



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC NO. 286 OF 2017**

**(FORMERLY KISII ELC CASE NO. 214 OF 2012)**

**SUGUTA MUHAGACHI MWITA.....PLAINTIFF**

**VERSUS**

**ORINGA MWITA.....DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The present dispute involves boundary of property title number Bukira/Buhiringera/65 which is approximately twenty nine decimal five hectares (29.5 Ha) in area (Hereinafter referred to as the suit land) and title number Bukira/Buhiringera/66 (the other parcel of land herein). The two parcels of land are located within Migori County.
2. The plaintiff, Suguta Muhagachi is represented by the firm of Bwondika and company Advocates.
3. The defendant, Oringa Mwita is represented by the firm of Odingo and Company Advocates further to a notice of appointment of an advocate dated 3<sup>rd</sup> November 2016 and filed in court on 7<sup>th</sup> November 2016.
4. Originally, this suit was lodged at Kisii Environment and Land court. On 30<sup>th</sup> July 2014, Okongo J sitting at the said court observed and ordered that the report by the District Land Registrar Kuria District filed in court on 22<sup>nd</sup> November 2013 was procured irregularly. The same was therefore struck out and expunged from the court record.
5. Subsequently, on 27<sup>th</sup> July 2016, the court (Mutungi J) ordered and directed the Land Registrar Kehancha, Kuria Sub County and the County surveyor, Migori to visit the suit land and the other parcel of land to establish and fix boundaries thereof and file a report(s) in court within 90 days from that date. Pursuant to the said order, a report dated 20<sup>th</sup> October 2016 by the county surveyor was duly filed in court on 4<sup>th</sup> November, 2016. Quickly, the defendant opposed the report by his grounds of opposition dated 13<sup>th</sup> October 2018 and filed in court on 16<sup>th</sup> October 2018. The plaintiff further filed a reply thereto dated 17<sup>th</sup> October 2018. The suit was transferred to this court upon its establishment, on 8<sup>th</sup> July, 2017.
6. On 19<sup>th</sup> November 2018, further to consent of Mr. John Omwoyo holding brief for Bwondika, learned counsel for the plaintiff and Nancy Nyarige holding brief for Odingo, concerning the report, it was instantly ordered, inter alia;

**“In view of the sentiments, the reports and comments thereon, I order that the report be and is hereby adopted for hearing of the suit in the spirit of Article 159 (2)(b) of the Constitution of Kenya, 2010.”**

**B. THE GIST OF THE PLAINTIFF’S CASE**

7. The instant suit was commenced by way of a plaint dated 20<sup>th</sup> June 2012 and lodged in court on 20<sup>th</sup> June 2012 for orders as follows:
  - a. A permanent injunction restraining the defendant, his servants, agents or anybody acting under his instructions from trespassing into the plaintiff’s parcel of land namely the suit land.
  - b. Costs of the suit.

c. Any other relief that this Honourable Court may deem fit to grant.

8. The plaintiff alleged that she is one of the registered proprietors of the suit land. That her other co-proprietors are Mwirori Mwita (Deceased 1) and Mwita Mwirori. That sometimes in the year 2009, the defendant unlawfully destroyed one common boundary between the suit land and the other parcel of land. That therefore, the defendant trespassed onto the suit land to the extent of about hundred (100) metres, thus generating the instant suit.

9. In his reply to defence and defence to counter claim dated 15<sup>th</sup> August 2019 and filed in court on even date, the plaintiff reiterated the contents of her plaint. She stated that she has locus standi to maintain the suit and that the report of the Land Registrar and County Surveyor did ascertain, alienate and fix the boundary in dispute. She prayed that judgement be entered in terms of the plaint and that eviction orders to issue against the defendant.

10. It was the testimony of the plaintiff (PW1) that she owns the suit land. That the defendant who is a younger brother to her husband and owns the other parcel of land, trespassed into the suit land. Part of her testimony was her list of documents dated 20<sup>th</sup> June 2012 (PEXhibits 1 to 4) filed together with the plaint and her statement herein.

