



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 78 OF 2017**

**BENJAMIN KIPROP CHELIMO.....PLAINTIFF**

**VERSUS**

**EZEKIEL CHERUIYOT CHELANGA.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The plaintiff commenced this suit by way of a plaint dated **24/4/2017** filed on even date. He seeks the following orders against the defendant:-

- (a) **An order of eviction of the defendant, his agents, servants and or employees from the 3.7 acres or thereabout part of plot No. 1269 Milimani Settlement Scheme;**
- (b) **Costs of the suit;**
- (c) **Any other relief this court may deem fit to grant.**

**PLEADINGS**

**The Plaintiff**

2. According to the plaint dated **24/3/2017** the plaintiff claims ownership of **Plot No.1269 Milimani Settlement Scheme** which measures approximately **5** acres while the defendant is the owner of **Plot No 1146** which borders the plaintiff's said land. In **July 2013** the defendant trespassed upon the plaintiff's parcel and carved out **3.7** acres or thereabouts took possession of the same and has remained in possession to date.

**The Defendant's Defence and Counterclaim**

3. The defendant defence and counterclaim was filed on **15/5/2017**. In that defence and counterclaim the defendant denied that the plaintiff owns plot **1269** or that it measures **5** acres or that he trespassed thereon; he admits being the owner of plot **number 1146** measuring **14** acres which he purchased from one *John Barmao Chebii*. He avers that he has been in possession since **2002**; in his counterclaim he avers that the plaintiff has occupied **2** acres of plot **1146**, that the plaintiff's claim is time barred, and that in the alternative he has acquired the **3.7** acres sought by the plaintiff by way of adverse possession. He seeks that **2** acres of land illegally occupied by the plaintiff be adjudged to belong to him and that the defendant is entitled to **3.7** acres if any by way of adverse possession.

**The Plaintiff's Reply to Defendant's Defence and Counterclaim**

4. In his reply to the defendant's defence and counterclaim the plaintiff reiterates the averments in the plaint and denies the allegations in the defendant's defence and counterclaim. The new feature in that pleading is the plaintiff's statement that the defendant's land measures **10** acres and not **14** acres, and that the cause of action arose in **2013** and not **2002**.

5. On **16/7/2019** when this matter came up for hearing the defendant and his counsel were absent. The plaintiff's case proceeded *ex-parte* and it was closed on that date.

6. On **18/7/2019** the applicant filed a notice of motion dated **17/7/2019** seeking orders that this court do set aside the *ex-parte* proceedings of **16/7/2019** and set a date for hearing of the defence. The court allocated hearing date for **31/7/2019**.

7. On **31/7/2019** the counsel for the parties consented to the re-opening of the case to pave way for the evidence of defendant and the court recorded the consent to set aside the *ex-parte* proceedings of **16/7/2019** and pave way for the evidence of the defendant and the defence case was slated for **17/10/2019**.

8. On **17/10/2019** the case could not proceed due to absence of counsel for the defendant and the defence hearing was set down for **10/2/2020**.

### **THE EVIDENCE OF THE PARTIES**

#### ***The Plaintiff's Evidence***

9. **PW1, Benjamin Kiprof Chelimo**, the plaintiff, testified on **16/7/2019**. His evidence closely followed the contents of the plaint. He produced the agreement dated **12/1/2009** vide which he purchased the land as **PEXh 1**; he stated that the name of the seller was *Jepkoskei Kimokiy* who had been allocated the land by Settlement Fund Trustees. The land was pointed out to him by the surveyors and the seller and he settled on it and developed it; the seller also took him to the land control board. However the defendant caused the land to be privately surveyed and took away a chunk of it measuring **2** acres while the plaintiff was away in America. Government surveyors later went to the land and reported that the defendant had carved out **2.7** acres from the plaintiff's land. They restored the beacons and the plaintiff fenced off his land along the re-established boundary line. The plaintiff adopted the surveyor's report in the court record. According to the plaintiff the defendant's title does not accord with the letter of allotment and the agreement for sale.

10. The plaintiff then closed his case.

#### **The Defendant's Evidence**

11. **DW1, Ezekiel Cheruiyot Chelanga**, the defendant, testified on **10/2/2020**. He adopted the contents of his statement dated **9/5/2017** filed in the court record and reiterated the contents of his defence and counterclaim. He stated that his land measures **5.07** ha; that he has never encroached on the plaintiff's land; that the plaintiff took away his land by force; that he was absent when the survey was conducted; that the plaintiff built a store along the boundary and in **2017** fenced off the disputed area which the defendant had been in possession of since **2002**; that he grazes his cows on the disputed area; that he wants his land to be **12.5** acres; upon cross examination he stated that his agreement with *John Barmao Chebii* reflects **10** acres and that he later bought **2.5** acres. However he never produced the second agreement for the alleged **2.5** acres. His title was issued in **2012**. However *John Barmao Chebii* had a title by the time of purchase. Upon re-examination he stated that his land was **10** acres and upon re-alignment it became **12** acres. He bought the extra **2** acres after the boundary re-alignment exercise. At some point in the re-examination he again changed his evidence and stated that he is seeking **12.5** acres. The land is now **10.4** acres because the surveyor's re-alignment exercise during which he lost some **1.7** acres.

