



**Machoge v Tauta (Environment & Land Case 701 of 2017)
[2020] KEELC 2879 (KLR) (24 April 2020) (Judgment)**

Pius Nyabuga Machoge v Ntinini Ole Tauta [2020] eKLR

Neutral citation: [2020] KEELC 2879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 701 OF 2017**

CA OCHIENG, J

APRIL 24, 2020

BETWEEN

PIUS NYABUGA MACHOGE PLAINTIFF

AND

NTININI OLE TAUTA DEFENDANT

JUDGMENT

1. By a Plaint dated the 5th May, 2017, the Plaintiff prays for judgement against the Defendant for:
 - a) A Declaration that the Plaintiff is the registered and lawful owner of the suit property herein known as Kajiado/ Loodariak/ 159.
 - b) A permanent injunction do issue to restrain the Defendant by himself or through his servants, agents and or any other person claiming under him from entering, trespassing and or interfering with and or any other manner whatsoever dealing with the suit property.
 - c) An order compelling the District Land Surveyor to visit the affected lands, establish and/ or re establish the boundaries therein and/ or further carve out the said suit land measuring 86 Ha.
 - d) General damages for trespass
 - e) Costs of this suit
 - f) Any other relief or order that this Honourable Court may deem fit to grant
2. The Defendant though duly served as evidenced in the affidavit of service sworn on 14th June, 2017 and filed in Court on the even date failed to enter appearance nor file his Defence. The matter hence proceeded undefended with the Plaintiff calling two witnesses.



Evidence of the Plaintiff

2. The Plaintiff as PW1 testified that in March 2014, together with Miton Ene Olooloshoo and Morompa Ole Loloshoo, they entered into an agreement for exchange of land wherein he was to exchange his parcels of land known as Kajiado/ Loodariak/ 489 measuring 88 hectares and Kajiado/ Keekonyokie/ Ilkisumet/ 1874 measuring 37.56 hectares for Kajiado/ Loodariak/ 159 measuring 86 hectares. He stated that previously the suit parcel of land measuring 86 hectares was registered in the names of Loloshoo Ole Dagitus who was the husband to Miton En Olooloshoo and father to Morompa Ole Loloshoo and at no time did Loloshoo Ole Dagitus ever transfer any acre of the said land to anyone. It was his testimony that at the time of executing the exchange agreement, the parcel Kajiado/ Loodariak/ 159 measuring 86 hectares was registered in the name of Miton Ene Olooloshoo and Morompa Ole Loloshoo and the same was held in trust with the authority of all beneficiaries pursuant to a grant of letters of administration issued vide Nairobi High Court Succession Cause No. 3411 of 2005, which beneficiaries consented for the same to be exchanged with the Plaintiff's parcels of land. PW1 confirmed that the title deed to the suit land was issued to him on 30th April, 2014. He further explained that due to boundary differences between the beneficiaries and the Defendant, the Defendant had instituted an application at the Land Disputes Tribunal Cause No. 31 of 2011 wherein the Defendant was granted orders to stay on the suit land. However, these orders were quashed vide Machakos Misc Application No. 15 of 2012 who further gave orders of prohibition directed at the Defendant to immediately vacate and unconditionally desist from interfering with the suit land. He averred that the Defendant had trespassed on the suit land and purported to take ownership while removing, destroying and/or altering the boundaries therein. The Plaintiff sought the intervention of the District Land Registrar to no avail. An independent Surveyor who was engaged by the Plaintiff established that the suit land exhibited a deficit of 152 acres which is being occupied by the Defendant.
3. PW2 John Dominic Obel who is a licensed Surveyor testified that he received instructions from the Plaintiff in 2017 to conduct a resurvey of land parcel number Kajiado/ Loodariak/ 159 but when they went to survey the first time, they were obstructed but later managed to conduct the same. It was his testimony that the dispute is between Kajiado/ Loodariak/ 159 and Kajiado/ Loodariak/ 160 which are adjoining parcels of land. He explained that after the Court had directed the District Land Registrar and District Surveyor to undertake a survey of Kajiado/ Loodariak/ 159 and Kajiado/ Loodariak/ 160 in their presence, they managed to prepare a separate report which was filed in court on 10th April, 2019. He proceeded to produce three of his reports in Court as exhibits. He argued that the District Surveyor in his report which he filed in Court failed to determine the boundary of Kajiado/ Loodariak/ 159 as ordered by the Court. He further explained that at the time of titling both Kajiado/ Loodariak/ 159 and Kajiado/ Loodariak/ 160 were each allocated proper acreage as per the titles however the owner of Kajiado/ Loodariak/ 160 resurveyed his land and created a new parcel inside Kajiado/ Loodariak/ 159 namely Kajiado/ Loodariak/ 22520. Further, this resurvey culminated in the encroachment on Kajiado/ Loodariak/ 159 where the owner of Kajiado/ Loodariak/ 160 acquired a bigger area while the acreage for Kajiado/ Loodariak/ 159 drastically reduced. He contended that a resurvey should have been done in accordance with Regulation 50 of the Survey Regulations under the *Survey Act*. Further, that the person undertaking a resurvey should have looked out for the original beacons and used them to determine the acreage of the parcel under survey and where the beacons were missing, they should have been re-established in their original positions. The Plaintiff produced various documents including the Copy of Title Deed issued to the deceased on 10th August, 1990; Proceedings in the Nairobi High Court Succession Cause No. 3411 of 2005; Copy of Certificate for Confirmation of Grant issued on 5th October, 2010; Copy of Title Deed issued to the Vendors on 7th June, 2013; Agreement for Exchange of Land dated the 25th April, 2014; Order in Judicial Review Miscellaneous