11. On 21<sup>st</sup> February 2020, learned counsel for PW1 filed submissions dated 17<sup>th</sup> February 2020 wherein he framed three (3) issues for determination including who is the owner of the suit land and whether the defendant has any colour of right on the other parcel of land. He submitted that the orders of the court made on 25<sup>th</sup> July 2016 were complied with and that the report of the County Surveyor was adopted by the court. Counsel cited the Court of Appeal decision in **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) eKLR** and urged this court to dismiss the counterclaim and enter judgement as prayed in the plaint.

### **C. THE GIST OF THE DEFENDANT'S CASE**

12. The defendant denied the plaintiff's claim by his amended statement of defence and counterclaim dated 20<sup>th</sup> March 2019 filed in court on 15<sup>th</sup> July 2019. He stated, inter alia, that before the initial registration of the suit land and the other parcel of land, they belonged to Mwita Nyangoko (Deceased 2) who was the father of the plaintiff's husband, Muhagachi Mwita (Deceased 3), the defendant and Deceased 1. That the dispute between the parties relates to boundary of the suit land and the other parcel of land. That the plaintiff (PW1) lacks locus standi to originate this suit. Therefore, the defendant counter claims against the plaintiff who is allegedly interfering with the boundary for orders as follows:

- a. A declaration that the plaintiff destroyed the boundary demarcation between the suit land and thereby encroached into big portion of the other parcel of land barring the defendant to occupy and cultivate it for his social upkeep.
- b. That there be permanent injunction restraining the plaintiff, his agents, servants, employees and anybody interested in him from entering, occupying, cultivating, residing, disposing, conveying the disputed portion that belongs to the defendant till the determination of the suit.
- c. A declaration that the disputed portion is part of the defendant's suit land referenced as Bukira/Buhiringera/66.
- d. That the plaintiff be permanently restrained and evicted from the disputed portion and give the defendant peaceful enjoyment of the same forms part of the defendant's Suit Parcel No. Bukira/Buhiringera/66.
- e. Cost of the suit.
- f. Interest on (e) above at the present court's rates.
- g. Any other relief that is deemed fit to be granted in the circumstances of the suit.

13. In his evidence, the defendant (DW1) relied on, inter alia, his statement dated 3<sup>rd</sup> July 2012 as well as certificates of official search regarding the suit land and the other parcel of land (DEXhibits 1 and 2). He stated in part that the other parcel of land measuring approximately 15 hectares, belongs to him and he has built thereon. That the plaintiff's claim is false and ought to be dismissed with costs and judgement be entered in terms of his counter claim.

14. The defendant failed to file and serve submissions as per orders of 3<sup>rd</sup> December 2019 and extended on 24<sup>th</sup> February, 2020. In that regard, this court gave date for judgement in view of **Article 159 (2) (b) of the Constitution of Kenya, 2010**.

### **D. ISSUES FOR DETERMINATION**

15. I have duly considered the parties' respective pleadings, evidence alongside the plaintiff's submissions and the surveyor's report. In the case of **Galaxy Paints Ltd -vs- Falcon Grounds Ltd (2000) 2EA 385**, the Court of Appeal held that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination.

16. In view of the foregone, the issues that fall herein for determination are as follows;

- a. Whether the plaintiff and the defendant are the proprietors of the suit land and the other parcel of land respectively.

b. Do the two parcels in (a) hereinabove share a common boundary?

c. Who has trespassed into the land of the other?

d. Depending on the outcome in issues (a), (b) and (c) hereinabove, what are the appropriate reliefs available to the parties in this suit?

**(E) ANALYSIS AND DETERMINATION**

17. As regards the first issue, it is common baseline that the plaintiff is a registered proprietor of the suit land while the defendant is the registered proprietor of the other parcel of land. It is so discerned from the paragraph 3 of her plaint, paragraph 5 of the reply to amended defence and defence to the defendant's counter, paragraph 8 of the latter and the parties' respective submissions.

18. Moreover, in her evidence in chief, PW1 relied on her statement lodged in court on 22<sup>nd</sup> June, 2012 wherein she stated:

**“It was in the year 1983 when I got registered as owner of Land Parcel No BUKIRA/BUHIRINGERA/65 together with Mwirori Mwita (Deceased) and Mwita Mwirori.”**

19. On 17<sup>th</sup> September 2019, PW1 also testified that she owns the suit land. In cross examination, she stated, inter alia, that her late husband (deceased 3) registered the same in her name prior to his death.

20. On the other hand, DW1, too, relied on his statement dated 3<sup>rd</sup> July 2012 as part of his evidence whereby he stated that:

**“I am holder of ID No. 6803186 and registered owner of land parcel No. Bukira/Buhiringera/66 together with Mwita Oringa since 1973...”**

21. DW1 further testified in part that PW1 is his sister in law as she is wife of his elder brother, Deceased 3 who together with Deceased 2 owned the suit land. DExhibits 1 and 2 show that PW1 and DW1 are the registered proprietors of the suit land and the other parcel of land respectively.

22. It is abundantly clear from the evidence of PW1 and DW1 including PExhibits 2 and 4 as well as DExhibits 1 and 2 that PW1 is a registered proprietor of the other parcel of land. Under Sections 27, 28 and 30 of the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act), they are entitled to their respective parcels of land. (See also the Court of Appeal decision in **Michael Githinji Kimotho -vs- Nicholas Muratha Mugo Civil Appeal No. 53 of 1995** applied in **Macharia Mwangi Maina and 87 others -vs- Davidson Mwangi Kagiri (2014) eKLR**).

23. In respect of the second issue, it is discernable from paragraphs 4 and 2 of the plaint and statement of defence respectively, that the suit land and the other parcel of land share a common boundary. PW1 and DW2 were on even ground in their respective testimonies as shown herein below, that the suit land and the other parcel of land share a common boundary made of sisal plants. That the boundary is duly established by Land Registrar and Surveyor.

24. Furthermore, during cross examination, PW1 stated in part:

**“...I can identify the boundaries of the two parcels of land. The Land Registrar visited the boundary of the parcels of land and fixed boundaries thereof...”**

25. On his part, DW1 told the court in cross examination as follows:

**“...The land was surveyed and boundaries marked between the suit land and my land LR No. Bukira/Buhiringera/66. The area of LR No. 66 is approximately 15 hectares...”**

26. It is cardinal to note that the Land Registrar and Surveyor are endowed with the technical capacity to determine, establish and fix boundaries of parcels of land as required under Sections 18, 19 and 20 of the Land Registration Act, 2016 (2012). Accordingly, I endorse the position taken by Mutungi J in **Andrew Marigwa -vs- Josephat Ondieki Kebati (2017) eKLR**, on their mandate thereof. Thus, it has been demonstrated that the suit land and the other parcel of land share a duly established common boundary.

27. In regard to the third issue, PW1 did state that in the year 2009 the defendant started to encroach the suit land. He testified in examination in chief that the defendant trespassed into the suit land and built thereon. DW1 further testified that:-

**“...A surveyor has mandate to mark and fix boundaries of land...”**

28. PW1 alleged at paragraph 4 of the plaint that DW1 destroyed the common boundary hence trespassed into the land of PW1. The statement of PW1 indicates that DW1 trespassed into the suit land to the extent of 100 metres. PW1 testified that DW1 built and cultivates on the suit land.

29. On the other hand, DW1 denied the alleged trespass. Notably, paragraph 2 of his statement dated 3<sup>rd</sup> July 2013 which forms part of his testimony is to the effect that PW1 trespassed into the other parcel of land. During re-examination on 3<sup>rd</sup> December, 2019, he emphasized his statement. Nonetheless, he admitted that he lives on the suit land.

