



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 195 OF 2015 (MULTI TRACK)**

**HAMISI MOHAMED BAKARI**

**SULTAN MOHAMED BAKARI**

**WAZIRI MOHAMED BAKARI**

**RAMADHANI MOHAMED BAKARI**

**BARU W. MOHAMED**

**SAID MOHAMED BAKARI.....PLAINTIFFS**

**VERSUS**

**THOMAS SADIKI**

**JOYCE SADIKI**

**KIBOKO NDURYA**

**TOM NANCHOKE.....DEFENDANTS**

**JUDGMENT**

1. By a plaint dated 14<sup>th</sup> August 2015 and filed on 25<sup>th</sup> August, 2015, the plaintiff avers that at all material times, they were and still are the legal and beneficial owners of all that PARCEL OF LAND KNOWN AS LR NO. 126 SECTION V situate in Jomvu within Mombasa County (hereinafter “the suit property”). The plaintiffs states that the defendants have intermittently between 2013 and 2014 entered and trespassed upon portions of the suit property and thereafter started putting up temporary structures and a barbed wire fence without the plaintiffs’ consent or authority. That the plaintiffs’ attempt to have the matter resolved amicably at the Deputy County Commissioner’s Office after the suit property boundaries were ascertained and having confirmed that the defendants had encroached on the suit property have proved futile.

2. The plaintiffs aver that the defendants have since June, 2015 started putting up permanent structures with a view to permanently dispossess the plaintiffs of the suit property and have threatened violence on the plaintiffs if they set foot on the suit property. The plaintiffs aver that the defendants’ acts on the suit property constitute trespass and are illegal. The plaintiffs aver that as a result of the defendants’ acts as aforesaid, the plaintiffs have been hindered from accessing and developing the suit property and have suffered and continue to suffer irreparable loss and damages. The plaintiffs further aver that in spite of numerous requests and pleas by the plaintiffs to vacate the suit property, the defendants have refused to heed the same rendering this suit necessary.

3. The plaintiffs pray for judgment against the defendants jointly and severally for:

**a. Vacant possession of LR NO. 126 SECTION V situate in Jomvu within Mombasa County and demolition of all the illegal structures thereon.**

**b. An order of injunction restraining the defendants whether by themselves their servants, agents, employees, family members, or otherwise howsoever from entering upon, or remaining in possession of LR. NO. 126 SECTION V situate in**

**Jomvu within Mombasa County or putting up structures thereon or in any the manner dealing with the said property.**

**c. Damages for trespass.**

**d. Costs of and incidental to this suit.**

**e. Any other further relief this honourable court may deem fit and just to grant.**

4. The matter proceeded before Komingoi, J who took the evidence of the plaintiffs' witnesses. The 1<sup>st</sup> plaintiff Hamisi Mohamed Bakari testified as PW1 and stated that the plaintiffs are brothers. He stated that the suit property belonged to their late father, Mohamed Bakari (deceased). That the plaintiffs took out letters of administration and produced the same as well as the Certificate of Confirmation of Grant as P.Exhibits 1(a) and (b) respectively. The plaintiff produced the title deed in their names as P.Exhibits 2.

5. PW1 stated that they have sued the defendants because they entered onto their land in 2014/2015 and put up a fence and erected structures thereon. It was his evidence that the 1<sup>st</sup> and 2<sup>nd</sup> defendants fenced off part of the suit land and erected a structure while the 3<sup>rd</sup> defendant also erected a structure and subdivided the land and sold to other parties, including the 4<sup>th</sup> defendant. That the matter was reported to Changamwe Police Station and later to the Deputy County Commissioner, Changamwe, and were referred to the land registry and a surveyor came to the ground. PW1 produced the receipt for Kshs.10,000/= for payment made to the surveyor as p.exhibit. 3 He stated that the survey was done on 10/3/2015 when they were shown their boundary but the defendants refused the report and claimed that the plaintiffs bribed the surveyors as the report showed that the defendants had encroached on the plaintiffs portion. PW1 stated that they went back to the police and the Deputy County Commissioner and wrote a letter marked P.exhibit 4 to the Land Registrar. He stated that thereafter, the plaintiffs brought a private surveyor to the land who did his report dated 16/6/2015 which was produced as p.exhibits 5. That the plaintiffs instructed their advocates who wrote a letter to the 1<sup>st</sup> defendant (p.exhibit 6). The 1<sup>st</sup> Defendant replied stating that he did not own PLOT NO. 126 (p.exhibits 7). That the 1<sup>st</sup> Defendant then went to Transparency International who wrote letters advising that he gets a surveyor to confirm his portion of land. The letters were produced and marked p.exhibit 8(a) and (b). PW1 urged the court to compel the defendants to vacate from the plaintiffs' portion. He further urged the court to grant them the orders sought and to dismiss the defendants' counter-claim.

