



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC 882 OF 2015**

**(FORMERLY HCC NO. 140 OF 2010)**

**DR. GEORGE TIMOTHY OPANDE.....PLAINTIFF**

**VERSUS**

**EZEKIEL . M. OKEMWA .....1<sup>ST</sup> DEFENDANT**

**THE COUNTY COMMISSIONER.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

**PLAINTIFF'S CASE**

By plaint amended on 7/5/2013, Dr. George Timoty Opande hereinafter referred to as the plaintiff sued Ezekiel M. Okemwa and Olang Linda Adede. and the Honourable Attorney General claiming to be the registered proprietor of all parcel of land known as Kisumu/Konya/36 while **the 1<sup>st</sup>** defendant was the registered owner of all that parcel of land known as Kisumu/Konya/34 which was transferred to the 2<sup>nd</sup> defendant on 26/6/2010.

Without any colour of right, the plaintiff's permission, let, leave and or excuse, the 2<sup>nd</sup> defendant has trespassed into the plaintiff's said parcel of land and has erected therein a fence curving out of the plaintiff's said parcel of land portion and erected a structure within the Plaintiff's land.

The plaintiff has made attempts to repulse the 2<sup>nd</sup> defendant agents, but he has exhibited militancy and the willingness and readiness to use force in an attempt to remain on and in the plaintiff's said parcel of land.

The plaintiff avers that the 1<sup>st</sup> defendant using unscrupulous lands officials deliberately and with intention to defraud the plaintiff of a portion of his parcel illegally amended the Registry Index Map (RIM) to place Kisumu/Konya/34 between his plot and Kisumu/Konya/24 and sold it to the 2<sup>nd</sup> defendant.

The Plaintiff avers that the said illegal amendments were reversed after his complaint, but the 2<sup>nd</sup> defendant proceeded to take possession of the plaintiff's parcel of land alleging it to be plot Kisumu/Konya/34.

Particular of illegality and fraud perpetuated by the 1<sup>st</sup> and 3<sup>rd</sup> defendant's his agents, servants and/or employee are illegal insertion of plot Kisumu/Konya/34 between plot Kisumu/Konya 36 and 24 without following due procedure and failure to follow the provisions of the survey Act Cap 299 and Physical Planning Act Cap 286. Uttering false documetns. Back dating entries to the Geen Card. Attempting to interfere with a marked boundary. Selling land to the 2<sup>nd</sup> defendant and wrongly pointing to the plaintiff's parcel to be the said parcel.

The plaintiff avers that the 3<sup>rd</sup> defendant agents attempt to super impose and implant Kisumu/Konya/34 into the RIM is pertently illegal and has no basis in law.

The Plaintiff prays that **an order compelling the 2<sup>nd</sup> defendants by themselves, their agents, servants and or persons claiming their authority to remove the fence erected within the plaintiff's parcel of land (i.e KISUMU/KONYA/36) and vacate or surrender the same in vacant possession and in default, an order for forcible/forceful eviction.**

**The plaintiff prays for a permanent order of injunction restraining the 2<sup>nd</sup> Defendants, their agents, servants and or person claiming his authority from trespassing into the plaintiff's land parcel no. KISUMU/KONYA/36 and further, a declaration that any amendment to the RIM to insert plot Kisumu/Konya/34 is between Kisumu/Konya/36 & 24 is illegal null and void abinitio. General damages for trespass and exemplary damages. Mesne profits at Kshs. 3,000.00 per month with effect from July, 2010 until the date of surrender of vacating the land or their forcible eviction as prayed. Costs of the suit.**

When the matter came up for hearing the plaintiff gave evidence on oath stating that he is a lecturer of Botany and Maseno University Siriba Campus and also a businessman and director at RITZ garden Hotel and Wilmart shopping complex.

The suit land is Kisumu/Konya/36 and registered in the plaintiff's name. Rita Hotel is situate on the parcel of land. He bought the parcel of land from one James Kimani Kanyatta. The parcel of land is boarded by parcels number Kisumu/Konya/33, 24, 35. When he started developing the plot in 2010 he received summons from the Land Registrar office Kisumu in respect of a boundary dispute. The dispute was between the owners of plot 34 and 36.

The Land Registrar attempted to resolve the dispute but failed and later he reached on 2/9/2011 that the map had been amended. A line had been inserted between plots numbers 24 and 36 and a new plot had been superimposed upon plot number 36. He states that the 1<sup>st</sup> Defendant is constructing on his plot number 36. He states that plot number 34 is super-imposed on plot number 36. He confirms that another survey was done on the orders of this court. He complained to the director and the error was reversed on 24/8/2011. The plaintiff showed the court the land Registrar's report dated 4/9/2012. The plaintiff bought the parcel of land from Joseph Kamau Kangata on 29/8/2008.

On cross examination by Mr. Njoga learned counsel for 1<sup>st</sup> Defendant, he states that he is surprised to hear that the 2<sup>nd</sup> Defendant did not buy the land from the 1<sup>st</sup> Defendant. He states that he thought that it was the 1<sup>st</sup> Defendant trespassing on the land but denied that it was the 2<sup>nd</sup> Defendant. He admitted having had the plot partially fenced.

On cross examination by Mr. Mugoye, he admits that parcel number 34 borders parcel number 36 and that the 2<sup>nd</sup> Defendant is a neighbour. He confirmed seeing the Registrar's report and insists that he had not seen the boundary. He confirms that the dispute is over the boundary between the two parties. According to the plaintiff, the 2<sup>nd</sup> Defendant has trespassed on plot 36.

