



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 133 OF 2016

SHADRACK KIPSOIMO TIROP.....PLAINTIFF

VERSUS

PHILEMON MAGUT.....1ST DEFENDANT

ELIUD MAGUT.....2ND DEFENDANT

JULIUS MAGUT.....3RD DEFENDANT

DAVID MAGUT.....4TH DEFENDANT

JUDGMENT

This judgment arises from a plaint dated 25th May 2016 and one dated 6th September 2017 whereby ELC No. 133 of 2016 and ELC No 298 of 2017 were consolidated and ELC No. 133 was made the lead file. The plaintiff in this suit and the plaintiff in ELC No. 298 of 2017 one Catherine Chelugut sued the defendants jointly and severally seeking for the following orders:

a. A permanent injunction to prevent the defendants from re-entering, trespassing or in any other manner dealing with the land parcel number NANDI/KAMOYWO/805 and NANDI/KAMOYWO/382 and an order do issue uprooting beacons erected thereon by the surveyor on instructions of the defendants.

b. Costs of the suit

PLAINTIFF'S CASE

PW 1 gave evidence and stated that he purchased the suit land in the year 1965 measuring 42.5 Ha. That they were two parcels which he combined and produced the title deed to the suit land, a certificate of official search and the receipt .

It was PW1's evidence that the defendants encroached on the suit land which necessitated him to report the matter to the chief who wrote a letter dated 14th October 2015 which he produced as PExh-3. The chief stopped the defendants from placing beacons on his land.

PW1 also testified that he reported the matter to the police whereby he produced the OB and the police order to arrest the defendants as PMF1-4(a) and 4(b).

On cross examination, PW1 confirmed the measurements of his parcel of land to be 42.5 acres and the title deed was issued to him in 2017 which was a combination of parcels number 566 and 372.

PW2, Catherine Chelugut Cherotich who is the plaintiff in ELC No. 298 of 2017 told the court that she is the owner of parcel of land known as Nandi/Kamoywo/382 and she had a title deed which she produced as PExh-9. She told the court that the defendants were the children of the deceased, one Langat. She sued them because they went to measure her land without her permission.

It was PW2's evidence that the surveyor brought by the defendants interfered with her boundaries while measuring the land and therefore wanted the court to order that they remove the beacons they placed on her land. She further stated that she had been given a letter by NEMA directing her to cut the trees that were near the river which she did.

PW3 confirmed that he knows the plaintiff and PW2 and that they both own land parcels Nos. Nandi/Kamoiywo/805 and 382 respectively. He stated that his parcel of land is Nandi/Kamoiywo/381 and there is a river marking the boundary and the defendants live on the other side of the boundary. He testified that the surveyor was brought by the 1st defendant on 13th October 2015 but they had been informed that he would come on 9th October 2015. He measured and extended the boundary beyond the river. The boundary dispute was caused by the defendants as it did not exist earlier.

PW4, the chief of Kamoiywo location testified that he knows the plaintiff and that he owns the land known as Nandi/Kamoiywo/805, and that Catherine owns parcel no. Nandi/Kamoiywo/382. He testified that Nandi/Kamoiywo/520 belongs to the defendants and was registered in the name of the deceased who was the defendants' father. He stated that on 4th October 2015 Shadrack Tirop raised a complaint that his land had been curved out by 0.3 acres and that 1 acre had been curved out of Catherine's land. He further testified that the boundary was interfered with on 13th October 2015. He wrote a letter for purposes of succession of parcel no. 520 but at that time there was no land dispute. He confirmed that there was a letter dated 6th October 2015 from the county surveyor addressed to the parties indicating that they will confirm the boundary. He confirmed that the parties were to appear on 9th October 2015 but the date of survey was 13th October 2015. He stated that the curved portions belonged to the plaintiffs.

DEFENDANT'S CASE.

DW1 stated that they stay on the land parcel Nandi/Kamoiywo/520. He stated that he had the area map of the said land and the boundary of land never changed. He stated that they had a boundary dispute and went to the D.O to solve it. The plaintiff refused the verdict of the D.O.

DW1 confirmed that Nandi/Kamoiywo/805 belongs to the plaintiff and that parcel 502 is registered in his father's name who is deceased. Further, that parcel Nandi/Kamoiywo/382 belongs to Catherine who is the plaintiff in ELC 298 of 2017. He confirmed that the boundary between the parcels of land is the river. He confirmed that the surveyor was to come to court on 9th October 2015 but he did not. He stated that he had no court order to take the surveyor to the land but the DO is the one who sent the surveyor. That was the close of defence case.

