



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC NO. 77 OF 2016**

**JANE NANGUNDA KABWERE.....PLAINTIFF**

**= VERSUS =**

**EVANS MUTISO MUTUNGA.....DEFENDANT**

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

1. By a Plaint dated 21<sup>st</sup> July, 2016, the Plaintiff brought this suit against the Defendant and prayed for judgement against the Defendant for:

**a) An order of permanent injunction restraining the Defendant by their agents and/or servants from interfering with LR NO. BUKHAYO/BUGENGI/10890;**

**b) Costs of this suit.**

2. The Plaintiff contends that although she is the registered owner of the land known as **LR NO. BUKHAYO/BUGENGI/10890**, the Defendant has without any authority invaded her land and is putting it to his own use which action is illegal and against the Constitution and the Registered Land Act forcing the Plaintiff's to file the current suit requesting for an order of injunction.

3. The Defendant filed his statement of Defence on 4<sup>th</sup> of October, 2016 denying the claim and that he had invaded the plaintiff's parcel of land. He pleaded that one James Owori Omodo sold him a portion of land measuring 0.1Ha curved from L.R NO. BUKHAYO/BUGENGI/10889. That the land has been clearly demarcated on the ground as he planted a boundary which is still there to date. That the defendant holds the title to his portion of land and that the present suit is vexatious.

4. The hearing commenced on the 21<sup>st</sup> of the April, 2021 with the Plaintiff calling only one witness. The Plaintiff, testifying as **PW1** stated that she has known the Defendant since 2016 when she bought land and discovered that he had built on the said land. That the parcels of land are No. Bukhayo/Bugengi/10301 and 10890 which parcels are adjacent to each other. She confirmed that she holds titles to both parcels. **PW1** continued further that the Defendant built a house on the said parcels around February/March 2016. **PW1** further asserted that she reported the matter to the area Chief and the Land Registrar. The Land Registrar visited the suit parcel together with the Surveyor subsequent to which a report was prepared which was produced as pex-3. She concluded by urging this Court to grant her the eviction order and costs of this suit.

5. The Defendant was not present in Court during the hearing of the plaintiff's case despite being served with the hearing notice. The matter therefore proceeded without his testimony but both parties were given time to file submissions.

6. The Plaintiff filed her submissions on the 28<sup>th</sup> of April, 2021 and in them she submitted that the findings of the Surveyor have not been faulted or controverted and urged this Court to find that she had proved her case thus deserving of an order of permanent injunction against the Defendant restraining him and any other person claiming under him from entering, using, developing, cultivating and utilizing the suit land. She also submitted to be awarded the costs of this suit.

7. The Defendant filed his submissions on the 2<sup>nd</sup> June, 2021. He submitted that he was in total disagreement with the surveyor's report dated 18<sup>th</sup> April, 2016 as it is misleading the Court. He stated that the Plaintiff's two parcels of land are far away from his parcel and he urged this Court to visit the site on the ground to ascertain the truth from the original seller before arriving at the judgement.

8. I have considered the parties' pleadings, evidence rendered, submissions filed and the applicable law. The issues that arise for determination are as follows:

i) Whether the Defendant has encroached into the Plaintiff's parcel of land and whether eviction and permanent injunction should issue; and

ii) Who bears the costs of the suit?

9. Both parties bought their parcels from the same Vendor, one OWORI OMODO EGESA. From the documents produced in evidence, the plaintiff got her title on 9<sup>th</sup> May 2014 which was before the defendant got into a sale transaction with the vendor on 28<sup>th</sup> November 2014 and the second portion purchased in the year 2015.

10. On the question of whether or not the Defendant's land parcel no. 11601 has encroached into the Plaintiff's parcels of land Nos. Bukhayo/Bugengi/10301 and 10890? PW1 stated that there was encroachment into her land by the Defendant and he has even built a house on it. She stated that the Land Registrar and the Land Surveyor visited the parcel of land and made a report dated the 13<sup>th</sup> of May, 2016.

