



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT OF KENYA AT MIGORI**

**ELC CASE NO. 348 OF 2017**

**(Formerly Kisii Elc Case no. 264 of 2014)**

**FRANCIS NYAKWAKA OMOLLO.....PLAINTIFF**

**VERSUS**

**1. ZACHARIA OGUTU NYAURA**

**(Sued as the legal administrator of the estate of**

**ABISALOM OGURU NYAURA**

**2. COUNTY LAND REGISTRAR, MIGORI COUNTY**

**3. COUNTY SURVEYOR, MIGORI COUNTY**

**4. THE HON. ATTORNEY GENERAL .....DEFENDANTS**

**JUDGMENT**

**A. INTRODUCTION**

1. At the heart of the present dispute is the property known as LR No. Kanyamkago/Katieno/381 measuring approximately four decimal three one hectares (4.31 Ha) in area (Hereinafter referred to as the suit land). The same is contained in Registry Map Sheet number 39 and located within Migori County. The suit land borders LR No. Kanyamkago/Katieno/1494 (the neighbouring parcel of land).

2. On 28<sup>th</sup> September, 2016, the court (Mutungi J) observed, directed and ordered, inter alia;

***“Having preliminarily heard the plaintiff and his counsel, I am satisfied the dispute between the plaintiff and the defendants is one that touches on the position of the boundary in respect of Land Parcels Kanyamkago/Katieno/381 and Kanyamkago/Katieno/1494 owned by the plaintiff and the respondents respectively. The Land Registrar is mandated under the provisions of the law to determine disputes relating to land boundaries. Accordingly, I order and direct that the Land Registrar Migori County and the County Surveyor do visit the site of the two parcels of land above stated and thereat to re-establish and to fix the boundary of the two parcels of land in accordance with Sections 18 and 19 of the Land Registration Act, 2012. The Land Registrar to also confirm if there is any encroachment by any of the parties on the land of the other. The Land Registrar/Surveyor to file their report in court within 90 days from today.”(Emphasis added)***

3. Consequently, this suit was transferred to this court upon its establishment, for hearing and determination. The orders granted as per paragraph 2 hereinabove were extended accordingly.

4. Notably, hearing of this suit proceeded ex parte and judgement delivered on 6<sup>th</sup> March 2018. However, pursuant to an application by way of Notice of Motion dated 2<sup>nd</sup> May 2018, the judgement was set aside with thrown away costs of Ksh 10,000/= on 13<sup>th</sup> December, 2018. It thus, paved way for hearing of this suit.

5. Further to court orders made on 9<sup>th</sup> July 2019, the suit was heard at the disputed site at Mori area in Uriri sub-county within Migori county. The plaintiff (PW1) and Milton Otieno (PW2) as well as the 1<sup>st</sup> defendant (DW1) and Peter Wanjala, the 3<sup>rd</sup> defendant (DW2) gave their respective testimonies as pertains this suit.

6. It is worthy to note that on 29<sup>th</sup> January 2020, by consent of counsel for the plaintiff and counsel for the 1<sup>st</sup> defendant, it was ordered in part that:

i. The plaintiff's bundle of documents itemized as numbers 1 to 10 and dated 7<sup>th</sup> July 2014 and filed in court on 10<sup>th</sup> July 2014 be admitted as PExhibits 1 to 10 respectively.

ii. A report by P.O Wanjala, County Surveyor Migori County (DW2) also attached to the defendant's application dated 2/5/2018 and filed on 3/5/2018 be and hereby admitted as PExhibit 11.

iii. A report dated 20/9/2017 and filed in court on 7<sup>th</sup> November 2017 by Land Registrar Migori hereby admitted as PExhibit 12.

iv. The 1<sup>st</sup> defendant's list of documents namely item numbers 1, 2 and 3 dated 6<sup>th</sup> August 2014 and filed on 7<sup>th</sup> August 2014 admitted as DExhibits 1, 2 and 3 respectively.

v. The plaintiff and the 1<sup>st</sup> defendant through their respective counsel have their respective cases closed accordingly.

