



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 139 OF 2013**

**CHARLES MERISIA.....1<sup>ST</sup> PLAINTIFF**

**ABRAHAM M. LIMAKWANY.....2<sup>ND</sup> PLAINTIFF**

(Suing as the Administrators of the Estate of **KOCHULEM AMOYWAL**)

**DANIEL ROTICH NGURIAPUS.....3<sup>RD</sup> PLAINTIFF**

(Suing as the Administrator of the Estate of **KABELI MOLER KORINYANG**)

**VERSUS**

**PETRO KALUNGOKOR.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiffs in this matter filed this suit on **23/10/2013** seeking the following orders:-

(a) **An order that the District Land Registrar, West Pokot do rectify the boundaries between parcel Nos. WEST POKOT/CHEPKONO/169 & 171 and the defendant's LR No. WEST POKOT/CHEPKONO/170.**

(b) **A permanent injunction restraining the defendant, his servants and/or agents from trespassing upon and/ or in any other way interfering with plaintiff's use and possession of the parcel Nos. 169 and 171.**

(c) **Costs.**

(d) **Interest.**

2. The plaintiffs who are Administrators of the Estate of the late **Kochulem Amoywal** and **Kabeli Moler Korinyang** respectively, claim against the defendant is that, the deceased **Kochulem Amoywal** who was the registered proprietor of LR No. **West Pokot/Chepkono/169** while **Kabeli Moler Korinyang** was the registered proprietor of LR No. **West Pokot/Chepkono/172** which parcels of land the defendant has trespassed upon **5.90 Ha** and **4.56 Ha** forming part of the plaintiffs land No. **171** and **169** respectively.

3. The plaintiffs aver that the defendant is the registered owner of L.R No. **West Pokot/Chepkono/ 170** which land borders that of the plaintiffs and that the boundaries to the suit lands were established way back in **1968**.

4. That despite the defendant being aware of his boundary, he has trespassed on the plaintiffs' land and has begun paddocking the area and planting maize.

5. The plaintiff further avers that by virtue of the trespass, the defendant has now denied the plaintiffs use of the land.

6. The defendant filed a statement of defence in this matter on **3/4/2014**. In that defence he denies the contents of the plaint and avers that the cause of action relied on in this suit is the same as that relied on to institute **Kitale HCCC No. 146 of 2000** hence is *res judicata* and that the suit herein is time barred under the Limitations of Actions Act.

7. The defendant further avers that the orders sought are not available as the orders sought cannot be effected the Land Registrar since he is not a party in this suit.

8. I noted as I went through the record that a preliminary objection was raised to the effect that this suit ought to be dismissed on grounds of being *res judicata*. By a ruling dated **16/5/2016**, the preliminary objection was dismissed and this matter was ordered to be set down for hearing.

9. The suit herein proceeded to hearing on **23/4/2018, 18/10/2018, 13/11/2018** and on **25/7/2019** where the plaintiffs closed their respective cases. The defendant's case was heard on **13/11/2019** where the defendant testified and closed his case.

10. The court then after the close of the defence case ordered parties to file submissions in the matter. The plaintiffs filed their submissions on **3/12/2019** while the defendant filed his on **27/11/2019**.

## **EVIDENCE OF THE PARTIES**

### **The Plaintiffs' Evidence**

11. The plaintiffs called the West Pokot County Surveyor, a **Mr. Henry Lumasayi** as **PW1**. He testified that he visited the parcel of land in issue being **Chepkono 169, 170 and 171** pursuant to a court order to establish the boundaries as they exist on **14/06/2018**. He testified that upon picking out the boundaries as pointed out by the parties, parcel No. **169** was **37.72 Ha**, No. **170** measured **29.33 Ha** and No. **171** measured **61.29 Ha**. PW1 further stated that he did a comparison of the ground acreage and the registered acreage and found that the acreages on the ground and title do not correspond.

12. According to PW1, the 2<sup>nd</sup> plaintiff has encroached on parcel No. **170** and that the defendant had partially encroached on parcel No. **169**.

13. **PW2** was **Charles Onguso Mbaka**, the Land Adjudication Assistant, West Pokot who stated that the dispute between the parties herein had earlier been referred to the County Commissioner and that as result, the County Commissioner decided that parcel No. **169** gets **50** meters into parcel No. **170** and parcel No. **171** was to get **15 meters** into parcel No. **170**. According to PW2, the sketch map which he produced as **P. Exhibit 2(a)**, were the original boundaries before the dispute. He produced the proceedings of the dispute between the parties herein before the Assistant Director of Land Adjudication, West Pokot as **P. Exhibit 2(b)**.