6. When cross-examined by Mr. Khatib, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, PW1 stated that he did not know if the 1<sup>st</sup> defendant owns plot No. 128. That he knows his portion. He stated the defendants put up a barbed wire fence in 2014/15. That before they went to the surveyor the 1<sup>st</sup> defendant did not want to discuss anything. PW1 stated that before 2014 he used to go to the land everyday. That they share a boundary with the 1<sup>st</sup> defendant and found that the beacons had been removed. That he went to the Land Registrar to get a joint survey done but when the report came out, the 1<sup>st</sup> defendant refused, claiming the surveyor had been compromised. That the land had more than 9 beacons, but only 3 were in situ. He stated that the 1<sup>st</sup> defendant did not want a joint survey done. He stated that his surveyor found that the 1<sup>st</sup> defendant had encroached on the plaintiffs' land and 6 beacons were missing. He stated that survey was done but the 1<sup>st</sup> defendant refused the report. PW1 stated that he did not go to PLOT NO. 128. That their portion that has been encroached was 1.66 acres.

7. On being cross-examined by Mr. Gitonga, learned counsel for the 3<sup>rd</sup> defendant, PW1 stated that the land belongs to his father Mohamed Bakari. That he went there when his father was alive. That he is ploughing the land, but have not erected any structure. He stated that they did not know the 3<sup>rd</sup> defendant. That in 1980, his father was alive, adding that there was no agreement between the 3<sup>rd</sup> defendant and the plaintiffs' late father. That the 3<sup>rd</sup> defendant has erected a structure on their land that is why he has been sued. That the survey was done but not completed as the defendants claimed that the plaintiffs had compromised the surveyor. That the 3<sup>rd</sup> defendant was not in the land since 1980 but came into the suit land after the demise of the plaintiffs' father.

8. When re-examined by Mr. Ndumia, learned counsel for the plaintiffs, PW1 stated that they were issued with letters of administration on 3.12.2013 and were later registered as owners of the suit land. That before their father died, there was nobody on the land and that the trespass entered after their father died. He stated that he lives about 1.5KM from the suit land and knew the land well, including where the beacons were as he had been shown by his father. That when the government survey confirmed the boundaries, the defendants refused, but the same boundaries were confirmed by the private surveyor. He stated that the 3<sup>rd</sup> defendant did not come into the land in 1980 as he resides in Mariakani.

9. The second plaintiffs' witnesses was Bartholomew Mwanyungu who is a licensed land surveyor. He stated that he prepared a report on 16/6/2015 for PLOT NO. MN/SECTION/126 Jomvu area to determine the developments within the area and to note any encroachment to the said parcel of land. That the report was requested by Suleiman Mohamed Bakari. He stated that he saw a survey plan which was used RNo.17/53 and after the survey, he indicated his observations. That PLOT NO. 126/I/II/III were on the presection at that time and that there were buildings on the plot which were encroachments according to the owner. That barbed wire fence done by owner of PLOT MN/V/128 is an encroachment of 1.66 acres. That the area of PLOT NO. 126/V/MN is 7.6 acres and the plot has been encroached by way of barbed wire fence among other defendants. He stated that some beacons were missing. He produced the report as p.exhibit 5.

10. On cross-examination, the surveyor stated that he could not estimate the age of the buildings. That he did a survey using the original survey plan. That the missing beacons belonged to plot no.126, not for plot 128.

11. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint statement of defence and counter-claim dated 30<sup>th</sup> September, 2015 and filed on 1<sup>st</sup> October, 2015. They state that they are the owners of PLOT NO. 128/V/MN which borders PLOT NO.126/V/MN. They deny the plaintiffs' claim. It is the 1<sup>st</sup> and 2<sup>nd</sup> defendants case that it is the plaintiffs' show have persistently encroached onto their property and erected beacons thereon and demolished a fence. They have denied the jurisdiction of this court on grounds that this is a boundary dispute and the plaintiffs have not invoked the provisions of the Land Act, 2012.

12. In their counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> defendants state that on or about 9<sup>th</sup> February 2015, the plaintiffs, in the company of hired goons

descended on the 1<sup>st</sup> and 2<sup>nd</sup> defendants' PLOT NO. 128/V/MN and pulled down the fence, damaging 20 poles in the process. That the plaintiffs had previously damaged another fence built by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that as a result of the plaintiffs' conduct, they have suffered loss and damage and have given the particulars, totalling Kshs.40,700/= which the 1<sup>st</sup> and 2<sup>nd</sup> defendants claim together with general damages.

13. Thomas Emmanuel Sadiki, the 1<sup>st</sup> defendant, gave evidence on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He adopted his witness statement filed herein. He stated that he is the owner of PLOT NO.128/V/MN and produced the title as D.exhibit 1. He also produced a Deed Plan for the plot as D.exhibit 2. He stated that on 10/2/15 he received a report from his neighbours informing him that some people had invaded his plot and removed the boundary markings. That he went there and found a group of youth who were demolishing the fence, claiming that the land was theirs. That he stopped them, but they told him they had directives from the D.O. Mikindani. He stated that he inherited the land from his late father who had also inherited it. The 1<sup>st</sup> defendant stated that he was aged over 70 years. That he later came to know that those people were the plaintiffs herein. That he took photographs of the damaged property which he produced as D.exhibit 3. That thought the plaintiffs left, they later returned at night and levelled the wall and took away the barbed wire and poles. He produced the letter dated 23/10/17 as D.exhibit 4 and the receipt as D.exhibit 5. That on 10.2.15, he reported the matter at Changamwe Police Station where he was given OB No.76/10/2/2015. He stated that in the title document produced as D.exhibit 1, his name is entered as Entry No.4 while in the plaintiffs' title (p.exhibit 2), their names are entered as Entry no.20. He stated that since 1974; he has never transferred his plot. He denied that survey was undertaken. He urged the court to dismiss the plaintiffs' suit and allow his counter-claim.

14. When cross-examined by Mr. Mwakireti, learned counsel for the plaintiffs, DW1 stated inter alia, that he inherited the Plot NO.128/V/MN from his late father, William George Kombo (deceased) though the title does not state so as it indicates it was transferred. He admitted that there is a portion he is not using and that his neighbours include owners of PLOT NO. 126/V/MN. He was shown the survey report produced by the plaintiffs and stated that he did raise an objection to survey being undertaken. He admitted that he has not produced any report to contradict that produced by the plaintiffs. He admitted that he did not know the people who removed the fencing poles and barbed wire as they came at night, and that there was no criminal case in court against those who caused the damage. He admitted that D.exhibits 4 and 5 had different figures.

15. When cross-examined by Ms. Nduku, learned counsel for the 3<sup>rd</sup> defendant, the 1<sup>st</sup> defendant stated that he knew the 3<sup>rd</sup> defendant as his neighbour for over 50 years.

16. When re-examined by Mr.Gitonga, DW1 stated that D.exhibit 5 was the entire demolition and the entire work undertaken, while the sum of Kshs. 40,700/= was for work done earlier. He stated that he wanted a government survey and the court to visit the site.

17. Kiboko Ndurya, the 3<sup>rd</sup> Defendant adopted his witness statement dated 21/7/2016. He stated that he has lived in the suit property since 1980 and that he only came to know the plaintiffs through this case in 2013. He stated that the plaintiffs have not put up any building and are not his neighbours. That he built his house in 1981 having bought the plot from one Mzee Menza who showed him the boundary. That in 1989, he planted trees on the boundary. He wants the plaintiffs' case dismissed.