PLAINTIFF'S SUBMISSIONS

It was the plaintiffs' case that the boundary of the parcels of land was the river. Counsel submitted that this was confirmed by PW2 and 3. DW1 also confirmed the same when he testified that both lands are divided by the river as a boundary. It was Counsel' further submission that the defendants had no right to interfere with the boundary and if they had any issues, then they should have referred their concerns to the Land Registrar before going to the surveyor.

Counsel cited the case of **Azzuri Limited v Pink Properties Limited (2018) eKLR** and the case of **Jane Njeri Arthur v Joseph Mwaura Njoroge (2019) eKLR** and submitted that the boundary in existence is a general boundary and not fixed and the same cannot be determined by a surveyor.

Mr. Chepkwony also submitted that the plaintiffs' land was surveyed without their consent which amounted to an illegality. Counsel cited section 23(2) of the Survey Act, Cap 299 which provides as follows:

(2) Before so entering upon any land, the Director or other surveyor or person duly authorized shall, whenever practicable, give reasonable notice to the owner or occupier of the land of his intention to enter thereon, and shall, on so entering, produce written evidence of his authority to any person reasonably requiring the same.

Counsel submitted that the plaintiffs being the owners of the parcels of land affected were not notified that the Surveyor would visit the land. That the alleged letter that was issued to the occupants of the land stated that he would visit the land on 9/10/2015 but he appeared on 13/10/2015. The testimony of PW2 and 3 and DW1 confirmed the same.

Mr. Chepkwony further submitted that from the evidence on record it is clear that the defendants encroached on the plaintiffs' land and placed beacons in disregard of the existing boundary which action led to the variance between the registered acreage and the surveyed acreage and the same has not been explained as the defendant did not call the surveyor to present the survey report and explain the differences in acreage.

Counsel therefore urged the court to grant the orders as prayed in the plaint in favour of the plaintiffs. The defendant's Counsel never filed written submissions as agreed.

ANALYSIS AND DETERMINATION

The issue for determination is whether the plaintiffs are entitled to an order of injunction and whether the defendants interfered with the boundary on the suit parcels of land.

It should be noted from the onset that the defendants had filed an application seeking for an order for identification, survey, fixing of boundaries of the suit parcels of land which application was heard and dismissed on the grounds that this was not a boundary dispute. Had it been a boundary dispute then the court would have downed its tools as per section 18 of the Land Registration Act where the Surveyor and Land Registrar have the mandate to deal with such matters before being filed in court.

Section 18 of the Land Registration Act provides;

(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The 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 in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).

The defendants wanted the court to sanitize what they had done with the surveyor which is the subject of this case. These are titled parcels and no boundary dispute had been filed with the Land Registrar.

From the evidence on record DW1 was in agreement with the plaintiff and PW2 that there was a boundary in existence. The defendants failed to produce the survey report upon which their claim to a different boundary is based. They could not prove that the boundary was further from the river.

The plaintiff's witnesses corroborated the claim that the boundary was marked by the river. The defendants failed to prove that their boundary extended into the land they encroached. .

The plaintiff sought a permanent injunction against the defendants and it is clear from the testimony and documentary evidence that the defendants encroached on the plaintiff's land Nandi/Kamoiywo/805 measuring 17.2 Ha as per the title deed produced in court. PW2 also provided a title deed indicating the acreage as 4.2 ha for Nandi/Kamoiywo/382.

I have considered the pleadings, the evidence tendered and submission of counsel and come to the conclusion that the plaintiff has proved his case against the defendants. I therefore enter judgment in the following terms.

- a. That a permanent injunction is hereby issued restraining the defendants from re-entering, trespassing or in any other manner dealing with the land parcel number NANDI/KAMOYWO/805 and NANDI/KAMOYWO/382 and an order is hereby issued compelling the defendants to uproot the beacons erected thereon by the surveyor on instructions of the defendants.
- b. Defendants to pay costs of suit to the plaintiffs.

DATED and DELIVERED at ELDORET this 5TH DAY OF FEBRUARY, 2020

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr. Chepkwony for Plaintiff and in the absence of Mr. Choge for Defendant.

Mr. Yator – Court Assistant