## **B. THE GIST OF THE PLAINTIFF'S CASE**

7. The plaintiff through Oguttu Mboya and Company Advocates, now Oguttu, Ochwangi, Ochwal and Company Advocates, commenced this suit by way of a plaint dated 7<sup>th</sup> July 2014 and filed in court on 10<sup>th</sup> July 2014 seeking the following orders:

i. Declaration that plaintiff is the lawful owner and/or proprietor of the suit land.

ii. Declaration that the reports dated 14<sup>th</sup> day of May 2014 and 29<sup>th</sup> May 2014, by and/or on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, were irregular, illegal and fraudulent, to the extent that same departs from and/or is at variance with the dimensions contained in the relevant Registry Index Map.

iii. Declaration that the 1<sup>st</sup> defendant has since encroached onto, excised and annexed portions of the suit land and thereby trespassed onto the suit property without the permission and/or consent of the plaintiff, whatsoever and/or howsoever.

iv. An order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to re-visit the concerned parcels of land herein, that is the suit land and the neighbouring parcel of land, respectively, and while thereat to demarcate the exact boundary position between the subject parcels of land, in accordance with the records held and/or kept at the County Land Registry, Migori County.

v. Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, alienating, selling, leasing, interfering with and/or in any other manner dealing with the suit land and/or any portion thereof.

vi. General damages for trespass.

vii. Interest on (vii) above hereof at court rates.

viii. Costs of this suit be borne by the defendants.

ix. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

8. The plaintiff complains that he is the legitimately registered proprietor of the suit land and its title deed was issued in his favour on 19<sup>th</sup> February 2014. That without any notice, on 14<sup>th</sup> May 2014, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, at the request of the 1<sup>st</sup> defendant, proceeded to the boundary of the suit land and the neighbouring parcel of land and while thereon, purported to demarcate the boundary thereof. That it culminated into the annexation and excision of a portion of the suit land measuring 26 metres by 246 metres and included the same as part of the neighbouring parcel of land. That following the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the plaintiff has been dispossessed of a portion of the suit land measuring 26 metres by 246 metres hence precipitating the present suit.

9. On 4<sup>th</sup> June 2020, learned counsel for the plaintiff filed submissions dated 18<sup>th</sup> April 2020 wherein reference was made to the orders sought in the plaint, evidence adduced during hearing and that the plaintiff has established his case to the requisite standard for the grant of orders in terms of the plaint. Counsel cited authorities, inter alia, *Aikman-vs-Muchoki Civil Appeal No. 9 of 1982 at Nairobi (COA) and Giella-vs-Cassman Brown and co Ltd (1973)EA pages 358 to 361*, in support of the submissions.

### **C. THE GIST OF THE 1<sup>ST</sup> DEFENDANT'S CASE**

10. In his 20-paragraphed statement of defence dated 6<sup>th</sup> August 2014 and filed in court on 7<sup>th</sup> August 2014, through Odingo and Company Advocates, the 1<sup>st</sup> defendant denied the plaintiff's claim. He stated, inter alia, that notice and information to visit the suit land and the neighbouring parcel of land boundaries were duly given and that boundaries were planted according to the Registry Map. He termed the plaintiff's claim baseless, vexatious and an abuse of the court's process. As such, he sought dismissal of the suit with costs.

11. On their part, the 2<sup>nd</sup> to 4<sup>th</sup> defendants through Chepkirui Janet, litigation counsel for the Honourable Attorney General, denied the plaintiff's allegations in the plaint. It is stated that requisite summons were duly served on parties and the plaintiff flatly refused to acknowledge receipt of the summons without any reason. That the suit land was never interfered with during the demarcation exercise carried out by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who did the same in accordance with the lawfully registered Part Development Plan (PDP) regarding the suit land. They, too, sought dismissal of the suit with costs.

12. The parties including the defendants were given a period of sixty (60) days from 29<sup>th</sup> January 2020 to file and exchange submissions. Therefore, the court complied with the right to fair hearing under Article 50 (1) of the Constitution of Kenya, 2010. However, the defendants failed to file and serve their submissions.

