 b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

“(2) in exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources...

(c) Relating to land administration and management

(e) Any other disputes relating to environment and land”

23. On the other hand, learned counsel for the Defendant submitted that this court does not have jurisdiction to entertain this suit by virtue of sections 18(2) and 19 of the Land Registration Act. **Section 18(2)** provides as follows: -

Section 18 “Except where, in accordance with section 20 it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

Section 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.”

Section 19 of the Land Registration Act, 2012 gives Land Registrar the mandate to fix boundaries. The said section provides that:

Section 19 (2) “The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed and the plan shall be deemed to accurately define the boundaries of the parcel

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for survey of land, a note shall be made in the register and the parcel shall be deemed to have had its boundaries fixed under this section.

24. Counsel contended that the Plaintiff did not produce any documents to show that the boundary between the Plaintiff’s land and the Defendant’s land had been fixed as required by law before instituting this suit. He submitted that the mutation form produced in court did not indicate that an entry was made in the register that the boundaries of the respective parcels shall be as per the filed plan and the boundaries are therefore mere approximations. It is on record that PW3, the County Surveyor who visited the suit property for purposes of determining the boundary pursuant to the court order admitted that he did not have a beacon certificate and he did not find any beacons in place. He also stated that according to the mutation form which was prepared in 1984, the suit properties emanated from land parcels no. **WEST KTUTU/BOMATARA/721**. However, he admitted that he did not take the measurements of all the three parcels in order to determine how the discrepancy in the acreage in the titles *vis a vis* the ground arose.

25. Counsel cited the case of **George Kamau Macharia v Dexka Limited** (2019) eKLR where it was held that:

“It is trite law that where the law has given a legal obligation to a department of Government, it is important for the court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the court. It is the view of this court that htee dispute is prematurely before the court. The plaintiff should take the steps contemplated in section 18(2) of the Land Registration Act 2012 in resolving the dispute”.

I concur with the above decision.

26. In the instant case, it is clear that although the court order directed the Land Registrar to visit the suit property, the report clearly shows that it is only the County Surveyor who conducted the visit. Even if the court were to assume that the boundaries had been determined as contemplated under section 18 (2) of the Land Registration Act pursuant to the court order, the report of the County Surveyor without the Land Registrar's input cannot be basis of a determination of boundaries given the clear mandate of the Land Registrar under section 19(1), (2) and (3) of the Land Registration Act. In the circumstances it would be premature for the court to assume jurisdiction in the matter.

Whether the Plaintiff's suit is time barred.

27. Counsel for the Defendant submitted that the Plaintiff's claim was time barred. It was his contention that the Plaintiff had allowed the Defendant to occupy the disputed portion for a period of more than 14 years as she bought parcel no. 1491 in 1999. He therefore submitted that the Defendant was entitled to the suit property by way of adverse possession.

28. Counsel for the Defendant submitted that the Defendant acquired parcel No.1491 at a public auction on an 'as is' basis in the year 1999 from KCB Bank which had exercised its power of sale over the same. According to the Defendant's testimony, the said parcel already had a concrete fence and three structures. Counsel submitted that the Defendant continued to occupy her parcel of land for a period of 14 years without any complaint from the previous owner of parcel 1492 who is the complainant's late father. It was his contention that the Plaintiff only came to court in 2015 after his father transferred parcel 1492 to him claiming that the Defendant had encroached into his land. Counsel for the Plaintiff submitted that the Defendant filed a List of Documents, in which architectural drawings were mentioned, meaning that she had developed her parcel of land. However, the said architectural drawings were neither attached to the List of Documents nor were they produced in court so the court cannot speculate on their relevance.

29. Although I do not agree with counsel's submission that the Plaintiff is entitled to the suit property by virtue of adverse possession, the fact that she bought the suit property when it was already fenced and developed means that she cannot be held responsible for the acts of trespass or encroachment complained of before she bought the land. Additionally, the said acts of trespass or encroachment did not take place within the limitation period prescribed under the Limitation of Actions Act.

30. Trespass being a tort, section 4 of the Limitation of Actions Act provides that an action founded on tort should not be brought after the end of three years. In his Plaint, the Plaintiff has not stated when the acts of trespass commenced. He has also not controverted the Defendant's evidence that she has been in occupation of the suit property since 1999. Upon cross-examination by counsel for the Plaintiff, the Defendant stated that she had been sued vide Kisii HCCC No. 50 of 2003 by one Benson Nyakundi who was the previous registered owner of parcel no. 1492 and the late father of the Plaintiff. The said suit was however dismissed for want of prosecution. This clearly shows that as far back as 2003 the Plaintiff's family was aware of the acts of trespass allegedly committed by the Defendant. In the circumstances, the Plaintiff's suit cannot be sustained.

Whether the Plaintiff is entitled to the reliefs sought.

31. Having found that the suit herein was commenced before the boundary between parcels no. **WEST KITUTU /BOMATARA/1491** and **1492** was determined by the Land Registrar in accordance with sections 18 and 19 of the Land Registration Act, 2012 and that the alleged acts of encroachment commenced more than three years before the suit was filed, it is my finding that the Plaintiff has failed to prove his case on a balance of probabilities. Accordingly, the Plaintiff's suit is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021

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J.M ONYANGO

JUDGE