



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 72 OF 2012**

**HERBERT WANGANYA WANGA .....PLAINTIFF**

**VERSUS**

**JONAI MAKANA OBORA .....1<sup>ST</sup> DEFENDANT**

**JOSAM A. WANGA.....2<sup>ND</sup> DEFENDANT**

**J U D G E M E N T**

1. The plaintiff brought the suit against the two defendants vide a plaint dated 15/11/2020 seeking the following reliefs;

- (i) **Permanent injunction be issued against the 2<sup>nd</sup> defendant by himself, his servants, agents, family members and or by his representatives.**
- (ii) **An eviction order be issued against the 1<sup>st</sup> defendant by himself, his servants, agents, family members and or by his representatives.**
- (iii) **Mesne profits from the time of occupation and or encroachment to that time of determination of the suit.**
- (iv) **Cost of this suit.**
- (v) **Such further or other relief this Honourable Court deems fit to grant.**

2. The plaintiff pleaded that he is the registered owner of L.R No. Marachi/Elukhari/1128 measuring 4½ acres while the 2<sup>nd</sup> defendant is registered as owner of L.R No. Marachi/Elukhari/1159 which is adjacent to the plaintiff's land. The plaintiff avers that since 1981, the 1<sup>st</sup> defendant, his family and servants wrongfully entered into and or encroached on the suit land and forcefully evicted the plaintiff and burnt down his houses. That they continue to threaten him any time he attempts to go back to the suit land. The plaintiff accuses the 2<sup>nd</sup> defendant of uprooting the boundary planted by an order of the Court made on 25/1/2007.

3. The defendants filed their joint statement of defence on 5<sup>th</sup> April 2018 denying the claim. The defendants pleaded that the suit title L.R No. Marachi/Elukhari/1128 measures 3½ and not 4½ acres as stated by the plaintiff. They denied entering the plaintiff's land in 1981 as the plaintiff had not then acquired title to the suit land which he states he acquired on 2/11/2012. The defendants denied contents of paragraph 8, 9 and 10 of the plaint and put the plaintiff to strict proof.

4. The plaintiff gave his evidence on 5/11/2019. He stated that the 2<sup>nd</sup> defendant is his elder brother while the 1<sup>st</sup> defendant is a son of the 2<sup>nd</sup> defendant. The witness said he filed this case because the defendants have not allowed him to use his land. That the defendants destroyed the boundaries fixed by the elders of the Land Disputes Tribunal. He relied on the following documents in support of his case;

- (i) **Land Registrar's report dated 20/3/2017.**
- (ii) **Title deed for L.R No Marachi/Elukhari/1128 issued to him on 2/11/2012.**
- (iii) **Proceedings and judgment from the Butula Land Dispute Tribunal.**
- (iv) **An Order dated 8/11/2010 issued in BSA SPMCC No. 103 of 2006.**

5. The 1<sup>st</sup> defendant gave his evidence on 10/2/2020. He said that he is a retired assistant chief. That he lives on L.R No. 1129 and has never lived on the suit land. He produced a title deed for land Marachi/Elukhari/1129 registered in the name of Absalom Obora Wanga whom he says is his grandfather. In cross-examination, the witness said a road separates his land and the plaintiff's land. He denied cutting any trees on the plaintiff's land.

6. The 2<sup>nd</sup> defendant said he is a retired driver. He acknowledged the plaintiff as his step brother. The 2<sup>nd</sup> defendant said he lives on his parcel No. 1159 where he has always lived since 1957. He denied the plaintiff's claim. The 2<sup>nd</sup> defendant denied that the Land Registrar planted any boundary. This marked the close of the defence case.

7. The parties filed written submissions which I have read and considered. From the evidence adduced, each of the parties herein have their separate parcels of land. The plaintiff owns land title No. Marachi/Elukhari/1128; the 1<sup>st</sup> defendant owns title No. Marachi/Elukhari/1129 and the 2<sup>nd</sup> defendant owns Marachi/Elukhari/1159. The plaintiff's claim borders on both interference of user of his land as well as boundary dispute/encroachment.

8. The burden was upon the plaintiff to prove his Case as the defendants have categorically denied the claim. It is not in dispute that the plaintiff is the owner of L.R No. Marachi/Elukhari/1128 and is therefore entitled to enjoy its peaceful and exclusive use as guaranteed under Article 40 of the Constitution and Sections 24 and 25 of the Land Registration Act. Section 24(a) of the Land Registration Act provides thus;

**“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.**

9. The Land Registrar visited the disputed area after this Case was filed to determine the boundary between L.R No. 1128 and 1159. He filed his report in Court on 29<sup>th</sup> March 2017. The report stated that the visit was made in the presence of the following;

- (i) **Herbert Wang'anya Wanga – Complainant**
- (ii) **Josam A. Wanga – Defendant**
- (iii) **Area Assistant Chief – Emukhweso Sub-location**
- (iv) **James Maloba – Area Village Elder (Liguru)**
- (v) **Ernest Okwako**
- (vi) **Peter Okumu**
- (vii) **Benedict Okumu**

10. The Land Registrar observed that the boundary between the two plots on the lower side was intact so they adopted it as the common boundary separating the two parcels. On the upper side, he noted that no physical boundary existed so they proceeded to fix it guided by the Registry Index Map (RIM). Lastly the Land Registrar observed that the place where the 2<sup>nd</sup> defendant was pointing as the official common boundary was inside the plaintiff's land. That after they planted the boundary, parties were asked to respect it and maintain peace.

11. The defendants did not challenge the report by the Land Registrar. The report clearly showed that the 2<sup>nd</sup> defendant had encroached on the plaintiff's portion of land on the upper side. Since at the time of the hearing of this case, the County Land Registrar and County Surveyor Busia had fixed the boundary on the upper part of the plaintiff's land and 2<sup>nd</sup> defendant's land according to the Registry Index Map; this court's duty has been made easier since the law gives the Land Registrar mandate to determine boundary disputes. Section 18(3) of the Land Registration Act states that;

**“(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. In light of the above, I am satisfied that the plaintiff has proved his Case as against the 2<sup>nd</sup> defendant therefore I shall grant him **prayer (a)** of the plaint that an order of permanent injunction be and is hereby issued restraining him, his family members or representatives from encroaching on the plaintiff's parcel of land L.R No. Marachi/Elukhari/1128. The 2<sup>nd</sup> defendant is also directed to respect the boundary as fixed by the County Land Registrar Busia and County Land Surveyor Busia on 4<sup>th</sup> February 2016.

13. The plaintiff's claim as against the 1<sup>st</sup> defendant was not proved within the required standards because the 1<sup>st</sup> defendant stated that there is a road separating his land and the plaintiff's land. Secondly, the plaintiff was not specific on the nature of threats if any issued against him by the 1<sup>st</sup> defendant. If such threats are issued, the plaintiff is at liberty to report to the nearest police station for assistance as those are criminal incidences.

14. The plaintiff also prayed for mesne profits for the period of encroachment. I am not persuaded that the plaintiff proved to the Court what he was using/intended to put to use the part in dispute which he was prevented from using for that intended purpose. This head of the claim is therefore dismissed for lack of proof.

15. Costs follow the event. In this case, the plaintiff's suit has partially succeeded. I award the plaintiff costs of the suit to be paid by the 2<sup>nd</sup> defendant.

**Dated, signed and delivered at BUSIA this 7<sup>th</sup> day of July, 2020.**

**A. OMOLLO**

**JUDGE**