### **D. ISSUES FOR DETERMINATION**

13. I have thoroughly considered the parties' respective pleadings, evidence of PW1, PW2, DW1 and DW2 as well as the statement of agreed issues (plaintiff's version) dated 4<sup>th</sup> September 2014 duly filed on even date and the plaintiff's submissions. I also bear in mind, the Court of Appeal decision in *Galaxy*

***Paints Co. Ltd v Falcon Grounds Ltd (2000) EA 385*** in respect of the issues for determination in a suit.

14. In view of the foregone, I am of the considered view that the issues for determination herein are compressed as to whether:

- a) The plaintiff is the lawful registered proprietor of the suit land.
- b) Does the suit land share a common boundary with the neighbouring parcel of land belonging to DW1?
- c) The 2<sup>nd</sup> and 3<sup>rd</sup> defendants visited the boundary stated in (b) hereinabove on 14<sup>th</sup> May 2014 and or subsequent date(s) and finally determined the boundary dispute between the parcels of land.
- d) The plaintiff is entitled to the orders sought in the plaint.

#### **E. ANALYSIS AND DETERMINATION**

15. In respect of the first issues, PW1 stated at paragraphs 6, 7 and 8 of his plaint that he is the registered proprietor of the suit land. Moreover, during examination in chief, he stated that:

***“...I have sued the defendant, Zacharia Ogutu Nyaura over the suit land, LR No. Kanyamkago/Katiemo/381 registered in my name since 1972...”***

16. As stated at paragraph 5 of his statement of defence, PW1 is the registered proprietor of the suit land. Furthermore, in examination in chief, he stated, inter alia;

***“The plaintiff(PW1) owns LR No. 381 on the other side...”***

17. The evidence of DW2 affirmed the testimony of DW1 that PW1 owns the suit land. That the neighbouring parcel of land belongs to DW1.

18. PExhibits 1 to 12 as well as DExhibits 1 to 3 were duly admitted by consent of the parties to this suit on 29<sup>th</sup> January 2020 as noted at paragraph 6 hereinabove. It is discernable from PExhibits 1, 2 and 4 alongside DExh 1 and 2 that the suit land is registered in the name of PW1 who obtained title deed (PExh2) thereto on 19<sup>th</sup> February 2014.

19. Pursuant to Sections 3, 24, 25 and 26 of the Land Registration Act, 2016 (2012) (The LRA) with regard to certificate of title of land, PW1 is the proprietor of the suit land. PExhibits 5, 6 and 7 reveal that DW1 is the proprietor of the neighbouring parcel of land registered on 17<sup>th</sup> July 1986 and title deed issued on 21<sup>st</sup> July 1993 in the name of the late father of DW1 under Sections 27, 28 and 30 of the Registered Land Act Chapter 300 Laws of Kenya (the Repealed Act) following a lawful process, see the observation by Mutungi, J in the case of ***Lepore Ole Maito v Letwar Kortom and 3 others (2016)eKLR***, which I approve accordingly.

20. In ***Michael Githinji Kimotho v Nicholas Muratha Mugo Civil Appeal No. 53 of 1995*** cited in ***Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri (2014)eKLR***, the Court of Appeal held that:

***“The protected rights of a proprietor under Section 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser.”***

21. Thus, it is even ground that PW1 and DW1 are lawful proprietors of the suit land and neighbouring parcel of land respectively. Indeed, under Article 40(1) of the Constitution of Kenya, 2010, their rights and interests in the respective parcels of land are protected.

22. On the second issue, paragraphs 4, 9 and 11 of the plaint and paragraph 10 of the statement of defence of DW1, discern a common boundary between the suit land and the neighbouring parcel of land. PW1 testified that sisal plants formed the boundary between the two parcels of land.

23. DW1 also testified that his land extends beyond the sisal boundary. Nonetheless, DW1, DW2 and PW2 confirmed the two parcels of land share physical common boundary as shown in Registry Map Sheet Number 39 and noted during hearing at the disputed site.

24. The next issue is whether the boundary between the suit land and the neighbouring parcel of land was finally determined by the Land Registrar and DW2. PW1 testified in examination in chief that;

***“He (DW1) returned and conspired with some people who subdivided the suit land using sisal plants (boundary made of sisal plants noted). The boundary never used to exist.”***

25. PW1 maintained in cross examination that DW1 built an iron sheet roofed house (Also noted by court during hearing at the disputed site) on the suit land in 2014. He urged this court to order that the sisal plant boundary fixed by DW1 be removed and fixed on the right place (boundary).

26. DW1 confirmed that the sisal plants boundary was fixed later as his land extends beyond it. That he built the house and pit latrine (noted during hearing, too) for his son.

