



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ELC CASE NO. 05 OF 2021

(FORMERLY NAROK ELC CASE NO. 63 OF 2018)

KEIYIAN GROUP RANCH.....PLAINTIFF

-VERSUS-

SAMWEL ORUTA1ST DEFENDANT

PHILLIP KIMOONGE.....2ND DEFENDANT

MALACKI MAYOYO.....3RD DEFENDANT

NYANGARESI RACHAMI.....4TH DEFENDANT

OUKO ORIANGO.....5TH DEFENDANT

ONGOU ORIANGO.....6TH DEFENDANT

SAMWEL ABUYA.....7TH DEFENDANT

GABRIEL ABUYA.....8TH DEFENDANT

MOSES GIDEON ABUYA.....9TH DEFENDANT

PAMELA KIRIMA MACHAMI.....10TH DEFENDANT

JUDGEMENT

A. INTRODUCTION

1. Keiyian Group Ranch (**'The Plaintiff'**) commenced this suit by way of a Plaint dated 21.10.2013; seeking the following Orders:-

i. Declaration that the Plaintiff is the lawful and/or registered proprietor of the suit land, that is, LR NO. TRANS-MARA/ KEIYIAN/5.

ii. Permanent Injunction restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit land, that is, LR NO. TRANS-MARA/ KEIYIAN/5.

iii. General damages for Trespass.

iv. Costs of this suit be borne by the Defendants.

v. Such further and/or other reliefs as the Honourable Court may deem fit and expedient so to grant.

2. It is the Plaintiff's contention that it is the registered proprietor of Land Parcel No. TRANS- MARA/KEIYIAN/ 5, which was registered

in the name of the Plaintiff on 19th November, 1988, on behalf of its members. However, the Defendants who live on the adjoining land in South Mugirango Constituency, have commenced and continue to encroach onto that parcel land, which actions constitutes trespass, interfering with the boundary of the said land, have taken possession of portions of the suit land and as a result the defendants have denied and deprived the Plaintiff the right to use its lawful registered land.

3. Further, the Plaintiff claims that the 1st and 2nd Defendants have diverted water from the neighbouring streams thus interfering with the cultivation, possession and usage of portions of the suit land. As a consequence, thereof, the plaintiff has been dispossessed and deprived of the use of substantial portions of the suit land.

4. All the Defendants, except the 5th Defendant, entered Appearance and filed their respective Statements of Defence through various firms of Advocates.

5. The 1st and 2nd Defendants filed their Statement of Defence through the firm of S.M Sagwe & Co. Advocates; denying the allegations made by the Plaintiff. It was their contention that they live on their legally owned parcels of land which they have been occupying for more than 12 years and therefore allegations by the Plaintiff of encroachment, interfering with the boundary features and re-channelling water from the Plaintiff's side are all denied. Further, the 1st and 2nd Defendants denied the jurisdiction of this court to hear and determine the dispute. It is however important to note that no Preliminary Objection was filed by them.

6. The 4th, 7th, 8th, 9th and 10th Defendants also jointly filed their Statement of Defence through the firm of J.O. Soire & Co. Advocates; denying the allegations made by the Plaintiff. It is their claim that they have lived on their rightful land being L.R. NO. SOUTH MUGIRANGO/ BOTABORI SOUTH/ 150 and annexed a copy of the search certificate of the said land in support of their case. It is their contention that having lived on the said parcel for their entire lives, issues of encroachment or trespass or interfering with the boundary features are strange to them and are therefore denied. They also stated in their defence that they would raise a Preliminary Objection that the Plaintiff's claim of trespass is statutorily time barred and further that the claims of boundary interference contravenes provisions of the Land Registration Act. They denied dispossessing or denying the plaintiff use of their land.

7. The 3rd Defendant through the firm of S.M. Sagwe; filed his Statement of Defence. It was his position that he had wrongfully been sued since he is a minor and had no knowledge of the Plaintiff's claim against him. He thus asked the court to dismiss the suit against him.

8. The 6th Defendant filed his statement of defence through the firm of Asati, Anyona & Co. Advocates where he denied the Plaintiff's claim against him. It was his contention that he has been living on land parcel L.R. NO. SOUTH MUGIRANGO/ BOTABORI SOUTH/ 150, registered in the name of Oriango Omwoyo, who is since deceased; and thus, claims of trespass, encroachment, dispossession and interference with the boundary as alleged by the Plaintiff are strange to him.

9. He did further contend that that this court has no jurisdiction to hear and determine the dispute herein for the reason that the law requires any boundary dispute to be handled by the Land Registrar. He also claimed that if the land indeed belonged to the Plaintiff, then had acquired title over the same by way of adverse possession.