18. When cross-examined by Mr. Mwakireti, the 3<sup>rd</sup> defendant stated that he bought the land from the 1<sup>st</sup> defendant, but did not have the sale agreement. He admitted the does not have title to the land he bought, though he built houses but had no evidence to confirm such as photographs. He reiterated that he lives on the suit land.

19. When cross-examined by Mr. Gitonga, the 3<sup>rd</sup> defendant stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are his neighbours and that the plaintiffs only came in the year 2013.

20. Both the plaintiffs and the defendants filed their respective submissions. In their submissions the plaintiffs reiterated their claim and emphasized that the defendants have encroached on their PLOT NO.126/V/MN and should be evicted therefrom. The plaintiffs further submitted that the defendants counter-claim should be dismissed as the same is based on allegations that the plaintiffs pulled down their fence which the plaintiffs submit is in PLOT NO.126/V/MN. That the defendants cannot allege a wrong so as to justify their trespass and submitted that the well established principle of *ex turpi causas non oritur* action applies. The plaintiffs relied on the case of **Sangele Ole Langas –v- Stephen Mishish & Another (2018)eKLR; Shadrack Kuria Kimani –v- Stephen Gitau Nganga & Another (2017) eKLR; and Nakuru Industries Limited –v- S. S. Metita & Sons (2016) eKLR. With regard to general damages, the plaintiffs relied on the case of James Mulwa Malunda & 2 Others –v- National Water Conservation & Pipeline Corporation (2018) eKLR and Philip Ayaya Aluchio –v- Chrispinus Ngayo (2014)eKLR** and urged the court to award them general damages for trespass in the sum of Kshs.100,000 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the same amount as against the 3<sup>rd</sup> defendant.

21. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in their submissions contended that from the surveyor's report, the plaintiffs were not sure on the boundaries because the beacons were missing. They submitted that the plaintiffs have not proved that they suffered loss of any kind, and that the plaintiffs have never been in occupation of the suit land and have not proved trespass. That the defendants have proved the loss suffered as claimed in the counter-claim which should be allowed and the plaintiffs' suit dismissed. The 1<sup>st</sup> and 2<sup>nd</sup> defendants relied on the case of **Jim Kennedy Kiriro Njeru –v- Equity Bank (K) Limited (2019)eKLR.**

22. The 3<sup>rd</sup> defendant submitted that he has been in occupation of the suit property since 1980 and that since he had pleaded elements of adverse possession in his defence, it was upon the plaintiffs' to challenge that position by filing a reply to defence and adduce evidence to rebut the 3<sup>rd</sup> defendant's averments. He submitted that pursuant to Section 51 of the Land Act and Sections 30 (f) and (g) and 112 of the Registered Land Act (repealed), a suit on trespass cannot be maintained against the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant also relied on the case of **John Kiragu Kimani –v- Rural Electrification Authority (2018)eKLR** and submitted that the plaintiffs have failed to prove their case.

23. I have considered the pleadings, the evidence tendered and the submissions made. The issues for determination in this suit are:

- i. Whether the plaintiffs are the rightful owners of the suit land known as LR. NO.126/V/MN.
- ii. Whether the defendants have encroached onto PLOT NO. 126/V/MN.
- iii. Whether the defendants should be evicted from PLOT LR . NO. 126/V/MN.
- iv. Whether the plaintiffs are liable to pay the 1<sup>st</sup> and 2<sup>nd</sup> defendants Kshs.40,700 for loss and damage suffered as well as general damages.
- v. Who will bear the costs of this suit.

24. From the material placed before me, there is no dispute that LAND PARCEL LR. NO. 126/V/MN is registered in the plaintiffs names. The plaintiffs tendered evidence in court indicating that they are the registered proprietors of the suit land and produced the title which confirmed that the property is registered in their names. The defendants admit that PLOT NO. 126/V/MN belongs to the plaintiffs. It is also not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the owners of PLOT NO. 128/V/MN which is adjacent to the plaintiffs' PLOT NO.126/V/MN.

