



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CIVIL CASE NO. 1340 OF 2007

1. GEORGE GICHURU NJOROGI
2. HANNA WAMBUI NJOROGI
3. BERNARD NGACHA BARUA.....PLAINTIFFS
(TRUSTEES OF KARIRI & GIKARU FAMILY)

=VERSUS=

1. SAMUEL MUTHUI
2. STEPHEN GICHOHO
3. JOSEPH KELAI.....DEFENDANTS

JUDGEMENT

1. By a plaint dated 4th May 2004 the plaintiffs field this suit against the defendants jointly and severally seeking:-

- a. A permanent injunction restraining the defendants their servants and/or employees from encroaching and interfering with the beacons and boundary marks in respect of land parcel number Nairobi Block 126/479.**
- b. A mandatory injunction compelling the defendants to restore the beacons and boundary marks removed from Land Parcel Number Nairobi Block 126/479.**
- c. General damages**
- d. Costs of this suit.**
- e. Any other relief that this honourable court may deem apt to grant.**

2. Upon being served with copies of plaint and summons to enter appearance the defendants filed a memorandum of appearance and a statement of defence dated 31st July 2009.

3. It is the plaintiff's case that they are the registered trustees for Kariri and Gikaru family, as the proprietors of land reference Number. Nairobi/Block/126/479 measuring 6.575 hectares. They aver that on or about 19th February 2004, the defendants encroached on the plaintiffs land uprooted beacons and boundary marks that the provincial surveyor had identified and erected. That on 23rd February 2004 the defendants stopped the survey work on the suit property, and uprooted boundary marks that had been erected. The plaintiffs are desirous of selling the suit property and want the defendants restrained from encroaching and interfering with the survey work.

4. It is the defendants' case that they members of Ngundu Farmers Co-operative Society Limited who were the previous owners of Land Parcel Nos Nairobi/Block 126/480, 481 and 482 (original 683, 753 and 760). The society pointed out the beacons to both the plaintiffs and the defendants. The parties then erected boundary features marking out the boundaries of their respective parcels. The plaintiff visited them on their land over the years, and it was only in the year 2003, that they raised the issue of the boundaries.

5. The plaintiffs had earlier sold a portion of their land to Mwhoko Housing Company which proceeded to subdivide the land and erect beacons. The plaintiffs had long acquiesced to the existing boundaries and cannot raise the issue now. The defendants denied uprooting the boundary marks and stated that the marks put up in 1988 are still in place. It is also the defendants' case that the plaintiffs are trying to seize an extra 6 acres from the land that the defendants have had possession of or developed since 1988. That in so doing it will change the entire layout of the locality as well as causing the demolition of houses and existing boreholes and trees. They pray that the plaintiffs case be dismissed with costs.

6. The plaintiffs called two witnesses. PW1 Bernard Gitonga, a surveyor told the court a letter was received in their office in respect of the boundaries of Nairobi/Block 126/479 (hereinafter referred to as "**the suit property**"). He told the court that the District Land Registrar directed them to fix the beacons on the suit property. He said he visited the suit property with other officers. At the scene they found the proprietors of the suit property and those of the neighbouring parcels. They established the beacons and prepared a report. He told the court the said report was filed in court on 12th May 2005. He further told the court that they picked the boundaries on the ground and compared with the measurements in the Registry Map Index. They discovered that there was an encroachment on the suit property. They then reestablished the beacons. The report was produced by consent as exhibit P2 and D1.

7. Pw2, Hannah Wambui Njoroge, the 2nd plaintiff told the court that she was adopting her witness statement. She confirmed that the suit property has been encroached by the neighbouring parcels 480, 481 and 482 respectively. He prays that the boundary marks be fixed as per the Registry Map Index. She also told the court that she was seeking damages.

