



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT BUSIA

CASE NO. 137 OF 2017

MOSES ONYANGO ODIANGO.....PLAINTIFF

VERSUS

REBECCA KAMUNDE.....1ST DEFENDANT

GERALD OTHIENO OLAIISA.....2ND DEFENDANT

JUDGMENT

1. Vide the Complaint dated 20th July 2017, the Plaintiff avers that he is the registered owner of the land parcel No. Marachi/Esikoma/1201 entitled to the exclusive vacant peaceful possession, occupation and use thereof having acquired it by lawful purchase in 2002. That he had enjoyed the said rights until 2014 when he started experiencing interference from the Defendants. The Plaintiff pleaded that the 1st Defendant who owns an adjacent parcel Marachi/Esikoma/1200 bought from the 2nd Defendant in 2014 was settled within his property. That both defendants have since then continuously trespassed on the suit property by randomly cultivating and using a portion thereof; and removing boundary features despite being notified to cease their activities.

2. The Plaintiff therefore seeks remedy through issuance of the following orders:

i. An order directing the eviction of the defendants and their agents and family members from land parcel no. Marachi/Esikoma/1201

ii. An order of permanent injunction restraining the defendants by themselves, their servants, agents or otherwise from howsoever entering, remaining on, cultivating, planting any crops, removing boundary features, erecting or maintaining structures thereon or continuing to be in occupation or use of land parcel no. Marachi/Esikoma/1201

iii. Costs of the suit

iv. Any other or further relief

3. Having failed to enter appearance and file defence within the requisite period, interlocutory judgment was entered against the Defendants. The matter proceeded for formal proof on 20th January 2020 with the Plaintiff testifying as the sole witness in support of his case. **PW 1** adopted his statement and documents as his evidence in chief. He testified that he purchased the suit property in December 2002 from one Josephat Masingo. The Defendants were known to him. The 2nd Defendant was his neighbour while the 1st Defendant came onto the property recently in 2014. It was his evidence that the 1st Defendant put up a house on the suit property due to misrepresentation by the 2nd Defendant who had purportedly sold her a portion of PW 1's property and settled her thereon.

4. After instituting this suit PW 1 obtained a court order directing the Land Registrar to conduct a site visit for the purpose of determining the boundary between the suit property and the defendants' property. On the first visit, the Land Registrar reported on 17th January 2019 that the Defendants were hostile prompting PW 1 to obtain an order for provision of security. That the 2nd visit was conducted and the resultant report filed in court in October 2019. The report of the Land Registrar was favourable to the plaintiff's case. The Plaintiff added that both Defendants are still on the land as the 1st Defendant has constructed a house in which she resides in while the 2nd Defendant cultivates a portion of the suit land.

5. PW 1 produced the following documents as exhibits in support of his case:

- i. Green Card for Marachi/Esikoma/1201 – P.Ex 1
- ii. Green Card for Marachi/Esikoma/1200 – P.Ex 2
- iii. Title Feed for Marachi/Esikoma/1201 – P.Ex 3
- iv. Demand Notice dated 2nd May 2015 – P. Ex 4
- v. Land Registrar’s Report dated 17th January 2019 – P. Ex 5(a)
- vi. Land Registrar’s Report dated 11th October 2019 – P. Ex 5 (b)

6. The Plaintiff filed his final submissions on 20th February 2019. I have considered the same as well as the pleadings and the applicable law. It is not contraverted that the Plaintiff is the registered owner of Marachi/Esikoma/1201 as confirmed by the green card produced in evidence. The 2nd Defendant is the owner of the neighboring parcel; Marachi/Esikoma/1200 which the plaintiff said has since been subdivided and a portion given to the 1st Defendant. The matter in issue is the alleged encroachment and/or boundary dispute between the properties.

7. Under Section 18(3) of Land Registration Act, the determination of boundaries is bestowed on the Land Registrar of the registration area. It provides thus;

“(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).”

8. From the above provision of the law, the crucial evidence in this case is the report by the Land Registrar which was presented as Exhibit 5(a) & (b). The report gave the Registrar’s view as regards the determination of the boundary between the two parcels and whether there has been encroachment on the Plaintiff’s Land. The report in which annexed a sketch map stated that the two parcels are separated by a boundary that runs in the East-West direction. That the lower portion of the properties are clearly demarcated with cuttings of euphorbia plants planted thereon as boundary marks. The upper portion of the Plaintiff’s land is the one in dispute. It is occupied by the 1st Defendant who has put up a house on it. The title deed held by the 1st Defendant with respect to parcel no. Marach/Esikoma/2544 is a resultant subdivision from parcel no. 1200. The Registrar’s reported that she has settled on a portion measuring about an acre of the Plaintiff’s property.

9. The Plaintiff’s evidence is uncontroverted as the Defendants did not participate in these proceedings. The evidence was further corroborated by the Land Registrar’s report and the documents produced in evidence. I am thus persuaded to find that the plaintiff has proved his case on a balance of probabilities as required in civil law. Accordingly, I enter judgment for him and issue the following orders;

v. The Defendants to remove any of their structures built on the plaintiff’s land within 90 days from the date of service of this decree upon them. In default of compliance within the time stated, **an order be and is hereby issued for the eviction of the defendants and their agents and family members from land parcel no. Marachi/Esikoma/1201 and removal of any and all offending structures at the defendants’ costs.**

vi. **An order of permanent injunction be and is hereby issued restraining the defendants by themselves, their servants, agents or otherwise from howsoever entering, remaining on, cultivating, planting any crops, removing boundary features, erecting or maintaining structures thereon or continuing to be in occupation or use of land parcel no. Marachi/Esikoma/1201**

vii. **Costs of the suit awarded to the plaintiff**

Dated and signed at BUSIA this 3rd day of June 2020.

A. OMOLLO

JUDGE