Application No. 15 of 2012 Machakos High Court; Certificates of Official Searches conducted on 17th July, 2014 and 27th August, 2014; Survey Report prepared by Geomatic Services Limited; Demand Letter and Letter to the District Land Registrar Ngong dated 29th March, 2017 as his exhibits.

The Plaintiff filed his submissions which I have considered.

Analysis and Determination

4. Upon consideration of the Plaintiff's testimonies, exhibits and submissions, the following are the issues for determination: Whether the Defendant has encroached on the Plaintiff's land parcel number Kajiado/ Loodariak/ 159. Whether the Court should proceed to order for the rectification of the register in respect to the Plaintiff and the Defendant's parcels of land. Who should bear the costs of the suit.
5. As to whether the Defendant has encroached on the Plaintiff's land parcel number Kajiado/ Loodariak/ 159. It is not in dispute that the Plaintiff is the owner of land parcel number Kajiado/ Loodariak/ 159 which he exchanged with Miton Ene Oloshoo and Morompa Ole Loloshoo. The Plaintiff produced the Certificate of Official Search dated the 27th August, 2014 confirming he was registered as owner of the land from 30th April, 2014. The said parcel of land was initially owned by Loloshoo Ole Dagitus who was the husband to Miton En Oloshoo and father to Morompa Ole Loloshoo. Further, that the Defendant owns land parcel number Kajiado/ Loodariak/ 160 which is adjacent to the Plaintiff's land. It emerged in evidence that Loloshoo Ole Dagitus and the Defendant were both allocated their respective parcels of land during the adjudication of the Loodariak Group Ranch. PW1 confirmed that the title deed to the suit land was issued to him on 30th April, 2014. He explained that due to a boundary dispute between the Dagitus Loloshoo's beneficiaries and the Defendant, the Defendant had instituted an application at the Land Disputes Tribunal Cause No. 31 of 2011 wherein he was granted orders to stay on the suit land. However, these orders were quashed vide Machakos Misc Application No. 15 of 2012 that granted orders of prohibition directed at the Defendant to immediately vacate and unconditionally desist from interfering with the suit land. It was PW1's testimony that despite the Court Order, the Defendant was in contempt and continued to trespass on the suit land and purported to take ownership while removing, destroying and/or altering the boundaries therein. The Plaintiff engaged an independent Surveyor (PW2) who established that the suit land exhibited a deficit of 152 acres which is being occupied by the Defendant. PW2 further noted that at the time of titling for both Kajiado/ Loodariak/ 159 and Kajiado/ Loodariak/ 160 they were each allocated proper acreage as per the titles however the owner of Kajiado/ Loodariak/ 160 resurveyed his land and created a new parcel inside Kajiado/ Loodariak/ 159 namely Kajiado/ Loodariak/ 22520. As per the title deeds and the Certificate of Official Searches produced by the Plaintiff, it is clear that the suit property measures 86 hectares. As per the Private Surveyor's Report which was produced as an exhibit, it is evident that the Defendant has indeed encroached on the Plaintiff's land. Based on the evidence before me as well as my analysis above, I find that the Defendant has indeed encroached on the Plaintiff's land.
6. As to whether the Court should proceed to order for the rectification of the register in respect to the Plaintiff and the Defendant's parcels of land. PW2 explained that the Defendant had proceeded to resurvey his land and acquired a huge acreage of the Plaintiff's land during the exercise. PW2 faulted the Surveyor who had undertaken the exercise as it interfered with the Plaintiff's land. PW2 testified that the dispute is between Kajiado/ Loodariak/ 159 and Kajiado/ Loodariak/ 160 which are adjoining parcels of land. He explained that as per the Court's direction, the District Land Registrar and District Surveyor undertook a survey of Kajiado/ Loodariak/ 159 and Kajiado/ Loodariak/ 160 in their presence and they each did a separate report which was filed in court on 10th April, 2019.



