



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 32 OF 2015

GODFREY ODUORI ONDERO PLAINTIFF

VERSUS

1. REDEMPTOR TEDDY WERE 1ST DEFENDANT

2. ALBERT HUSSEIN KARANI 2ND DEFENDANT

J U D G E M E N T

1. Vide an amended plaint filed on 31st May 2017 the plaintiff avers that as the registered owner of L.R. No. Bunyala/Bukoma/1735, he is entitled to use and disabuse the land bereft of any interference from other persons including the 1st and 2nd defendants. That the 2nd defendant has trespassed on and took into his possession a portion of the plaintiff's land and settled thereon. He pleaded that the 2nd defendant's entry onto the suit land is premised on a malicious and false report by the Land Surveyor and Land Registrar, Busia pursuant to a survey carried out on 7/4/2015.

2. The plaintiff pleads that the purported exercise of 7/4/2015 and the resulting report of 13/4/2015 is fraudulent, illegal and thus null and void. He pleaded the following as the particulars of the fraud;

1) Failing to disclose to the survey team that Land Parcels Number Bunyala/Bukoma/1735 and 1933 are far apart and do not share a common boundary at all.

2) Failing to give to the survey team a proper map and instruments to guide in locating the exact ground position of the two parcels of land in dispute.

3) Deliberately misleading the survey team to visit wrong Land Parcels instead of land parcels No. Bunyala/Bukoma/1735 and 1933.

4) Failing to disclose and show the survey team the location and the actual position of land parcels No. Bunyala/Bukoma/1735 and 1933.

3. Consequently, the plaintiff prays for judgment as follows;

1. A Declaration that the entire survey exercise of 7th April 2015 and the report emanating therefrom, to extend the exercise and the findings thereof are to the effect that the plaintiff herein has encroached into land parcel number is untruthful, null and void.

2. An Order quashing the survey report of 7th April 2015 as contained in a letter of 13th April 2015 by one George Kimani, Surveyor, Busia Survey Office.

3. Costs of this suit.

4. An Order of Eviction against the 2nd defendant herein from Land Parcel No. Bunyala/Bukoma/1735.

5. An Order of permanent injunction against the 1st and 2nd defendant from trespassing into, occupation, possessions and or in any manner interfering with land parcel No. Bunyala/Bukoma/1735.

4. The 1st and 2nd defendants also filed an amended statement of defence on 8th June 2017. The defendants denied the allegations of trespass

levelled against them, aggression in exercise and use of his statutory right over parcel of L.R. Bunyala/Bukoma/1933. They also denied the particulars of fraud pleaded and put the plaintiff to strict proof. The defendants urged the Court to dismiss the plaintiff's suit with costs.

5. The plaintiff gave evidence as **PW1**. He adopted his statement dated 9/4/2015 in Court as his evidence in chief. **PW1** said that he is the owner of Bunyala/Bukoma/1735 while Bunyala/Bukoma/1933 belongs to the 1st defendant. The plaintiff said he was never given a report prepared by the surveyor pursuant to the exercise of 7th April 2015. **PW1** referred to the report filed by the defendants stating that he had encroached on the 1st defendant's land by 0.035ha which claim he denies. It is the plaintiff's case that the two parcels of land are clearly marked on registry index map which shows the two plots do not share a common boundary. The map was produced as **Pex 2**. He urged the Court to grant the orders sought.

6. In cross-examination, **PW1** said he was the first one to buy land in that area. That they bought land from the same person who is still alive. He confirmed that the surveyor came to the land but added that the surveyor never completed the exercise. **PW1** did not have a different survey report and he is also not a surveyor. He was asking for the orders because he was the first one to buy land. This marked the close of plaintiff's Case.

7. The first defendant gave evidence as **DW1**. She adopted her witness statement dated 2/7/2015 and filed in Court as her evidence in chief. She also adopted the list of documents filed on 9/5/2015 as her exhibits. In her statement, **DW1** said the two plots 1735 and 1933 neighbours each other and the boundary has been obscured due to human activities and nature attrition. **DW1** said she requested the County Surveyor to re-establish the beacons between the two parcels. The exercise was done in the presence of both parties and a report prepared which she produced as **Dex 1**. The 1st defendant avers that the plaintiff's claim are devoid of facts and flies on the face of the surveyor's report. She urged the Court to dismiss the suit with costs.

8. Parties filed written submissions which I have read and considered. Two questions are framed for determination;

- (a) whether or not the defendants have encroached on the plaintiff's parcel of land.
- (b) Whether or not the survey report produced as Dex1 is null and void.
- (c) What orders ought this court make and who bears the costs of this suit.

9. According to the R.I.M produced as Pex 2, the following parcels of land exist between Bunyala/Bukoma/1735 and 1933; **(i)1863 (ii)1864 (iii) 1733 (iv) 1827 (v) 1833**. It is the plaintiff who moved this court claiming encroachment by the defendants. The burden of proof was imposed on him to prove that indeed there exist an encroachment complained of. The plaintiff dismissed the survey report (**Dex.1**) on the basis that the two suit plots do not neighbour one another. According to the survey report, it stated that it is the plaintiff who had encroached on the 1st defendant's land by 0.035ha.

10. The map annexed to the survey report was however not legible. Before the surveyor did the exercise, the plaintiff was duly notified and he produced the **notice issued** to him as **pex1**. The plaintiff did not deny that he was present during the survey exercise. He distinguished the report by stating that the exercise process was not completed on the 7th April 2015. If the plaintiff did not agree with the survey report, he had the option of raising a complaint with the Land Registrar Busia and or presenting an alternative report to contradict it.

11. Under Section 18 of Land Registration Act, the determination of boundaries is bestowed on the Land Registrar of the registration area. The said Section provides thus;

“(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).”

12. The survey exercise carried out was at the instance of the 1st defendant who wanted the boundaries re-established. The plaintiff seemed not to have any issues before the survey exercise thus the survey report would have formed a basis for his cause of action which report he has disowned. However, he has not demonstrated by way of evidence the extent of the encroachment if any on his parcel by either of the defendants. The lack of proof is aggravated by the plaintiff's own evidence that the two parcels do not share a common boundary as per his exhibit **Pex 2**. Consequently, I am unable to conclude that the plaintiff has made out a Case with the standards required in civil law. The result is the suit filed is dismissed for want of merit with costs to the defendants.

Dated, signed and delivered at BUSIA this 15th day of April, 2020.

A. OMOLLO

JUDGE