B. TRIAL

10. On 18th May 2017, Justice J. Onyango made an Order directed to the Land Registrar and Surveyor Trans- Mara West Sub- County; to visit the dispute land L. R No. TRANS- MARA/KEIYIAN/ 5. The Land Registrar and the Surveyor were to demarcate and fix the boundary between the Plaintiff and the Defendants and to establish the extent of trespass, if any, and thereafter file a report in court within 90 days.

11. Both the Land Registrar and the Surveyor complied with the said orders as directed. The Surveyor filed his report dated 4th June, 2018 together with a sketch map, outlining the boundary and the encroachment into the dispute land. The Land Registrar also filed his report dated 29th June, 2018 clearly addressing the boundary issue and equally addressing the issue of the encroachment into the dispute land.

12. The Plaintiff in seeking to wholly associate itself with the findings and Report of both the Land Registrar and the Surveyor made an oral Application that the Court do adopt the said Reports dated 29th June, 2018 and 4th June, 2018 respectively as the final Judgment in final determination of the suit against the Defendants. The Court issued its Ruling on the said Application on the 19.06.2019 whereupon he dismissed the application and directed that the suit do proceed to full trial.

13. On 4th November, 2020; upon being satisfied that the Defendants were all served with the date of the trial and an Affidavit of Service filed to that effect, the court did proceed with the hearing of the suit in absence of the Defendants or their advocates. Mustafa Ole Njirone Paswa testified as PW1. He adopted his witness statement dated 21.10.2013 and produced the list of documents as Plaintiff Exhibits 1-7 in support of their case. He also relied on the Findings and Report by the Land Registrar dated 29th June, 2018 and by the Surveyor dated 4th June, 2018 in support of his case.

14. The matter did proceed in the absence of the Defendants, who were fully aware of the date of the hearing but chose not to attend court, they had an opportunity to present their claim but did not take advantage of the same. Therefore, I find that the Plaintiff's testimony and evidence stands uncontested and uncontroverted.

C. ANALYSIS AND DETERMINATION

15. I have carefully considered the Plaintiff and the various Statements of Defence filed by the Defendants thereto, the respective exhibits, submissions and the Reports filed by the Land Registrar dated 29.06.2018 and the Surveyor dated 04.06.2018. On that account, it is this court's considered view that the following issues arise for determination: -

- a. **Whether this court has Jurisdiction to entertain the suit**
- b. **Who is the rightful owner/ registered proprietor of the suit land.**
- c. **Whether there was trespass by the Defendants and if an Order of Permanent Injunction should issue.**
- d. **Whether the Plaintiff is entitled to General damages as sought.**

A. Whether this court has Jurisdiction to entertain the suit

16. As was held in the celebrated case of **Owners of Motor Vessel “Lillian S”**, jurisdiction is everything and it goes to the root of the case; without jurisdiction, the court must down its tools.

17. **Section 18 (2) of the Registration of Land Act** provides as follows: -

“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.”

18. **Section 19 of the Land Registration Act** also provides that: -

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2)

(3)

19. Further, the Supreme Court of Kenya in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

“A Court’s jurisdiction flows from either the Constitution or

legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

20. The main issue in dispute in the present case is that of trespass and/or encroachment on the suit land and to establish this; there was need to assess the boundary between the 2 land parcels being, L. R No. TRANS- MARA/KEIYIAN/ 5 and L.R. NO. SOUTH MUGIRANGO/ BOTABORI SOUTH/ 150 in order to clearly ascertain the issue of trespass, if any. The issue before me is not one related to a boundary dispute as suggested by the Defendants herein.

21. Be that as it may, I need to point out that there was full compliance with the provision of the law with regards to this court entertaining suits with boundary related disputes, as outlined in Section 18(2) and 19 of the Registration of Land Act.

22. Lady Justice J. Onyango issued Orders dated 18th May, 2017 directed to the Land Registrar and the Surveyor, Trans- Mara West Sub-County, to visit the suit property for purposes of demarcating and fixing the boundary between the parties herein and further, to establish the extent of trespass if any.

23. From the above Order, it is clear that the trial court did not usurp authority that is statutorily vested upon the Land Registrar. The said issue on boundary, though not at the centre of the claim filed by the Plaintiff in the present suit, was handled prior to the suit being certified ready for hearing.

24. In view of the foregoing, I therefore find and hold that this honourable court has the requisite jurisdiction to hear and determine this suit.

B. Who is the rightful owner/ registered proprietor of the suit land

25. **Section 26 (i)** of the Registered Land Act provides: -

“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.”

26. The Plaintiff has attached a copy of the Green Card and the Title deed to the dispute land, clearly outlining the name of the registered owner and the acreage of the same. The Defendants on the other hand have not produced any title deed but instead annexed a copy of the Search Certificate of the land where they live in being L.R. NO. SOUTH MUGIRANGO/ BOTABORI SOUTH/ 150.

27. It has been said time and again that a Title Deed is an indefeasible evidence of the ownership of land. It is also not in dispute that the parties herein live on 2 land parcels adjacent to one another.