He contended that the District Surveyor in his report failed to determine the boundary of Kajiado/ Loodariak/ 159 as ordered by the Court. Further, that the resurvey conducted by the Defendant, culminated in the encroachment on Kajiado/ Loodariak/ 159 where the owner of Kajiado/ Loodariak/ 160 acquired a bigger area while the acreage for Kajiado/ Loodariak/ 159 reduced drastically. He explained that a resurvey should have been done in accordance with Regulation 50 of the Survey Regulations under the Survey Act. Further, that the person undertaking a resurvey should have looked out for the original beacons and used them to determine the acreage of the parcel under survey and where the beacons were missing, they should have been re-established in their original positions. In PW2's report dated the 26th March, 2017, he found that the ground area of the suit land measured 85.5 hectares while the original area in the Area List indicated 86 Hectares. He explained that this was within the acceptable limitations of General Boundary Surveys error. Section 79 1) (a) (b) (c) (d) of the Land Registration Act provides that: (1) The Registrar may rectify the register or any instrument presented for registration in the following cases— (a) in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor; (b) in any case and at any time with the consent of all affected parties; or (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel; (d) for purposes of updating the register;'

7. Further section 80 of the Land Registration Act provides that: 'Rectification by order of Court (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default'
8. In the case of Francis Nyauma Obare & 3 others v Maina Marwanga Omwamire & another [2017] eKLR Justice Mutungi held that: ' In the present case the plaintiffs contend that the title registers of the parcels of land Nos. North Mugirango/Boisanga/1485, 4361, 4362, 1494 and 1496 have variances in area and that their physical locations on the ground do not correspond with the Registry Index Map and that there is need for rectification of the registers and amendment of the Registry Index Map (RIM). The plaintiffs' evidence points to there being a problem on the ground. The Tribunal which heard a dispute referred by the 2nd defendant made a finding after visiting the locus in quo that the RIM had errors or mistakes that required to be corrected. For the record the Tribunal had jurisdiction under Section 3 (1) of the Land Disputes Act, No. 18 of 1990 to entertain the dispute before them as it related to boundaries to land and claim to occupy or work land and/or trespass. The plaintiffs' case relates to both boundary dispute and rectification of the registers and records once the issue of boundary is cleared. The court therefore has jurisdiction to entertain the suit. 20. On a balance of probability, I am satisfied the plaintiffs have proved there may be a case for rectification of the registers of the affected parcels of land namely Land Parcels North Mugirango/Boisanga/1485, 4361, 4362, 1494 and 1496. I accordingly enter judgment in favour of the plaintiffs in the following terms:- (1) That the land registrar, Nyamira County be and is hereby directed and ordered to visit land parcels North Mugirango/Boisanga/1485, 1487 (now 4361 and 4362), 1494 and 1496 and to establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed.'
9. In the current scenario, I note that the Defendant undertook a resurvey and encroached largely on the Plaintiff's land. Further, he had been directed by the High Court to stop trespassing on the Plaintiff's land and vacate it but he declined to do so. From the Geomatics Surveyor's Report which was presented in Court as an exhibit, it emerged that the Defendant undertook a resurvey but neglected to take



into account the already established beacons which were in place at the time of adjudication. Further, he instead proceeded to produce a new title number Kajiado/ Loodariak/ 22520 based on illegal boundaries culminating in the Plaintiff's land being divided into two. Based on my findings above and in relying on above cited legal provisions as well as associating myself with the quoted case, I find that there is need to order for rectification of the register in respect to the Plaintiff and the Defendant's parcels of land to enable the same be in tandem with their respective title deeds as well as the original measurements as per the adjudication process.

10. It is against the foregoing that I find the Plaintiff has established his case on a balance of probability and will proceed to enter judgment in his favour in the following terms:
- i. A Declaration be and is hereby issued that the Plaintiff is the registered owner of the suit property herein known as Kajiado/ Loodariak/ 159 measuring 86 Hectares.
 - ii. A permanent injunction be and is hereby issued restraining the Defendant by himself or through his servants, agents and or any other person claiming under him from entering, trespassing and or interfering with and or any other manner whatsoever dealing with the suit property Kajiado/ Loodariak/ 159.
 - iii. Based on the original boundaries during demarcation and in the Area List, The District Land Surveyor Kajiado be and is hereby directed to visit the affected lands, establish and/ or re establish the boundaries for suit property Kajiado/ Loodariak/ 159 measuring 86 Hectares.
 - iv. The costs of the suit is awarded to the Plaintiff.
 - v. Due to the prevailing circumstances of the COVID 19 Pandemic, I grant a 90 days stay of execution.

DATED SIGNED AND DELIVERED VIA EMAIL THIS 24TH DAY OF APRIL, 2020

CHRISTINE OCHIENG

JUDGE

