



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 18 OF 2015**

**CORNEL BWIRE ONGENGA.....PLAINTIFF**

**= VERSUS =**

**JULIUS BWIRE SIOKA .....1<sup>ST</sup> DEFENDANT**

**J U D G M E N T**

1. The Plaintiff – **CORNEL BWIRE ONGENGA** – first filed this suit in court against the Defendant – **JULIUS BWIRE SIOKA** – on 2/3/2015 vide a plaint of even date. That plaint was later amended, dated 26/4/2017, and filed on the same date. The Plaintiff's beef against the Defendant is that the Defendant has trespassed into and/or occupied parts of his land parcels numbers **BUNYALA/BULEMIA/2760** and **BUNYALA/BULEMIA/1435**. The Defendant is said to occupy legitimately land parcel No. BUNYALA/BULEMIA/2389 which borders the Plaintiff's parcels of land.

2. The Defendant' alleged actions are said to have denied the Plaintiff his rights of user and the Plaintiff therefore wants the court to intervene and order the Land Registrar and/or County Land Surveyor to move to the site and ascertain and/or fix the boundaries in order to show the precise position of land parcel No. BUNYALA/BULEMIA/2760, BUNYALA/BULEMIA/1435 and BUNYALA/BULEMIA/2389. After that is done, the Plaintiff would wish to get an order of eviction and permanent injunction against the Defendant. He would wish also to get an order of mesne profits, cost and interests, and/or any other just relief. All these orders are more clearly spelt out in prayers 1A, 2A, 3A, 4, 5, and 6 in the amended plaint.

3. The Defendant first responded to the initial plaint vide a defence filed on 25/6/2015 but when the plaint was amended he filed an amended defence on 17/7/2017. He denied the Plaintiff's claim.

4. The court started hearing the matter on 16/12/2016. Two witnesses testified on the Plaintiff's side, himself as PW1, and the then County Land Registrar – **TOM CHEPKWESI** – as PW2. According to the Plaintiff, the Defendant's late father – **PHILIP WERE SIOKA** – sold him a portion of land from land parcel No. BUNYALA/BULEMIA/2389. The portion was sold between 1992 and 1995 and measured 0.30Ha. Parcel No. 2389 was subdivided and the Plaintiff's parcel became BUNYALA/BULEMIA/2760 while that of the Defendant's late father became land parcel No. BUNYALA/BULEMIA/2759.

5. Thereafter, the Plaintiff's family and the family of the Defendant's late father which included the Defendant himself – co-existed peacefully as neighbours. The problem now complained of only arose after the death of the Defendant's late father. At that time the Plaintiff's mother was allegedly using the portion bought by the Plaintiff. The Defendant stopped and/or prevented her from using the land. He is said to have told her that the land did not belong to her son – the Plaintiff – and that the Plaintiff did not buy it from his late father.

6. The Defendant is said to have destroyed all the boundaries and this made the Plaintiff report the matter to the area local administration, and then to police, who advised him to call a surveyor to re-establish the boundaries. The surveyor was called but the Defendant and his family are said to have prevented him from doing his work. That is what impelled the Plaintiff to file this case. Besides taking over parcel No. 2760, the Defendant is also said to have taken over the Plaintiff's land parcel No. 1435 sold to him by **PANCREAS SIOTERO NGUMILI** and **JAMES MASIGA SIOTERO**.

7. In the course of hearing, the Plaintiff availed and/or produced the following exhibits.

- 1) PEX 1 - Title deed for Bunyala/Bulemia/2760
- 2) PEX 2 - Land Register for Bunyala/Bulemia/2760
- 3) PEX 3 - Title deed for Bunyala/Bulemia/1435

- 4) PEX 4 - Land Register for Bunyala/Bulemia/1435
- 5) PEX 5 - Map sheet No. 41
- 6) PEX 6 - Demand letter from Plaintiff's counsel.

8. During cross-examination by the Defendant, the Plaintiff was pressed to explain, *inter alia*, how he bought the land, why there are discrepancies in sizes shown in ownership documents and/or why the sizes are not adding up, whether he used trickery or falsehood to buy the land, and why he did not have the sale agreement. To which the Plaintiff said he bought the land lawfully and fairly, that he did not know why the sizes shown in ownership documents were not adding up, that he did not use falsehood or trickery to buy the land, and finally that it is not the sale agreement that shows purchase but rather the ownership documents that he had availed.

9. PW2 testified on 14/5/2018. He showed ownership documents of the Plaintiff's parcels of land. He confirmed that land parcel No. 2760 came from subdivision of parcel No. 2389 owned by the late father of the Defendant. The subdivision also created parcel No. 2759. After subdivision, land parcel No. 2389 ceased to exist. PW2 made reference to discrepancies in sizes which the Defendant had mentioned. He said there was an anomaly in the sizes shown, with parcel 2389 shown as 1.4Ha in size while parcel Nos 2760 and 2759, which are its resultant subdivisions, being shown as 0.30Ha and 1.82Ha in size respectively. The total size of the two parcels is 2.12Ha, a size larger than the indicated size of parcel No. 2389.

10. According to PW2, the anomaly needs to be explained and/or the ownership documents rectified. He side that a survey is needed to address the anomaly. In PW2's testimony too, parcel No 1435 was said to be 0.9Ha and the Plaintiff was said to have a genuine title. This land parcel was said to border land parcel No. 2760. Asked during cross-examination which map will be used if the court orders a survey to be conducted, PW2 said his office will use the original map.

