



REPUBLIC OF KENYA



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Okanga v Ongolo (Civil Case 97 of 2017)
[2020] KEELC 3888 (KLR) (30 January 2020) (Judgment)
Rodgers Odikara Okanga v Joseph Ambundo Ongolo [2020] eKLR
Neutral citation: [2020] KEELC 3888 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
CIVIL CASE 97 OF 2017
AA OMOLLO, J
JANUARY 30, 2020

BETWEEN

RODGERS ODIKARA OKANGA PLAINTIFF

AND

JOSEPH AMBUNDO ONGOLO DEFENDANT

JUDGMENT

1. Rodgers Odikara Okanga has sued Joseph Ongolo Ambudo vide a plaint dated 15th March 2017. The plaintiff pleaded that he is the registered owner of land parcel No. Bukhayo/Kisoko/2279 which the defendant has constructed on without his permission. The plaintiff therefore prays for judgment against the defendant for;
 - (a) Eviction
 - (b) Mesne Profits
 - (c) Damages
 - (d) Costs of the suit
 - (e) Any other relief the Court deems just to grant
2. The defendant contested the suit by filing his statement of defence dated 25th July 2017. The defendant pleaded that he bought a portion of the land comprised in title No. Bukhayo/Kisoko/2281 where he has put up his house. It is the defendant's case that his land is distinct from that of the plaintiff thus he denies the plaintiff's claim in toto.
3. The plaintiff called 3 witnesses in support of his case. Similarly the defendant also called 3 witnesses. The surveyor called Kennedy Masibo testified as PW1. PW1 works with Busia Lands office and stated



that he is the one who visited the two parcels of land in dispute to carry out the survey. He made his findings thus;

- (a) Shift in position of the road between parcel numbers 2279 and 2281.
 - (b) The home of the defendant falls within the parcel No. 2279.
 - (c) According to the map 2279 should run as shown in the sketch map ABDF.
 - (d) The encroached sections are marked which is approximately 0.39 ha.
4. In cross-examination by the Defendant, PW1 said plot number 2280 is not within the place the defendant has built his home. PW1 also said there is no plot number between land parcel no. 2279 and 2281.
 5. The plaintiff testified as PW2. He gave evidence that he brought this suit because he found the defendant had built on his land. He called the defendant and notified him of the illegal action. That the defendant's denial contained in the statement of defence has been answered by the survey report. The plaintiff asked the Court to grant him judgment as per prayers in his plaint.
 6. In cross-examination by the defendant, PW2 answered the defendant that he built the offending house at night and started living on it even before fixing the doors. That he did not find the defendant at home when they went to look for him with the police as PW1 was told the defendant works elsewhere.
 7. Benard Inyoni Adeya gave his evidence as PW3. He said that he is the one who sold the parcel of land number 2279 to the plaintiff. He later learnt that someone had built on the part of the sold land. That he sold the land without the offending house on it. In cross-examination, PW3 stated that L.R 2279 was registered in his name before he sold it. That PW3 had 2 brothers and they each had their separate parcels. This marked the close of plaintiff's case.
 8. The defendant gave his testimony as DW1 on 23/9/2019. He began by stating that he had come from Kakamega district while looking for a place to settle on. In the process of looking for land, he met Lokio Adeya who had land measuring ½ acre to sell. That they agreed and he paid Lokio Kshs.100,000 as part payment on receipt of which he was shown where to build as they waited for survey to be done. Later he paid him the balance. DW1 continued that Lokio supervised the building of the house. That later on the plaintiff called him to tell him that he had built on the plaintiff's portion.
 9. It is DW1's evidence that since he did not know the plaintiff, he enquired from Lokio about the complaint and Lokio advised him to ignore the plaintiff's complaint. That he works far from the suit parcels so when he returned, he found the plaintiff had brought this matter to court. DW1 said he does not know about the boundaries of the two plots since he is only a purchaser. He said he had not been given any document by Lokio.
 10. In cross-examination, DW1 said that before buying the land, he did not know the process to be followed but he has since learnt. That he has not engaged a surveyor to mark out the portion he had bought and confirm that it belongs to Lokio. The survey report produced by the plaintiff scares him on how the numbers follow each other; neither did he know when the numbers 2279, 2280 and 2281 were registered. DW1 said he bought a portion of L.R No. 2281.
 11. Kinjo Lokio Adeya was called as DW2. He knew the plaintiff and the defendant. According to DW2, he sold the land to the defendant and Benard (DW2's brother) sold the same land to the plaintiff. That Benard was the first one to sell the land. DW2 maintained that he owned the portion he had sold to the defendant. He added that they are three brothers and each owned their respective parcels. DW2



