



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO.169 OF 2009

PAUL NYAMUMBO MOKUA.....PLAINTIFF

-VERSUS-

KISII COUNTY GOVERNMENT.....1ST DEFENDANT

ENGINEER URBAN DEVELOPMENT.....2ND DEFENDANT

HIGHRICH CONSTRUCTION COMPANY LTD.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants vide an Amended Plaint dated the 20th August, 2014 seeking the following reliefs;

- a. A declaration that the Plaintiff is the registered owner of land parcel **NO LR. WANJARE/BOMORENDA/1140** (hereinafter referred to as the suit property).
- b. An eviction order and demolition of structures erected on the suit property by the Defendants.
- c. A permanent injunction restraining Defendants either by themselves, agents, servants and/or anyone claiming under the them, from re-entering, trespassing onto, diverting a road, interfering with and/or in any other manner, whatsoever, dealing with the disputed portion of the suit property.
- d. General damages for trespass
- e. Costs of the suit and interests.
- f. Any other suitable relief this Honourable Court may deem fit to grant.

2. The Plaintiff's claim is that he is the registered proprietor of the suit property measuring approximately 0.13 hectares. The suit property adjoins an access road that joins the Kisii-Migori Highway from Nyambunwa side. He further claims that in or about March 2009, the Town Council of Suneka now defunct which was succeeded by the 1st Defendant herein engaged the services of the 2nd and 3rd Defendants with a view of expanding, grading and gravelling the access road from Nyambunwa towards the Kisii-Migori Highway so as to enhance accessibility within Suneka Town. It is the Plaintiff's contention that while at the construction site, the 3rd Defendant in connivance with the 1st and 2nd Defendant respectively and without any lawful cause caused the access road to be diverted thereby trespassing into Plaintiff's land. The Plaintiff avers that as a result of the Defendants' acts of trespass he was dispossessed of a substantial portion of his land and he suffered loss and damage.

3. The 1st Defendant filed its Defense on 11th December, 2009 denying the Plaintiff's claim and put the Plaintiff to strict proof thereof.

4. Before the suit proceeded for hearing, the court recognizing that the case involved a boundary dispute directed that the Land Registrar and County Surveyor visit the suit property to establish if there was any encroachment by the 1st Defendant and if so, the extent of encroachment. The two officers visited the suit property on 7th February 2018 and filed their report in court.

5. Being dissatisfied with the said report, the Plaintiff sought and was granted leave to engage the services of his own private Surveyor who visited the suit property and filed his report in court.

6. The matter was subsequently fixed for hearing and each party was accorded sufficient time to present witnesses to testify in support of their case.

7. At the hearing of the Plaintiff's case, the Plaintiff testified as PW1. He reiterated the averments in his plaint and produced a copy of the title deed, search certificate and green card as his exhibits. He told the court that the Defendants had trespassed into the suit property and constructed an access road thereon without his consent thereby reducing its acreage by 3 meters. He produced the report prepared by the private Surveyor dated 7th May, 2018.

8. Upon cross examination by the counsel for the 1st Defendant, the Plaintiff conceded that even though he had neighbors who were affected by the actions of the Defendants, he was the only person who had filed suit against them. He stated that he did not agree with County Surveyor's report which indicated that there was no trespass into his property but strongly defended the report filed by his private Surveyor which showed that there was trespass. He confirmed that the 1st Defendant's representative was not present when the private Surveyor visited the suit property. The Plaintiff did not call any witnesses.

9. When it was the time for Defence hearing, learned counsel for the 1st Defendant indicated that the 1st Defendant did not intend to call any witnesses and thus the Defendant's case was marked as closed. Since the 2nd and 3rd Defendants never entered appearance, the hearing of the case was closed on 29th June, 2021.

10. Thereafter the court directed the Plaintiff and the 1st Defendant to file and exchange their written submissions. The Plaintiff filed his submissions on 12th May, 2021 while the 1st Defendant filed its submissions on 6th October, 2021.