12. **DW2, Evans Maritim**, a Surveyor, testified on the same date as **DW1**. His evidence is that he is a surveyor from Eldoret; that at the instance of the defendant he visited the site; that he found a new fence along the boundary and upon measurement he found the defendant's land to be **10.7** acres; that he asked him for the title and saw that it reads **5.07** ha, which translates to **12.52** acres; that the defendant has lost **1.8** acres. According to the witness on cross examination the defendant never showed him any allotment letter. He showed him an agreement. During the visit he never went to the plaintiff's parcel.

13. At that juncture the defendant closed his case.

### **SUBMISSIONS**

14. The plaintiff filed his submissions on **3/3/2020**. The defendant filed his on **10/3/2020**. I have considered the plaint, the defence and the submissions filed.

### **DETERMINATION**

#### **Issues for Determination**

15. The issues that arise in this suit and counterclaim are as follows:

**(1) Which of the parties has trespassed onto the other's land and what is the extent of encroachment?**

**(2) What orders should issue?**

16. The issues are addressed as hereunder.

#### ***Which of the parties has trespassed onto the other's land and what is the extent of encroachment?***

17. The ownership of the parcels mentioned herein is not in dispute. The certified copy of the letter of allotment dated **29/4/1999** which was produced by the plaintiff reflects that *Jepkosgey Kimokiy* was allocated **5.0** acres. The agreement dated **12/1/2009** shows that she sold **5** acres to the plaintiff. The transaction was sanctioned by the land control board in its letter of consent issued on **19/8/2015**. By consent of the parties in this matter recorded on **23/1/2018**, the County Surveyor visited the two parcels and came up with a report which was filed in court on **9/4/2018**. To the report is annexed a certified copy of the letter of allotment issued to one *John Chebii* which this court has reason to believe represents the land purchased by the defendant. The same reflects **10** acres. According to the surveyor, the acreages of the plaintiff's

parcel and the defendant's parcel are 5 acres and 10 acres respectively. The report states that the surveyor found that parcel no 1146 measured 13.92 acres while parcel no 1269 measured 2.83 acres on the ground respectively. It was found by the surveyor that the defendant had encroached on the plaintiff's land by 2.17 acres. In the survey exercise the acreage of the plaintiff's parcel was enhanced to 5 acres and the area of the defendant's parcel was reduced to 11.75 acres. From the sketch maps drawn by the surveyor it seems as if both parties had effected some kind of encroachment on each other's land. However the encroachment by the defendant was many times larger than the encroachment by the plaintiff. However, with the realignment of the boundary each party gave up the portion they had been encroaching on and the surveyor reports that the exercise went smoothly and without any resistance. The plaintiff appears to have erected a fence along the main boundary between the two parcels and DW2 confirmed the existence of the new fence along the common boundary to the two parcels when he visited the defendant's land. As DW2 did not visit the two parcels his other evidence in the report is inadequate and unreliable. This court is inclined to rely on the County Surveyor's report which indicates that there was an element of encroachment by both parties on each other's land. The proper measurements of the encroached portions are therefore as per that report and as analysed above.

18. In view of the foregoing I find that each of the two parties had encroached on the other's land to some degree.

## CONCLUSION

### ***(3) What orders should issue?***

19. The upshot of the above is that I find that the plaintiff has partially proved his claim on a balance of probabilities against the defendant only to the extent that the defendant had encroached upon 2.17 acres of the plaintiff's land. On the other hand the defendant has failed to prove that the plaintiff had encroached upon two acres of his land. However the boundaries were realigned by the County Surveyor at the orders of the court and each party has taken possession of their respective portions bearing the correct boundaries and the dispute has been settled.

20. I therefore enter judgment for the plaintiff and order as follows:

**i. The boundaries to parcels nos 1146 and 1269 shall be maintained as re-aligned by the surveyor's report dated 27/3/2018 which is filed in this court record.**

**ii. The surveyor's costs are to be shared equally as per the order of the court made on 23/1/2018 and the defendant shall reimburse the plaintiff his share which the plaintiff paid on his behalf and those costs are to be deemed as costs of this suit for purposes of taxation and execution in the normal manner if not amicably settled by the defendant.**

**iii. Save the costs mentioned in (ii) above each party shall bear their own other costs of the suit.**

It is so ordered.

**Dated, signed and delivered at Nairobi via electronic mail on this 29th day of May, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**