25. The next issue is whether the defendants have encroached onto the plaintiffs land. PW1 in his evidence stated that the defendants have encroached onto the plaintiffs' parcel of land. The defendants have denied the plaintiffs claim and the 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded that the actions complained of took place on their PLOT NO.128/V/MN and have made a counter-claim against the plaintiff for the damage allegedly committed on their plot.

26. It was the plaintiffs evidence that the dispute was referred to the Land Registrar to determine the boundaries of the two plots. Indeed the plaintiffs produced a receipt of Kshs.10,000/= which was paid to the Land Registrar Mombasa for the boundary re-establishment. It was the plaintiffs evidence that the exercise was undertaken by the Government Surveyor and parties shown their boundaries but a report could not be prepared because the defendants alleged the surveyors were compromised. This then prompted the plaintiffs to engage a private surveyor who produced the survey report marked p.exhibit 5. The said survey report that was produced in court by the plaintiffs confirmed that an area of about 1.66 acres of PLOT NO. 126/V/MN was encroached upon by a barbed wire fence among other developments by the owner of PLOT NO. 128/V/MN. From the testimony of the plaintiffs' including the documents produced as exhibits, it is evident that the two parcels i.e. plot no.126 and 128 share a common boundary.

27. I note that Section 18 (2) of the Land Registration Act provides that that court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined, and that it is only the Land Registrar who is mandated to deal with boundary disputes. I however find that the dispute was indeed referred to the Land Registrar, but a report could not be prepared because of the aspersions cast on their integrity by the defendant. It is against that background that the plaintiffs engaged a private surveyor, Mr. Bartholomew Mwanyungu who carried out the survey and prepared the survey report produced in court as p.exhibit 5. The defendants have not produced any report that contradicts the report produced in court by the plaintiffs. In my view, if the defendants felt the government surveyor was compromised, they could have engaged another surveyor of their choice just as the plaintiffs did. It was upon the defendants to bring evidence that contradicts the report that was produced in court by the plaintiffs. In the absence of any contradictory evidence, I find that the surveyor's report that was produced in court by the plaintiffs as authentic and dealt conclusively with the boundary dispute between LR NO. 126/V/MN and LR/128/V/MN. From the material and the evidence on record, I find that the defendants have indeed encroached on the plaintiffs PARCEL NO. 126/V/MN. The defendants counter-claim must therefore fail because it is based on the mistaken belief that the actions complained of happened on their PLOT NO. 128/V/MN and not on the plaintiffs' PLOT NO. 126/V/MN. The plaintiffs' have proved that the actions complained of including the erection of a barbed wire fence and structures were on the plaintiffs' land. It is my finding that the plaintiffs as owners of the suit land are entitled to be protected by the law from the defendants' who are interfering with the plaintiffs' rights and privileges over the suit land.

28. The upshot is that this court is satisfied that the plaintiffs have proved their case against the defendants on a balance of probabilities. Accordingly, judgment is entered for the plaintiffs' against the defendants jointly and severally in the following terms:

**a. The defendants and/or their agents, servants or other persons claiming through them be and are hereby ordered to vacate and deliver possession to the plaintiffs and to demolish and/or pull down all the illegal structures standing on LR. NO 126/V/MN within 45 days from the date of service of the decree herein upon them. In default the plaintiffs shall be entitled to an order of eviction for forcible removal of the defendants and demolition of the illegal structures under supervision of an authorized police officer from the nearest police station.**

**b. A permanent injunction be and is hereby issued restraining the defendants whether by themselves, their agents, servants, employees, family members or otherwise howsoever from encroaching, trespassing, entering upon or remaining in possession or continuing in occupation or putting up structures or in any manner dealing with or interfering with the suit property.**

**c. Kshs.200,000/= as general damages for trespass.**

**d. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' counter-claim is dismissed.**

**e. The plaintiff shall have costs of the suit.**

**DATED, SIGNED and DELIVERED at MOMBASA this 5<sup>th</sup> day of February 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ndege holding for Mwakireti for plaintiffs

Ns. Kiptum holding Mburu Kariuki for 3<sup>rd</sup> defendant for Khatib for 1<sup>st</sup> and 2<sup>nd</sup> defendant.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**