PLAINTIFF'S SUBMISSIONS

11. Learned counsel for the Plaintiff submitted on three issues namely:

- a. Whether the Plaintiff is the lawful owner of the suit property and if so, the extent of his ownership rights.
- b. Whether the Defendants have encroached into the suit property and if so whether their actions amount to trespass.
- c. Whether the Plaintiff is entitled to the relief or orders/ sought.

12. On the first issue, counsel submitted that the Plaintiff had proved both by oral and documentary evidence that he was the lawful owner of the suit property. It was his submission that the Plaintiff's evidence was uncontroverted and should therefore be relied on.

13. On the second issue, counsel submitted that the activities of the Defendants amounted to trespass. He relied on the private Surveyor's report which was not challenged and submitted that it constituted sufficient proof of trespass by the Defendant.

14. On the third issue, counsel submitted that the cornerstone of the Plaintiff's case rested on the basis of the excision of a portion of the suit property by the 1st Defendant. It was counsel's contention that the Plaintiff's private rights had been interfered with and thus he was entitled to the declaratory orders sought as well as general damages for trespass in the sum of Kshs. 500,000.

1ST DEFENDANT'S SUBMISSIONS

15. Learned counsel for the 1st Defendant submitted that the Land Registrar and County Surveyor prepared and produced a joint report dated 7th February 2018 which confirmed that there was no trespass. He contended that since the report was not disputed by the Plaintiff, it should be deemed to be accurate and admissible in this court. He relied on section 38 of the Evidence Act which provides as follows:

“An entry in any public or other official book register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty or by any other person in performance of a duty especially enjoined by the law of the country in which such book, register or record is kept is itself admissible”

16. It was counsel's submission that since the Plaintiff was present during the site visit by the Land Registrar and County Surveyor, the exercise was open and inclusive and its findings ought not to be disputed.

17. Counsel submitted that the Land Registrar Kisii County adhered to the provisions of Section 14 of Land Registration Act, and complied with Article 47 of the Constitution on Fair Administrative Action, as well as Article 50 of the Constitution that provides for fair hearing as he ensured that the Plaintiff was present to observe what was going on during the site visit.

18. He further contended that the Plaintiff never contested the manner in which the Land Registrar and County Surveyor conducted themselves during the site visit nor did he raise any complaints on their malpractice or any violations while discharging their lawful duties. To that end counsel submitted that the Plaintiff ought to be estopped from challenging the resultant report.

19. With regard to the private Surveyor's report, counsel for the 1st Defendant submitted that the report did not fundamentally depart from the findings of the Land Registrar. However, he argued that the same was inconclusive as it stated that;

"The allocation of un-surveyed plots within Suneka Trading Centre MIGHT have pushed the surveyed 8m road into the parcel numbers 1140, 1138 and 1143 downwards".

Counsel argued that the choice of the word "MIGHT" was an indicator of the said report's inconclusiveness.

20. Counsel faulted the private Surveyor for failing to inform the Defendants about his site visit thus denying them their constitutional right to a fair hearing as provided under Article 50.

21. He therefore implored this Court to disregard the private Surveyor's report and adopt the Land Registrar's report in line with section 38 of the Evidence Act.

ISSUES FOR DETERMINATION

22. From my analysis of the pleadings, oral and documentary evidence, and submissions filed by both parties, the following issues fall for determination;

a. Whether the Defendants have encroached into the suit property and if so whether their actions amount to trespass.

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

ANALYSIS AND DETERMINATION

23. It is not in dispute that the Plaintiff is the registered owner of the suit property. What is in dispute is whether the Defendants have trespassed into the Plaintiff's land. It is important to note that the dispute before the court involves a boundary dispute between the Plaintiff and the 1st Defendant. It is for this reason that this court with the consent of both parties ordered that the matter be referred to the Land Registrar, Kisii County and the Kisii County Surveyor.