8. The defence called three witnesses. DW1 Samuel Muthui, adopted his witness statements. He told the court that he is the owner of Land Reference Number Nairobi/Block/126/480, that he entered the land in 1988 after he was shown the beacons of the land. He said he also marked the boundary by planting sisal. He maintained the boundary marks are there to date. He also produced photographs showing the developments he has undertaken on his land. He took issue with the survey report since it will mean losing 1 ½ acres of his land. He told the court that he has lived there for 16 years. He denied that he removed any boundary features. He also relied on the documents on the list of documents. He prays that the plaintiff's case be dismissed.

9. DW2, a done of Power of Attorney by the 3rd defendant, Alice Wanjiru Kelai also told the court that she was adopting her witness statement. She denied that she damaged any boundary features. She told the court that she was comfortable with the way things are.

10. DW3 Jane Muthoni, also adopted her witness statement. She said she started residing on her land in 1993 though the land was allocated on the 1980s. She said she was shown the beacons of her land by the people who did the subdivision. They marked the boundaries by planting sisal plants. She denied that she damaged boundary features not did she stop any survey work. She also denied that she has encroached on the suit property.

11. At the close of the trial, parties opted to tender final written submissions. The plaintiffs' submissions are dated 14th August 2019. It is the plaintiffs' submissions that the defendants did not call any witness from Ngundu farmers Cooperative Society Ltd to shed light on the survey that was carried out. They did not produce any registry index map to show that the beacons had been placed as per the Registry Index Map.

12. That section 18, 19 and 20 of the LRA, 2012 gives power to the Registrar to determine and fix boundaries and the proprietors to the land ought to maintain the features that demarcate the boundaries. The registrar having determined and fixed the boundaries, and the defendants having failed and/or omitted to challenge the said determination by the Registrar as per the report filed in court, the defendants are estopped from contesting the findings. They have put forward the case of **George Kamau Macharia vs Dexka Ltd ELC NO. 195 of 2017**. It was further submitted that the plaintiffs have established that the defendants encroached and trespassed on the plaintiffs land as per the Land Registrar's report and are entitled to the orders sought. On the issue of mandatory injunction they have put forward the case of **Katana Kahindi Fondo vs Nelson Ajulu & 9 Others ELC No. 285 of 2017**. On costs, it was submitted that costs follow the event and the plaintiffs having proved their case on a balance of probabilities are entitled to costs.

13. The defendants' submissions are dated 14th October 2019. They submit that the 3rd defendant passed on, on 21st July 2019 but the plaintiffs' advocate chose not to comply with order 24 of the Civil Procedure Rules. No court process can go on against the estate until an administrator has been appointed by the court. The 1st and 2nd defendants own separate parcels of land and cannot litigate on behalf of the deceased, 3rd defendant. They have put forward the case of **Sarah Kobilu Chebii & Another vs David K'Chesang Kabarnet Civil Appeal No. 9 of 2017**.

14. Further that it is on record that the 1st plaintiff died and the case was withdrawn. The fact that the plaintiffs own the suit property in undivided shares, it is not possible to proceed with part of the claim without proof that the surviving plaintiffs own the portion that is in dispute. This is fatal to the plaintiffs' case as the court cannot partition the plaintiffs' case and give a judgment for part of the claim and leave the part owned by the deceased hanging. Parties are bound by their pleadings. They have put forward the case of **IEBC 7 Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR**. The plaintiffs witnesses never gave evidence to show that the defendants uprooted any beacons or boundary marks. Pw1 told the court that sisal plants physically marked the boundaries and metal beacons were in existence when they visited the suit land. PW2 stated that she did not know the defendants.

15. In the plaint, it is not alleged that the defendants have trespassed and occupied part of the part of the plaintiff's land. It is alleged that the beacons and the boundary marks were uprooted. The plaintiffs do not seek eviction orders. The defendant have filed another suit ELC 60 of 2007 (OSO against the plaintiffs claiming adverse possession. They have put forward the case of **Chevron (K) Ltd (Formerly known as Caltex Oil Kenya Ltd) vs Harrison Charo wa Shutu [2016] eKLR**. They pray that the plaintiffs' suit be dismissed with costs.