27. According to PW2, the County Surveyor fixed the live fence which never used to exist. That PW1 used to cultivate his land to the middle of the disputed portion of land and that the surveyor’s report tells it all.

28. During hearing of the suit at the disputed site, DW2 (the County Surveyor) showed the court the common boundary physically depicted by live hedge/fence made of sisal plants. That there was no overlap of the boundary thereof. That he visited the disputed portion measuring 1.1 hectares in area in 2017 and the Land Registrar determined the boundary in dispute after conducting a hearing of the parties and their respective witnesses.

29. I take into account the findings and the conclusion in PExhibits 11 and 12. The findings in the former called for determination of the correct physical position of the common boundary on the two (2) parcels of land while the latter shows that DW1 unprocedurally moved the boundary by encroachment of 1.1 hectares into the suit land respectively. It is important to note that PExhibits 11 and 12 were ordered for by the court’s on 28<sup>th</sup> September 2016 to the effect that DW2 and the Land Registrar revisit the suit land and the neighbouring parcel of land herein and file their respective reports. Indeed, Pexhibits11 and 12 are opinion evidence as envisaged under Sections 48 and 54 of the Evidence Act Chapter 80 Laws of Kenya.

30. Generally, PExhibits 11 and 12 are not binding on this court which is at liberty to accept or reject them depending on the facts and circumstances of the case before it; see ***CD Desouza-vs-BR Sharma (1953)26 KLR 41 at 42*** and ***Amosam Builders Developers Ltd-vs-Gachie and 2 others (2009) KLR 628***.

31. In the obtaining scenario, PExhibits 11 and 12 are pretty clear that DW1 encroached into the suit land. The testimonies of PW1, PW2 and DW2 strongly point to the fact of encroachment and observation duly made during hearing. DW2 and the Land Registrar are mandated to determine boundaries under Sections 18,19 and 20 of the LRA and as per the decision in ***Andrew Marigwa v Josephat Ondieki Kebati (2017)eKLR***, which I endorse without any reservations. PExhibits 11 and 12 are sound, determinative as stipulated under section 18 (1) of the LRA and fortified by the evidence of PW1, PW2 and DW2 hence I find no reason or at all to reject them.

32. As regards issue number four, Section 152A of the Land Act, 2016 (2012) prohibits unlawful occupation of private land. The plaintiff is the entitled to orders (i), (iii) and (iv) sought in the plaint. He is the indefeasible proprietor of the suit land bearing in mind **Article 40 (1) of the Constitution of Kenya, 2010, Section 13 (7)(i) of the Environment and Land Court Act, 2015 (2011), Giella v**

**Cassman Brown and co Ltd (1973) EA 358 and Nguruman v Jan Bonde Nielsen and 2 others (2014) eKLR.**

33. In view of the orders of revisit to the site made on 28<sup>th</sup> September 2016 and PExhibits 11 and 12 duly filed and admitted in evidence on 29<sup>th</sup> January 2020, orders (ii) and (iv) sought in the plaint are superfluous while order (vi) sought therein is not tenable in the circumstances. To that end, it is the finding of this court that the plaintiff has partially proved his case against the defendant on a balance of probabilities.

34. Accordingly, judgement be and is hereby entered for the plaintiff against the defendants jointly and severally in the following terms;

- a) Declaration that plaintiff is the lawful owner and/or proprietor of LR NO. KANYAMKAGO/KATIENO/381, measuring 4.31 hectares
- b) Declaration that the 1<sup>st</sup> defendant has since encroached onto, excised and annexed portions of LR NO. KANYAMKAGO/KATIENO/381 and thereby trespassed onto the suit property without the permission and/or consent of the plaintiff, whatsoever and/or howsoever.
- c) Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, alienating, selling, leasing, interfering with and/or in any other manner dealing with the suit property, that is, LR NO. KANYAMKAGO/KATIENO/381 and/or any portion thereof.
- d) Costs of the suit be borne by the defendants.

**Delivered, Signed and Dated at Migori in open Court and through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 15<sup>th</sup> day of JULY, 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In Presence of :-**

Mr. Ochwal learned counsel for the plaintiff

Mr. Sam Onyango holding brief for Owade learned counsel for the 1<sup>st</sup> defendant

Court Assistant – Tom Maurice