- did not understand how Benard's share (L.R. No. 2279) encroached on his portion (L.R. No. 2281). Parcel No. 2280 belongs to their brother Called Patrick Knoba.
12. Dickson Odikara was the defendant's last witness. He said that the defendant bought ¼ acre from Kinjo Loko comprised in L.R. No. 2281. According to DW3, it is not true that the defendant has built on part of L.R. No. 2279 which belongs to the plaintiff. According to this witness, it is the plaintiff who has encroached on parcel No. 2281.
 13. In cross-examination, DW3 admitted that parcel numbers 2279 and 2281 share a common boundary. DW3 was not present when the government surveyor visited the land. He also said he has no interest on L.R. No. 2281. In re-examination by the defendant, DW3 stated that L.R. numbers 2279, 2280 and 2281 initially belonged to brothers.
 14. Since parties were not represented by counsels, they relied on the evidence presented. The question for my determination is;
 - 1) Whether or not the defendant has encroached on the plaintiff's L.R. No. Bukhayo/Kisoko/2279?
 - 2) Who bears the costs of this suit?
 15. From the evidence, both parties are purchasers of neighbouring plots. The plaintiff bought L.R. No. 2279 from Benard Enyonyi Adeya while the defendant bought a portion of L.R. No. 2281 from Adeya's brother called Lokio Kinjo Adeya. Benard gave evidence as PW3 while Lokio testified as DW3. In support of his case, the plaintiff has produced the following;
 - (a) Search certificate issued on 23/7/2013 showing L.R. Bukhayo/Kisoko/2279 registered in the name of Benard Adeya.
 - (b) Green Card for L.R. No. 2279 showing the registration of plaintiff as owner thereof on 6/6/2014.
 - (c) Copy of RIM map showing the location of the three parcels of land with 2279 in the middle of 2280 and 2218.
 - (d) Photograph showing a house.
 - (e) Copy of Title Deed for L.R. No. 2279 issued on 25/6/2014 issued to the plaintiff.
 - (f) Sale agreement executed between the plaintiff and Benard Adeya.
 - (g) Surveyor's report 22nd May 2018.
 16. The defendant did not file or produce any documents. The defendant in his evidence in chief said that he had not been given any documents in respect of L.R. No. 2281 by Lokio. The defendant had also not engaged a surveyor to identify the boundaries of the land he was buying nor did he engage any surveyor after he received the plaintiff's complaint. The defendant was relying on the word given by the seller who testified as DW3. DW3 apart from saying that L.R. No. 2281 was his and accusing Benard of encroaching on his parcel of land; he never presented a report to support this averment as well as challenge the survey report presented by the plaintiff. DW3 also conceded that his brother Benard sold the land to the plaintiff before he did sell to the defendant thus he was aware the disputed portion had been sold. He never raised any complaint about his brother selling his land yet he proceeded to sell the "same portion" to the defendant. He is indeed the cause of the dispute.



17. The evidence of PW1 confirmed that indeed the defendant's house is lying on parcel No. 2279. The owner of parcel No. 2279 said he sold the land to the plaintiff who has since acquired a title to his name. In the absence of contrary evidence challenging ownership of the plaintiff, Section 24 of the [Land Registration Act](#) which grants the registered owner exclusive rights to enjoy quite possession is called into play. This right of the plaintiff has indeed been breached by the defendant.
18. The defendant had a duty to identify the land he was buying before developing it. Consequently he should limit his use within the boundaries of L.R. No. 2281 sold to him. Since the survey report has shown that the defendant's structure is on L.R. No. 2279 it is conclusive evidence that the plaintiff has proved his case on a balance of probabilities. The defendant confirmed the plaintiff's evidence that he received a call before this suit was filed i.e. he was notified. The defendant still chose to defend the claim even after the surveyor visited the land on 11/5/2018 in the presence of defendant's wife and that he must have been informed through the wife that their house encroaches on the plaintiff's land. For this reason, I find the plaintiff is entitled to costs of the suit.
19. On the prayer for mesne profits and damages, I find no basis was laid thus none is awarded to the plaintiff. In conclusion, I allow the plaintiff's claim for eviction orders. The defendant is granted 90 days from date of this judgment to remove his structures on L.R. No. 2279 and vacate the said land. In default the plaintiff is at liberty to remove the structures and evict the defendant at the defendant's costs. The costs of the suit is awarded to the plaintiff.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 30TH DAY OF JANUARY 2020.

A. OMOLLO

JUDGE

