



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 743 OF 2016**

**(Formerly KISII HCCC NO 63 OF 2012)**

**JOSHUA OKIOGA OMWANDO.....1<sup>ST</sup> PLAINTIFF**

**JEREMIAH MOGAKA OKIOGA.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**JANE MORAA NYAMWARO.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a Plaint dated 21<sup>st</sup> February, 2012, the Plaintiffs filed suit against the Defendant seeking an eviction order evicting the Defendant from land parcel number **WEST MUGIRANGO/SIAMANI/2011**. The said Plaint was amended on 27<sup>th</sup> February 2014.
2. The Defendant filed a Defence and Counterclaim on 4<sup>th</sup> April, 2012 denying the Plaintiff's claim. In the Counterclaim the Defendant seeks an order of eviction against the Plaintiffs, their servants or agents in respect of a portion measuring approximately 4 feet by 100 feet of land parcel number **WEST MUGIRANGO/SIAMANI/2010**. She also seeks a permanent injunction against the Plaintiffs either by themselves, their servants, agents, or any one claiming under the Plaintiffs from entering upon, building on or trespassing onto a portion measuring approximately 4 feet by 100 feet of land parcel **WEST MUGIRANGO/SIAMANI/2010**.
3. The matter was set down for hearing and both parties testified and closed their cases on 11<sup>th</sup> November, 2020.
4. Thereafter parties were directed to file their written submissions. The Plaintiffs filed their submissions on 4<sup>th</sup> March, 2021 while the Defendant filed her submissions on 15<sup>th</sup> January 2021.

**PLAINTIFFS CASE**

5. The 2<sup>nd</sup> Plaintiff, Jeremiah Mogaka Okioga testified as PWI and the only witness for the Plaintiffs. During examination in chief, he testified that he was the registered owner of land parcel number **WEST MUGIRANGO/SIAMANI/2011** measuring 0.03 Ha which he purchased from the 1<sup>st</sup> Plaintiff. He testified that the Defendant's parcel number 2010 is adjacent to his. He told the court that after purchasing the property, he left 4 feet as an access road linking his property to the main road which access road has now completely been blocked by the Defendant who is laying claim to the same.
6. During cross-examination, the 2<sup>nd</sup> Plaintiff stated that he had complained about the encroachment to the Land Registrar though he did not remember when he made the complaint. He stated that the Land Registrar visited the disputed section but he did not know whether a report of the said visit had been prepared. When shown the Land Registrar's report dated 22<sup>nd</sup> February, 2012 by counsel for the Defendant, he confirmed that the attendance shown thereon was accurate and he stated that he partly agreed with the contents of the report. He however indicated that what was indicated in the report as a pathway and which was the disputed section was part of his property which he had left as an access road to the main road. He however confirmed that he did not have any report that showed that the disputed section was part of his property.
7. In re-examination he acknowledged the existence of the report dated 22<sup>nd</sup> February, 2012 and pointed out that the Land Registrar had concluded that the dispute should be determined by the court since the same was not about a boundary but it was a dispute over ownership.

**DEFENDANT'S CASE**

8. The Defendant testified as DW1. It was her testimony that she was the registered proprietor of parcel of land NO. **WEST MUGIRANGO/SIAMANI/2010**, while the Plaintiff was the registered proprietor of parcel **WEST MUGIRANGO/SIAMANI/2011**.

9. She stated that parcel 2010 was transferred to her by her husband who bought the same from one Johnson Mogondo Omanwa as evidenced by an agreement dated 14<sup>th</sup> January, 1984. She stated that the parcel bought by her husband measured 25 feet by 100 feet but it was later increased after her husband bought an additional portion from Johnson Mogondo Omanwa.

10. She told the court that they constructed houses on the additional portion of land bought from Mr. Mogondo but they left a space measuring 4 feet to serve as an access road between the first and second parcels of land.

11. She testified that by the time they constructed the house on the second portion of land, the 2<sup>nd</sup> Plaintiff had not constructed any house on his parcel.

12. It was her further testimony that the 1<sup>st</sup> Plaintiff transferred parcel 2011 to the 2<sup>nd</sup> Plaintiff in the year 2010 when the access road was already in existence and the 2<sup>nd</sup> Plaintiff later claimed that the said access road was on his property and did not want them to use it. The 2<sup>nd</sup> Plaintiff then asked the tenants who were occupying the houses on the portion that her husband had purchased later to move out. She testified that she reported the matter to Lands office. Thereafter, the Land Registrar and County Surveyor and visited the suit properties, carried out the ground measurements and established that the 2<sup>nd</sup> Plaintiff had encroached into her property. They then prepared a report to that effect on 2<sup>nd</sup> February, 2012.