16. I have considered the pleadings, the evidence on record, the written submission made on behalf of the parties and the authorities cited. The issue for determination are:-

i. Whether or not the defendants have encroached on to the plaintiff's land parcel No. Nairobi/Block 126/479.

ii. What is the legal effect of the determination of boundaries by the Land Registrar?

iii. Are the plaintiffs entitled to the reliefs sought?

iv. Who should bear costs?

17. By a consent order dated 15th October 2004, which reads

“It is hereby ordered by consent:

1. That the matter be referred to the Land Registrar Nairobi to appoint an officer to determine the boundaries as per the Registry Index Map.

2. The Land Registrar Nairobi, also to prepare a report and plan showing the present physical boundaries on the four parcel of land Nairobi/Block 126/479, 480, 481 and 482.

3. The matter be stood over to 8th December 2004 at 9.00 am for mention”.

18. Following this order, the surveyor’s report dated 4th May 2005 was filed in court on 12th May 2005. This report was produced by consent as exhibit P1 and D1. In essence both parties wish to rely on it.

Part of the report read:-

“By measurements it was observed that the ground “beacons” (sisal plants) are wrongly positioned thereby occasioning distorted boundaries. This implies that ground acreages are also different from those depicted on the survey plans”.

It went further to state,

“NBI/Bloc 136/479

-Looses approximately 3.6 acres to BLK/126/482.

-Looses approximately 3.0 acres to BLK 126/480”

This report has not been challenged PW1 Bernard Gitonga confirmed that he was on the ground and they placed fresh beacons as per the registry index map. It is the defendants’ case that they have lived that way since 1988. That they planted the sisal plants to mark the boundaries. This does not mean that there was no encroachment on the suit property. They also denied that they uprooted the boundary features.

19. As stated earlier the surveyors report dated 4th May 2005 has not been challenged. The report confirms encroachment of the suit property. PW2, Hannah Wambui Njoroge, in her testimony did not state that the defendants uprooted the beacons and boundary marks. There is no evidence to show that the defendants were seen uprooting the said boundary marks. However there is evidence that there is encroachment on the suit property.

20. The defendants on their submissions have raised the issue of the demise of the 3rd defendant. It should be noted that he has not participated in this case. This is because he donated the power of attorney to Alice Wanjiru Kelai to represent him in this case.

21. She testified as DW2. She is the wife of the 3rd defendant. No evidence has been placed before court to show that the 3rd defendant is deceased by the close of the trial.

22. It is on record that some buildings are on the plaintiffs’ land. I find that they are entitled to general damages for trespass. In the case of **Philip Ayaya Aluchio vs Chrisphus Ngayo [2014] eKlr J Obaga** stated:-

“.....the issue which arises is as to what is the measure of such damage. It has been stated that the measure of damages for trespass is the difference in the value of the plaintiffs’ property immediately before and immediately after the trespass or the cost of restoration whichever is less. (See Hostler vs Greenpark Development Co. 986 W 2d 500 (No Ct App. 1999). The plaintiff herein did not adduce any evidence as to the state of his property before and after trespass.....however I find that the plaintiff is entitled to general damages for trespass. I award a nominal sum of Kshs.100,000 as general damage for trespass. The cost will go to restoration of the suit land to its former state”.

I am guided by this authority.

23. Similarly the plaintiffs herein did not give the value of the suit property before and after the trespass. I award Kshs.200,000 which I think is reasonable.

24. I find that the plaintiffs have proved their case on a balance of probabilities. They are entitled to the prayers in the plaint. Accordingly judgment is entered in favour of the plaintiffs as against the defendants jointly and severally as follows:-

a. That an order of permanent injunction is hereby issued restraining the defendants, their servants and employees from encroaching and interfering with the beacons and boundary marks in respect of Land Parcel No. Nairobi/Block/126/479.

b. That mandatory injunction is hereby issued compelling the defendants to restore the beacons and boundary marks removed from Land Parcel No. Nairobi/Block 126/479 and as per the registry index map.

c. General damages for trespass Kshs.200,000.

d. Cost of this suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 6th day of February 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant