



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 57 OF 2016

OBONDO OWUNGO AWOKO.....PLAINTIFF

VERSUS

PATRICK BUKAKI AWOKO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 21st June, 2016 and filed in court on 22nd June, 2016, the Plaintiff – **OBONDO OWUNGU AWOKO** – impleaded this court to find for him against the defendant – **PATRICK BUKAKI AWOKO** – whom he accused of trespassing onto his land parcel **NO MARACHI/ELUKONGO/4337**. The defendant was also said to have uprooted the boundary features and proceeded to put up a semi-permanent house. The plaintiff would wish to get an eviction order against the defendant. He would also wish to have the boundary features reinstated.

2. More specifically, the plaintiff asks for the following orders:

(a) Eviction of the defendant from land parcel NO MARACHI/ELUKONGO/4337

(b) Fresh establishment of the boundary features for the land

(c) Costs of the suit

(d) Interest on costs

(e) Any other relief the court may deem just to grant.

3. The defendant contested the suit and filed a defence on 21st June, 2016. He denied the plaintiff's claim and averred that he has been living on land parcel NO MARACHI/ELUKHARI/234 for over 60 years. It is from this parcel that the plaintiff's alleged land parcel and some two others were derived. He also denied the plaintiff's ownership of parcel NO 4337 and alleged that if parcel NO 234 was subdivided, that happened without his participation and/or knowledge. The defendant also pleaded that the dispute is essentially a boundary matter and the court should therefore decline to entertain it for want of jurisdiction. This issue however is not for consideration during trial. It was handled preliminarily and a ruling on it was delivered on 9th May, 2018.

4. This court heard the suit on two dates – 18th September, 2018 and 14th November, 2018. The plaintiff gave evidence as PW1. He said that the defendant is his nephew and that land parcel NO 234 belonged to his late father, who was also father to defendant's late father. A succession cause was said to have been filed in respect of the estate of his father and land parcel NO 234 was ordered to be shared out. The size was 8 acres and a quarter share was to go to the plaintiff, another quarter to his son, while the defendant was to get half share. To effectuate the sharing, the land was subdivided. Three (3) parcels – NO 4337, NO 4338, and NO 4339 – were the end result. Of these, the plaintiff got to own 4337, his son 4338 while the defendant got parcel NO 4339.

5. The defendant is said to have sold his land. He then moved to live on the plaintiff's land. That is why the plaintiff wants him removed.

6. The defendant testified as DW1. He denied trespassing onto the plaintiff's land. According to him, land parcel NO 234 is still the way its original owner, who is his late grandfather, left it. He is living, he said, where he has always lived with his family and his mother. He denied knowledge of any survey or subdivision carried out on the land.

7. After hearing both sides, a consent was entered into requiring the Land Registrar and a Surveyor to visit the three land parcels – NO 4337,

4338 and 4339. The aim was to confirm boundaries and also establish whether the defendant has trespassed into the plaintiff's land. A report dated 29th May, 2019 filed in court on the same date has this to say on the issue of trespass:

“On face value of this matter, it is obvious that the respondent has trespassed into the plaintiff's land”.

8. Both sides filed written submissions. The plaintiff's submissions were filed 4th October, 2019. According to the plaintiff, the defendant is well shown to have trespassed and his defence therefore is a mere denial. He urged the court to grant him the reliefs sought in the plaint.

9. The defendant's submissions were filed on 26th November, 2019. According to the defendant, the plaintiff's case is not proved and the surveyor's report filed on 29th May, 2019 was said to be *“controversial in that it lacks clarity.”* The report was further said to be *“paradoxical; it compounds the dispute between the parties rather than assisting the court to find a practical and amicable solution.”*

10. I have considered the pleadings, evidence, and rival submissions. The defendant would wish the court to believe that the surveyor's report confirming trespass by him onto the plaintiff's land be disregarded for its lack of *“clarity”* and/or being *“paradoxical”*. But I find it hard to agree with this position. And the reason for this is that usually, unless otherwise indicated, most measurements shown in land documents in this country are approximations. But on the basis of such approximations, clear boundaries are always marked on the ground and courts of law have never shied away from finding that there is trespass when such boundaries are crossed.

11. What seems to obtain here is that the defendant was shown his land. The plaintiff had his land. A subdivision done earlier by the land's office had established the boundaries of each land parcel. Obviously, the plaintiff knew or knows the boundaries of his land parcel. When the later report filed by the surveyor confirms trespass, that is not a conjectural finding. It is confirming the reason why the plaintiff came to court. To this court, it is clear that parcel NO 234 no longer exists. It was subdivided. The defendant does not want to accept this reality. I think the plaintiff is right regarding the current state of affairs on the ground.

12. This contrasts sharply with the defendant who at first denied knowledge of subdivision, then sought to treat the matter as a pure boundary dispute, before casting doubts on the latest survey report conducted in order to establish the actual position on the ground. If the defendant wanted to contest the report, he should have asked the court to call the surveyor for cross-examination.

13. In my view, it is well shown that the defendant has trespassed onto the plaintiff's land as alleged. The plaintiff's evidence shows it. The latest survey report confirms it. My finding therefore is that the plaintiff's case is well proved on a balance of probabilities. Without much ado, I grant the plaintiff prayers (a), (b) and (c) as prayed for in the plaint.

14. And as regards prayer (a) – which asks for eviction – I direct that the defendant be given 90 days from the delivery of this judgement to remove himself from the plaintiff's land. If he fails to move out within that period, he should be forcibly evicted.

Dated and signed at Kericho this 8th day of July, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 22nd day of July, 2020.

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A. OMOLLO

JUDGE