13. The Defence called one Alfred Mauti alias Bonyi who testified as DW2. He testified that he was the husband to the Defendant. He stated that him and the Plaintiff bought their respective parcels from Johnson Mogondo Omanwa and each of them was to get a parcel measuring 25 feet by 100 feet. He stated that he later bought an additional plot before an access road was created. It is his further testimony that the 2<sup>nd</sup> Plaintiff later constructed a house that encroached into their property by 4 feet and this was confirmed after the District Surveyor and Land Registrar visited their respective portions and prepared a report on the said encroachment.

#### **EVIDENCE OF THE LAND REGISTRAR**

14. The Nyamira County Land Registrar lamented that the report that had been prepared by his predecessor was unclear. He requested to visit the suit properties (parcels 2010 and 2011), fix the boundaries of the same and file a fresh report before he could give any testimony in this case. Since both parties had no objection, the court directed that the Land Registrar visits two parcels of the land in the company of the County Surveyor for purposes of establishing and fixing the boundaries of the two parcels of land. They were also required to establish if there was any encroachment by either of the disputants.

15. The said officers visited the suit property and filed their report dated 21<sup>st</sup> March, 2019. Counsel for the Plaintiff was satisfied with the report while counsel for the Defendant was dissatisfied with the same and prayed the Land Registrar and Surveyor be summoned to court to shed light on their report.

16. The Nyamira County Land Registrar Mr. Charles Mutua appeared before this court as DW3. He testified on behalf of his predecessor one Mr. Bosire who had visited the two parcels of land and prepared the report dated 21<sup>st</sup> March, 2019. He testified that according to the report, land parcel no. 2010 which belongs to the Defendant measures 25 by 100 feet while parcel 2011 which belongs to the Plaintiff measures 0.03 acres. It was also his testimony that the two parcels were sub-divisions of parcel 393 which measures 50 by 100 feet. He told the court that the defendant had not encroached into parcel no. 2011 as alleged by the 2<sup>nd</sup> Plaintiff.

17. Upon cross examination, he admitted that he did not visit the suit properties and he only signed his predecessor's report. He pointed out that the report did not talk of any encroachment by either party. The report however recommended that the area measuring 3 feet which separates the two parcels be used as a foot path by the owners of the two parcels. He stated that there was no access road between the properties as the 2 parcels shared a common boundary. He however stated that according to the report, the plaintiff's semi-permanent house protruded onto the Defendant's property.

18. The County Surveyor testified as DW4 and highlighted the contents of the report dated 22<sup>nd</sup> February, 2012 and the one dated 21<sup>st</sup> March, 2019. He testified that from his sketch prepared in 2012, parcel 2011 measured 29 feet long and the house constructed by the Plaintiff fitted within the 29 feet. He further testified that on 17<sup>th</sup> October, 2018 he together with the Land Registrar, Mr. Bosire, visited the two properties and prepared a report together with a sketch map showing the location of properties on the ground.

19. He stated that according to his findings there was no access road between the 2 properties both on the ground and on the Registry Index Map as the two properties shared a common boundary. He stated that if the ground measurements were considered, the Plaintiff had not encroached onto the defendant's land. However, if the Registry Index Map was considered then the Plaintiff had encroached onto the Defendant's land by 4 feet because according to the ground measurement, parcel 2011 measures 29 feet by 100 feet while on the RIM it measures 25 feet by 100 feet.

20. In cross examination he stated that he did not know whether the properties originally measured 50 feet by 100 feet as he relied on what the parties told him. He admitted that the report did not indicate the variance between ground measurement and the measurement on the mutation forms nor did it indicate the variance between the RIM measurement and the ground measurement.

#### **ISSUES FOR DETERMINATION**

21. From my analysis of the pleadings, documentary evidence, testimonies of witnesses of both parties and submissions filed by both parties,

I deduce the following as the main issues for determination;

- a) Whether the 1<sup>st</sup> Plaintiff has locus to sustain a claim against the Defendant.
- b) Whether the Defendant has trespassed into the 2<sup>nd</sup> Plaintiff's Property (parcel 2011).
- c) Whether the Defendant is entitled to the reliefs sought in the Counter-claim.

## **ANALYSIS AND DETERMINATION**

### **Whether the 1<sup>st</sup> Plaintiff has locus to sustain a claim against the Defendant.**

22. This court takes judicial notice that this suit was first filed by the 1<sup>st</sup> Plaintiff who by leave of the court amended his plaint on 27<sup>th</sup> February, 2014 to introduce the 2<sup>nd</sup> Plaintiff. It is clear that at the time the 1<sup>st</sup> Plaintiff filed this suit, he had not transferred parcel no. 2011 to the 2<sup>nd</sup> Plaintiff who was already in occupation of the same. The 1<sup>st</sup> Plaintiff subsequently transferred the said parcel of land to the 2<sup>nd</sup> Plaintiff on 16<sup>th</sup> April, 2012.