### **1<sup>ST</sup> DEFENDANT'S CASE**

The 1<sup>st</sup> Defendant denies being the owner of Kisumu/Konya/34 that was transferred to the 2<sup>nd</sup> Defendant on 2/6/2010. He denies having trespassed on parcel land number Kisumu/Konya/36. He denies having fraudulently carried the amendment of the map to defraud the plaintiff of his parcel of land number Kisumu/Konya/36 or fraudulently placing Kisumu/Konya/34 between Kisumu/Konya/36 and Kisumu/Konya/24. The 1<sup>st</sup> Defendant denies the particulars of fraud and illegality. He avers that he was registered owner of Kisumu/Konya/34 until 4/6/2010 having been such owner since 14/3/91 and having been in occupation for 19 years uninterrupted. He claims to have been wrongly sued as there is no cause of action against him and that the suit is time barred.

When the matter came for defence hearing, DW1 testified and adopted his statement as evidence in chief. He states that he was the owner of the land but on 4/6/2010, he sold the plot to Tom Agumbi and did not remain in possession. He acquired the plot in 1991. He never sold the plot to Olang Linda Adede.

On cross examination by the plaintiff, he states that he had a problem with the previous owner of Kisumu/Konya/36 and made a formal complaint to the Land Registrar on 4/2/1994 the problem was resolved in the presence of the surveyor. Kangatha was directed to move the boundary back to where it was.

**DW2, Charles Okemwa** a resident of Kondele, Kisumu County relied on his statement as his evidence in chief. He states on cross examination that DW1 bought the plots from Abiero family and that DW2 was a witness. The survey map did not exist. He was on ground when the Land Registrar and the Land surveyor went on the ground in 2012 but the plaintiff created disorder and the exercise aborted.

**DW3 Rosalinda Otuna Akuku**, the widow of Francis Akuku Njoga states that her late husband sold land number Kisumu/Konya/34 to the 1<sup>st</sup> Defendant. The plaintiff bought Kisumu/Konya/36 from Kangethe, who bought from Silvanus Abiero Ngoga brother to her husband and that the two plots share a common boundary. She got married in the home in 1956. Her late husband and his brother never had a boundary dispute.

**DW4, Rosemary Akeyo of Kajulu** states her parent in-law sold land to DW1. She states that she has been cultivating on Kisumu/Konya/34 for the last 20 years. She states that the Plaintiff has encroached on Kisumu/Konya/34.

**DW5, an estate agent** relied on his statement. He bought the property from DW1 on 14/4/2010. He was shown the beacons by Rosemary Akinyi. The acreage was 0.15Ha. The consideration was Kshs. 1,000,000. However he complained to Mr. Okemwa (DW1) that the parcel on the ground was different from the drawings on the RIM. He complained that the Registration of lands with a view of amending the map but the plaintiff objected.

However, the court later ordered that the Land Registrar and Surveyor to go on the ground and confirm the situation. They went on the ground and recommended amendment of the R.I.M AND A REPORT DATED 1/3/2012 was prepared and he later sold the land to Linda Adede.

DW6, Linda Adede, the 2<sup>nd</sup> Defendant states that she bought the land from DW5 on 22/6/2010. She is not aware of any dispute. She was sued for trespass after purchasing the land. She put a fence and mabati structure after purchasing in 2010 but was stopped from constructing

by the court. She is not aware of any illegality or fraud and prays that the suit be dismissed.

I have considered the submissions of all parties herein and do find that the 1<sup>st</sup> issue to be considered is whether the plaintiff has established a cause of action against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant sold the property on 4/4/2010 before the suit was filed by way of plaint on 2/9/2010.

By the time the plaintiff filed the suit, the 1<sup>st</sup> Defendant had transferred his interest to the third party and had ceased possession and therefore there is no cause of action against him. The action against the 1<sup>st</sup> Defendant is a non-stater.

The second issue is whether the dispute revolves on a boundary dispute between parcels 36 and 33. According to the Land Registrar there was a barbed wire fence between parcels number 36 and the neighbours. He explains that the map was a misrepresentation. He suggests the RIM to be amended through a mutual agreement.

This court finds that the ground has been the same since demarcation that ended in 1991. The parcels of land were registered in the names of DW1 and Kangethe respectively. Kangethe sold the plaintiff whilst Okemwa sold to Ayugi who sold to

From 1991 to 2010 there was no dispute.

The Land Registrar heard the dispute referred to him by this court and observed that the two parcels were adjudicated in the year 1991 and parcel number Kisumu/Konya/36 was registered in the names of Kangethe Kimani, while Kisumu/Konya/34 was registered in the names of Ezekiel Okemwa.

The Land Registrar found that according to the RIM, parcel no. 36 borders parcel number 24 to the South while parcel number 34 borders parcel number 36 to the South West.

It is explained by the county Land Registrar that the District Land adjudication officer indicated that the parcels were exchanged swapped and hence the difference in demarcation sketches

The Plaintiff could have seen the RIM and realised that the boundaries of parcels number 33, 34, 35 and 36 were not properly aligned on the ground as they are on the map.

**Section 18 of the Land Registration Act 2012 provides:**

**“18. (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.”**

I do consider this to be a boundary dispute that should be dealt with by the Land Registrar as it is the duty of the land registrar to ascertain boundaries and not the court. The upshot of the above is that the court cannot deal with the issue of trespass before the County Land Registrar determines the boundaries of parcels numbers 24, 33, 34, 35 and 36. This dispute is not ripe for this court. The suit is dismissed with costs.

**DATED, DELIVERED AND SIGNED THIS 27<sup>th</sup> DAY OF APRIL, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honorable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**