30. Clerk and Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01, defines the term “**Trespass**” thus:

**“An unjustifiable entry by one person upon the land in possession of another.”**

31. Quite clearly, the sub-county surveyor’s report Ref CSCO/KUR/SUR/VOL III/54 dated 20<sup>th</sup> October 2016 together with the annexed sketch map demonstrate the extent of the alleged trespass unto the suit land and the other parcel of land in this matter. The findings therein read:-

**“It was found after a vigorous exercise that both parcels encroached onto each other by certain margins.**

**Parcel No Bukira/Buhiringera/66 encroached onto parcel no Bukira/Buhiringera/65 by approximately 3.2Ha, while parcel no Bukira/Buhiringera/65 encroached onto parcel no Bukira/Buhiringera/66 by about 0.6Ha.**

**A sketch map showing the levels of encroachment by each parcel is hereby attached for your perusal.**

**After the exercise the parties were shown where the correct position of the boundary should be at. The registrar with the aid of the surveyor re-established the same and sisal plants were used to mark the said boundary.”**

32. From the foregone evidence including the surveyor’s report, the levels of trespass into the suit land and the other parcel of land by DW1 and PW1 respectively, are pretty clear. Indeed, the Land Registrar and Surveyor duly implemented this court’s orders of 25<sup>th</sup> July 2016 by the surveyor’s report dated 20<sup>th</sup> October 2016 which was duly adopted as shown in paragraph 6 hereinabove. I am of the considered view that the said report as affirmed, to a great extent, by the evidence of PW1 and DW1, has finally disposed of the present dispute; see also **Marigwa Case (supra)**.

33. In the premises, I find the plaintiff’s claim as well as the defendant’s counter claim partially proved on a balance of probabilities. The parties are partially entitled to the orders sought in their respective pleadings further to Section 13(7)(a) of the Environment and Land Court Act, 2015 (2011) and the Court of Appeal decision in **Nguruman Ltd-vs-Jan Bonde Nielsen and 2 others (2014) eKLR**.

34. Accordingly, judgment be and is hereby entered for the plaintiff against the defendant and for the defendant against the plaintiff as per the plaint and the counterclaim respectively in terms of:-

a. A permanent injunction to issue restraining the defendant as per prayer (a) sought in her plaint in respect of only three decimal two hectares (3.2 Ha) as shown at the second paragraph of the findings in the Kuria West/East sub-county Surveyor’s Report Ref No. CSCO/KUR/SUR/VOL III/54 dated 20<sup>th</sup> October 2016 duly filed in this court on 4<sup>th</sup> November 2016.

b. A permanent injunction to issue restraining the plaintiff, her agents, servants, employees and anybody as sought in prayer (d) of his counter claim in regard to only zero decimal six hectares (0.6 Ha) in area as shown at the second paragraph of the findings in the Kuria West/East Sub county surveyor’s report reference CSCO/KUR/SUR/VOL.III/54 dated 20<sup>th</sup> October 2016 duly filed in court on 4<sup>th</sup> November 2016.

c. The sub county surveyor’s report to be implemented to the latter. The plaintiff and the defendant to move out of the portions of land specified in orders (a) and (b) herein above within ninety (90) days from this date in default the Officer Commanding Station Kehancha Police Station to enforce the orders accordingly.

d. Since the parties are related coupled with the proviso to Section 27 (1) of the Civil Procedure Act Cap 21 Laws of Kenya and in view of the circumstances of the case, each party to bear his or her own costs of this suit.

**G.M.A ONGONDO –**

**JUDGE**

**Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 8<sup>TH</sup> day of JULY , 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In resence of :-**

Mr. Migele holding brief for Bwodika learned counsel for the plaintiff

Mr. Sam Onyango holding brief for odingo learned counsel for the defendant

Court Assistant – Tom Maurice