14. The 1<sup>st</sup> plaintiff who testified as **PW3** is the administrator of the estate of his late father **Kochulem Amoywal** (deceased) who was the original plaintiff in this case. In his evidence, he conceded that the position on the ground does not correspond with that in the map in terms of acreage. He urged the court to order the surveyor rectify the boundaries in accordance with the map which was produced in court.

15. The 3<sup>rd</sup> Plaintiff, the administrator of the estate of his late father **Kabeli Moler Korinyang** testified as **PW4**. He stated that his late father owned L.R No. **West Pokot/Chepkono/171** measuring **34.14 Ha**. His prayer to the court was to be given back their land which was absorbed into parcel No. **171**. On cross-examination, he admitted that the ground acreage is greater than the one on the titles and that the defendant was not utilizing the disputed area.

### **The Defendant's Evidence**

16. The defendant testified that he legally occupies his land in Plot No. **170** and has been in occupation for **20 years** since the land was demarcated. He stated that he was sued by the 1<sup>st</sup> plaintiff in **Kitale HCC No 146 of 2000** which case was dismissed. He urged the court to dismiss the instant suit too. With that, the defence closed its case.

17. Pursuant to this court order made on **13/11/2019**, with regard to the filing of written submissions, I note that both parties have filed theirs.

### **Determination**

18. Upon considering the pleadings on record, the evidence adduced in court and the submissions filed by the parties, the issues that arise in this suit are: -

*(a) Whether there is any basis to order for the rectification of the register in respect of the plaintiffs and the defendant parcels of land.*

*(b) By whom are the costs payable?*

19. An analysis of the evidence tendered in court shows that plaintiffs are seeking orders for the rectification of registers to reflect the true position on the ground of land parcels Nos. **West Pokot/Chepkono/169 & 171** and the defendant's land parcel **LR. No. West Pokot/Chepkono/170**.

20. **Section 79** of the Land Registration Act No. **3 of 2012** empowers the Land Registrar to rectify any register or title. **Section 79 (1)** provides thus:-

**“79 (1) the registrar may rectify the register or any instrument presented for registration in the following cases;-**

(a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) In any case and at any time with the consent of all affected parties; or

(c) Upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel”.

21. Similarly, the courts have been given powers under the provisions of **Section 80 (1)** of the **Land Registration Act, 2012** to order rectification of title or register. **Section 80 (1)** provides:-

**“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”.**

22. In the present case the plaintiffs contend that the title registers of the parcels of land Nos. **West Pokot/Chepkono/169, 170 and 171** have variances in area and that their physical locations on the ground do not correspond with the Registry Index Map and that there is need for rectification of the registers and amendment of the Registry Index Map (RIM). **PW2** the Land Adjudication Assistant in West Pokot confirmed this to be the position and pointed to there being a problem on the ground. He stated in his evidence that the forum which heard a dispute, the County Commissioner decided that parcel No. **169** gets **50 meters** into parcel No. **170** and parcel No. **171** was to get **15 meters** into parcel No. **170**. It would appear that the same was not implemented hence the suit herein.

23. Based on the foregoing, I am satisfied the plaintiffs have proved that there is be a case for rectification of the registers of the affected parcels of land namely Land Parcels No. **West Pokot/Chepkono/169, 170 & 171** and accordingly enter judgment in favour of the plaintiffs in the following terms:-

**(1) That the County Land Registrar, West Pokot is hereby directed and ordered to visit land parcels No. West Pokot/Chepkono/169,170 & 171 and to establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed.**

**(2) The Land Registrar is hereby directed and ordered to effect rectification of the registers of the said parcels of land (referred to in (1) above in case it is necessary) on the basis of the boundaries that he will have ascertained.**

**(3) Each party to bear their own costs of the suit.**

**Dated, signed and delivered at Kitale on this 27<sup>th</sup> day of February, 2020.**

**MWANGI NJOROGE**

**JUDGE**

**27/2/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Temba holding brief for Ms. Arunga for plaintiffs

Mr. Wanyonyi holding brief for Nasike for defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**27/2/2020**