28. There has not been any challenge by the Defendant's on the Plaintiff's title by reason of fraud or otherwise as envisaged under section 26 (1) (a) and (b) of the Land Registration Act.

29. I have looked at both the Green Card and the Title Deed of Land Parcel L. R No. TRANS- MARA/KEIYIAN/ 5 and I am satisfied that the suit property indeed belongs to the Plaintiff, who is the registered proprietor, on behalf of all its members. The registration and proprietorship of the Plaintiff is therefore not in dispute and thus, the Plaintiff remains the rightful, absolute and indefeasible owner of the property with all the rights and privileges accruing therefrom; including the right to possession, to a quiet and peaceful occupation and right to use of their property.

30. I therefore find and hold that the Plaintiff is the rightful registered proprietor of the suit land L. R No. TRANS- MARA/KEIYIAN/ 5 measuring approximately 816.4 Ha, having been issued with the title deed and the boundary features clearly outlined by the Land Registrar and is thus entitled to protection of the law.

C. Whether there was trespass by the Defendants and if an Order of Permanent Injunction should Issue

31. The Land Registrar, upon site visit to the suit property made a determination with regards to the boundary and the extent of the encroachment/trespass which I seek to reproduce. It said in part as follows;

“This being a regional boundary which was fixed at the independence the land boundary on the side of Nyanza Province and Rift Valley Province have their specific declaration within their areas.

Most of the Defendants claim to have bought their land from other people who were not present. There was an encroachment on the land of Keiyian Group Ranch Parcel No. Transmara/ Keiyian/5 approximately by 28 hectares and equivalent of 70 acres”

32. The Sub- County Surveyor equally made a Report and annexed therewith a sketch map; clearly outlining the boundary features between the two sides and the extent of the encroachment by the Defendants on the suit property. In his conclusion he made the following remarks;

“After placing the beacons it was found out that the Keiyian Farm has been encroached by about 28 Ha. That there are buildings in the encroached area.”

33. These Reports were filed in court on diverse dates as stated above. The Plaintiff adopted the same as Exhibits in support of its case. There was no comment whatsoever by the Defendants on the said reports and the same therefore stands unchallenged.

34. I wish to associate myself with the findings and conclusions arrived at by the Land Registrar and the Surveyor Trans- Mara West Sub-County and find that the Defendants herein are indeed guilty of encroaching and trespassing into the Plaintiff's land parcel.

35. Having found that the Defendants trespassed into the Plaintiff's land, the next issue is whether as a result of the same; the Defendants should be permanently restrained.

36. The Principles on Injunction were established in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. Having looked at the Reports by the Land Registrar and the Surveyor dated 29.06.2018 and 04.06.2018 respectively and the Plaintiff's exhibits produced in court, I hold that the Plaintiff has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants and /or anyone claiming under the defendants should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit land

D. Whether the Plaintiff entitled to General damages as sought

37. From the foregoing, it is clear that the Plaintiff is the absolute, rightful and indefeasible owner of the suit property herein, I have also held that the Defendants are guilty of encroaching and trespassing onto the Plaintiff's land. The said encroachment whose magnitude was found to be 28 Ha, did deny the plaintiff use, occupation, possession and enjoyment of said land, the defendants on the other side have been cultivating and enjoying the use of the unlawful actions. It is this loss of use and all the incidental rights that have been infringed by the defendants that the plaintiff now seeks compensation for.

38. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another** (2013) eKLR where **P. Nyamweya J.** held that: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the

Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass"

39. In **Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503**, it is provided as follows:-

- (a) *If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.*
- (b) *If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.*
- (c) *Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.*
- (d) --
- (e) --

40. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of **Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR** where it was held as follows:

*"The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See **Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999)**.*

41. From the evidence on record, the Plaintiff has proved trespass but there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiff and its members suffered for them to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the Plaintiff indeed suffered damages as a result of the Defendants' continued acts of trespass. I will proceed and award him Kshs. 100,000/= as general damages.

COSTS

42. Costs generally follow the event, and in this instant case, since the Plaintiff has been inconvenienced, I find that it is entitled to costs of the suit.

CONCLUSION

43. The upshot of the above is that the Plaintiff has proved its case on the required standard of balance of probabilities and I thus enter judgement for the Plaintiff against the Defendant in the following terms: -

- a) A Declaration that the Plaintiff is the lawful and/or registered proprietor of the suit land, that is, L.R NO. TRANS-MARA/ KEIYIAN/ 5.
- b) Permanent Injunction restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any manner dealing with the suit land, that is, L.R. NO. TRANS-MARA/ KEIYIAN/ 5.
- c) Kshs. 100,000/= being General Damages for Trespass.
- d) Costs of the suit
- e) Interest on c above at court rates.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF OCTOBER, 2021.

MOHAMMED KULLOW

JUDGE

In presence of:-