23. Having transferred the property that is at the center of this dispute to the 2<sup>nd</sup> Plaintiff, the 1<sup>st</sup> Plaintiff lost a legitimate interest in the same and as correctly submitted by counsel for the Defendant, his claim against the Defendant fails. I do not see any need of dwelling on this issue since the 1<sup>st</sup> Plaintiff never testified in support of his claim against the Defendant.

### **Whether the Defendant has trespassed into the 2<sup>nd</sup> Plaintiff's Property (parcel 2011).**

24. It is not in dispute that the Plaintiff is the registered owner of land parcel number **WEST MUGIRANGO/SIAMANI/2011** which measures 0.03 Ha while the Defendant is the registered owner of land parcel number **WEST MUGIRANGO/SIAMANI/2010** which measures 0.07 Ha. However, there is a portion of measuring 4 feet by 100 feet between the properties which both of them are laying claim to. The 2<sup>nd</sup> Plaintiff claims that he left the said space unoccupied so he could use the same to access the main road, which space he alleges to have been completely blocked by the Defendant. The Defendant equally claims that her husband constructed a house and left the portion to act as an access road which access she alleges to have been blocked by the Plaintiff.

25. There are two survey reports filed at different times. According to the first report which was filed on 22<sup>nd</sup> February, 2012 the Land Registrar stated that the 4 feet portion belonged to the Defendant and that the 2<sup>nd</sup> Plaintiff had encroached onto the same by constructing a house. The said report indicates that the 2<sup>nd</sup> Plaintiff's property measures 29 feet on the ground while the Registry Index Map shows that it measures 25 feet by 100 feet.

26. The second report which was filed on 21<sup>st</sup> March, 2019 does not state whether there is any encroachment. It merely talks of a section measuring 3 metres without stating whom the said section belongs to and recommends that the said section be used as a footpath by both parties.

27. Given the inconclusive nature of the report dated 21<sup>st</sup> March, 2019 the Nyamira County Land Registrar and Surveyor were summoned to attend court and shed light on the report. Since the Land Registrar who testified before the court did not visit the suit property, it would not be necessary to consider his testimony. However, the County Surveyor's testimony is pertinent.

28. The Surveyor conceded that the report did not indicate the variance between ground measurement and the measurement on the mutation form. He also testified that the 4 feet encroachment that featured prominently in the report dated 22<sup>nd</sup> February, 2012 was based on the perception of both parties that the suit property was supposed to be 50 feet by 100 feet which was to be shared equally by both the parties.

29. He testified that if the court considered the perception of the parties that the combined acreage of the properties was 50 feet by 100 feet and both parties were expected to share the properties equally, then it was the 2<sup>nd</sup> Plaintiff who had encroached on the Defendant's land because his property measured 29 feet long instead of 25 feet long. He stated that if the mutation measurement and ground measurement were considered then there was no encroachment by either of the parties since the Plaintiff's property was 29 feet long.

30. In view of the foregoing observation by the Surveyor, the 2<sup>nd</sup> Plaintiff's claim of trespass on the part of the Defendant fails.

### **Whether the Defendant is entitled to the reliefs sought in the Counter-claim.**

31. The survey report dated 22<sup>nd</sup> February, 2012 indicates that the Plaintiff has encroached into the Defendant's property by 4 feet. The survey report dated 21<sup>st</sup> March, 2019 acknowledges that there is a 3 feet portion that decreases downwards but it does not state to whom the section of 3 feet belongs. The report however suggests that the said portion is insignificant and that the parties should use the same as an access to the main road as it would be uneconomical to demolish any of the houses constructed thereon.

32. The Surveyor conceded that the 4 feet encroachment mentioned in the previous report was based on a presumption that the total acreage of the portion sold to the parties was originally 50 by 100 feet and that each of the parties was to get an equal share of 25 feet by 100 feet before the Plaintiff was added an extra 30 by 100 feet. Clearly the said presumption was not supported by the mutation form or ground measurements. It therefore follows that the allegation of encroachment is not supported by any credible evidence.

33. That being the position, I am constrained to agree with the County Surveyor that the two properties share a common boundary and that there is no encroachment by either of the parties. There is therefore no need to interfere with the ground measurements which tallies with the measurements in the mutation form.

34. The upshot is that both the Plaintiff's suit and the Counter-claim have not been proved on a balance of probabilities and they are both dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF OCTOBER, 2021.**

**J.M ONYANGO**

**JUDGE**