11. The Defendant testified as DW1 and gave his evidence on 26/9/2018. After introducing himself, he adopted as evidence his written statement dated 7/10/2015. The statement in a nutshell says that the Defendant is the only surviving child of his late father – PHILIP WERE SIOKA – who owned land parcel No. 2759 measuring 1.82Ha which, to his knowledge, was never sold to the Plaintiff or anyone else. The Defendant said he occupies that land and has never gone beyond its boundaries.

12. The Defendant's witness – DW2 – was his own mother and, like the Defendant, she adopted as evidence her own written statement dated 7/10/2015. She denied that her late husband sold land to the plaintiff. These two witnesses were cross-examined by counsel for the Plaintiff. The Defendant said that there is no existing boundary on the ground between land parcels Nos 2759 and 2760, both of which, he admitted, were subdivisions of the original land parcel No. 2389. He also said he was satisfied that PW2 said there was a problem of the indicated sizes of the various parcels of land in this matter.

13. The Defendant also said he does not know land parcel No 1435 and that he was opposed to the prayer for a re-survey because he is not the owner of parcel No. 2759 as it was still in the name of the late father. And while denying knowledge of parcel No. 1435, the Defendant also denied trespassing into it. DW2 on her part said that the home of the Plaintiff's mother and her own home are separated by a fence, with a road also passing in between.

14. Both sides filed written submissions. The Plaintiff's submissions were filed on 21/1/2019. The Plaintiff gave a recap of the case and urged the court to order rectification of ownership documents. The court was also urged to allow the other prayers because **“the Defendant did not dispel evidence that he had trespassed into and currently occupies the Plaintiff's land parcels Nos: Bunyala/Bulemia/1435 and 2760”**.

15. The Defendant's submissions were filed on 14/11/2018. He gave a snapshot of the case, and submitted, *inter alia*, that **“the Plaintiff failed in the first place to prove his allegations that he bought the suit land from the late PHILIP WERE SIOKA”**. According to the Defendant **“the Plaintiff forged a title deed for land parcel No. BUNYALA/BULEMIA/2760 and is forcefully trying to use the honourable court to acquire orders to create the said parcel out of the Defendant's land parcel No. BUNYALA/BULEMIA/2759”**. The court was urged to dismiss to the Plaintiff's case with costs.

16. I have considered the pleadings, evidence, and rival submissions. The Plaintiff showed his title deeds for land parcels Nos 2760 and 1435. The Defendant would have us believe that the Plaintiff forged the title deed for parcel No. 2760 and that parcel No. 1435 does not exist. But the evidence of PW2, who is the official custodian of ownership documents, shows the titles are genuine. It is apparent too that an error exists on record as to the sizes of land parcels No. 2389 and parcel No. 2759, both of which have all along been in the names of the Defendant's late father. And while parcel No. 2389 as it existed then is shown to have been 1.4Ha, the Defendant would rather go by the size of the parcel No. 2759 which is shown as 1.82 Ha inspite of the fact that this parcel is a resultant subdivision of parcel No. 2389.

17. But the more crucial issue is that of boundary. By the Defendant's own account, no boundary exists between land parcel Nos 2760 and 2759. He also said that land parcel No. 1435 does not exist. The Plaintiff showed that he owns both parcel No. 2760 and parcel No. 1435. He was emphatic that the Defendant interfered with the boundaries and has even occupied his parcels of land. The Defendant's disputes the Plaintiff's ownership but has not lodged his own formal claim of ownership. What this means is that if the court agrees with the Defendant, the current unsatisfactory and anomalous state of affairs is going to remain. This state of affairs benefits the Defendant.

18. There should be certainty both on the ground and regarding the documents of ownership. In my view, this certainty is beneficial to all. It would be wrong to allow the Defendant to continue to cling to an unsatisfactory state of affairs which is reasonably well shown to have been partly created by him. The intervention of the survey office on the ground will create certainty. This certainty stands to serve the Defendant well in future should he decide to formally contest the Plaintiff's ownership of the land.

19. More importantly however is the fact that a state of affairs in which the Plaintiff holds paper titles without a corresponding clear

identification of the physical area or location represented by these titles cannot be allowed to exist. The Plaintiff holds two titles. The approximate sizes of the physical area shown in the two titles should be clearly identifiable on the ground. The Defendant has not lodged a contestation as to ownership but he wishes that this state of affairs remain. That is clearly contrary to how things are supposed to be. It would be wrong to allow it.

20. My considered view is that as regards the prayer for a survey visit (prayer 1A), the Plaintiff's claim is well proved on a balance of probability. I am also persuaded that the survey to be done should be followed by rectification of the error shown on records. I would order rectification under prayer 6 in the amended plaint. And I hereby grant these two orders. I am unable however to grant the prayer of permanent injunction as prayed (prayer 2A). An order of such injunction would require certainty of the physical location where it is meant to apply. With boundaries said to be non-existent, and with records showing an error as to size, it is difficult to see how the order can effectively operate if granted.

21. In my view, the anomaly existing should be rectified first. Once that is done, there will be certainty and if an order of injunction is asked for in such circumstances it can be granted if merited. In the same way, it is difficult to grant the Plaintiff an order of eviction. I would not know where I would be evicting the Defendant from because the boundaries are still uncertain and/or unmarked. As regards the prayer for mesne-profits, the Plaintiff needed to lead evidence on this. There is really nothing availed by the Plaintiff to enable the court to come up with the quantum that can be awarded as mesne profits. This is just something that was claimed but not proved. Then there is the prayer (prayer 5) for costs and interest. The evidence adduced shows that the Defendant was involved in blameworthy conduct regarding the creation of the existing unsatisfactory state of affairs. I therefore order that the Defendant should pay costs and interests.

**Dated, signed and delivered at Busia this 12<sup>th</sup> day of September, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Present

Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: Absent

Court Assistant: Nelson Odame