11. From the County Surveyor's report filed on the 13<sup>th</sup> of May, 2016 he recorded his findings as follows:

a) That the mutation that gave rise to P/No 11601 shows that the number is imposed on P/No 11588. The implication being that 11601 has no position on the ground;

b) That the registered owner of P/No 11601 is occupying a position on the ground that he claims to be the position of 11601 but which position apparently straddles across the already surveyed P/No's 10890 and 10301 whose numbering preceded the sub division that created L.R. 11601.

12. The surveyor concluded that parcel numbers 10301 and 10890 already existed before P/No. 11601 hence the latter subdivision was null and void as it compromised the already surveyed parcels of land. His recommendation was that P/No. 10301 and 10890 be respected in their surveyed position and the registered owner of P/No. 11601 be allocated with an equivalent portion of land held by the original owner of P/No 11587 that produced P/No. 11601.

13. Attached to the survey report are copies of mutations for P/No. 11301, 10890 and 11601 as well as a sketch indicating the current situation on the ground. From the surveyor's sketch it is evident that parcel 11601 should be at the bottom left side of the suit land while parcels no. 10890 and 11301 are at the top right side of the suit land.

14. Both parties have attached titles to their respective parcels of land. The Plaintiff acquired her title to Bukhayo/Bugengi/10890 on the 9<sup>th</sup> of May, 2014 measuring 0.20Ha. The Defendant's title was issued on the 6<sup>th</sup> of March, 2015 in respect of Bukhayo/Bugengi/11601 measuring 0.083Ha. The Defendant in his witness evidence affidavit filed on the 21<sup>st</sup> of December, 2016 stated that he acquired his portion on 28<sup>th</sup> November, 2014 and 14<sup>th</sup> April, 2015 and finally got his title on the 6<sup>th</sup> of March, 2015. He stated that the portions sold to him by the Vendor were clearly demarcated on the ground and he took possession of the portions and even planted a boundary thereon.

15. The Defendant did not file a separate surveyor's report as to the position of the suit parcels on the ground leading this Court to determine the issue of the encroachment solely on the surveyor's report attached on the Plaintiff's list of documents. From the report the Surveyor indicated that the parties' parcels of land are separated by a boundary and the Defendant has built across the Plaintiff's parcels of land. Section 18 (2) of the Land Registration Act provides that: **The Court shall not entertain any action of other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.** In this instance, the same has been determined and the court is called upon to ensure the determination by County Surveyor and the Land Registrar is implemented.

16. The Plaintiff being the proprietor of the two parcels of land No. 11301 and 10890 has rights and interests as provided for under sections 24 and 25 of the Land Registration Act, which rights this Court is obligated to protect. This was the holding in John Moriasi vs. Nyakoye Onchwari (2018) eKLR.

17. In Jane Njeri Arthur vs. Joseph Mwaura Njoroge (2019) eKLR it was held that:

**"In relying on the facts as presented, I opine that the District Land Registrar and District Surveyor who were experts properly arrived at their conclusions in respect of the general boundaries between land parcels numbers Ngong/Ngong/6385 and Ngong/Ngong/ 6386 respectively."**

18. In view of the observations and analysis made herein above, the parties' pleadings and submissions offered, I am persuaded that the Plaintiff has proved their case against the Defendant on a balance of probabilities.

19. In conclusion I enter judgement for the Plaintiff and hold that:

a) The Defendant is ordered to surrender vacant possession of the suit parcel No. BUKHAYO/BUGENGI/10890 within ninety (90) days of the delivery of this judgement.

b) In default of (a) above, eviction shall issue.

c) An order of permanent injunction be and is hereby issued against the Defendant, his family, servants, workers, agents, 3<sup>rd</sup>

parties or any other person claiming through him from interfering with the Plaintiff's use and occupation of Land Parcels No. BUKHAYO/BUGENGI/10890;

d) The Costs of the suit are awarded to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 6TH DAY OF OCTOBER, 2021.**

**A. OMOLLO**

**JUDGE**