24. The two officers visited the suit property on 31st January 2018, in the presence of the Plaintiff and the area Chief and later retreated to prepare a joint report dated 7th February, 2018 which was filed in this court on 12th February, 2018. The Plaintiff however expressed dissatisfaction with the report. He successfully moved this court and was granted leave to engage the services of a private Surveyor.

25. The Plaintiff engaged a private Surveyor by the name Solomon Njoga from Olweny & Associates Limited who visited the suit property in the presence of the area Chief and carried out the survey. Mr. Njoga then prepared a report dated 7th May, 2021 which was produced in court as Plaintiff's Exhibit 5.

26. It is therefore clear that there are two rival reports that the court will have to consider in order to determine this suit. The two reports are; the joint survey report prepared by the County Land Registrar and County Surveyor and the report prepared by the private Surveyor.

27. The joint survey report by the County Land Registrar and Surveyor dated 7th February, 2018 was prepared out of a site visit carried out on 31st January, 2018 in the presence of the area Chief and the Plaintiff. The said report was filed in this court on 12th February, 2018. The observations in the report were as follows:

- a. The suit land touches on an 8-Meter road reserve to the south.
- b. The 8-meter road reserve however has a 3-meter marram motorable track.
- c. The parcel of land is fenced with a planted boundary along the road.
- d. There is a 2-meter strip between the planted fence and the motorable track
- e. The 2-meter strip is unused and appears more of a drainage
- f. The ground area of the suit land is 0.18 Ha approximately
- g. The Registered area is 0.13 Ha approximately.

28. The joint report concluded that there was no notable encroachment on the Plaintiff's land as the ground area occupied by the suit property (0.18 Ha) was greater than the registered area (0.13 ha).

29. On the other hand, the private Surveyor, Mr. Solomon Njoga conducted a site visit on the suit property in the presence of the area Chief and the Plaintiff and prepared his report dated 7th May, 2018 which report was later filed in court on 30th September, 2018. In his report, the Surveyor made the following observations;

- a. The parcel number in dispute touches on an 8-meter road reserve to the south.

b . Application of scale measurement between point a-d and b-c reveals an encroachment of about 3 meters into the Plaintiff's parcel number 1140.

c. Parcel number 1169 at Suneka Trading Centre is reserved for the County Government with proposed un-surveyed plots though they are allocated.

30. Having considered the observations made in the two reports, I am of the view that the joint report prepared by the Land Registrar and the County Surveyor is more comprehensive. This is because the said report indicates the approximate measurements of the suit property on the ground which is 0.18 Ha as opposed to the registered area which is expected to be approximately 0.13 Ha as clearly indicated on the copy of the title deed produced as the Plaintiff's exhibit. The attached Sketch Plan also depicts the position of the Plaintiff's land in relation to the road and there is no indication that the road has encroached on the suit property. The private Surveyor's report on the other hand only indicates the extent of the alleged encroachment to be 3 meters without showing the measurement of the suit property on the ground before and after the alleged encroachment by the 1st Defendant.

31. Further and as rightly pointed out by counsel for the 1st Defendant, the report of the private Surveyor is inconclusive. For instance, in its conclusion the report states in part that:

"..... The allocation of unsurveyed plots within Suneka Trading Centre MIGHT have pushed the surveyed 8m road into the parcel numbers 1140, 1138 and 1143 downwards".

32. This is a clear indication that the private Surveyor's report was based on presumptions and this could be the reason why he was not able to get the actual measurements of the suit property *vis a-vis* the alleged 3-meter encroachment by the 1st Defendant.

33. From the foregoing, it is my finding that the Plaintiff has not proved his case on balance of probabilities and he is therefore not entitled to the orders sought. Consequently, the Plaintiff's suit is dismissed with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF NOVEMBER, 2021

J.M ONYANGO

JUDGE