



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 49 OF 2013

MICHAEL KIPKOSGEI KWAMBAL..... PLAINTIFF

VERSUS

JANE NAFULA MOMANYI..... 1ST DEFENDANT

MARGARET MAISIBA..... 2ND DEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is the registered owner of **L.R. No. West Pokot/Siyoi/725** (suit land). The first defendant is the wife of the late **Francis Matara Momanyi** who had purchased a plot measuring **100ft x 82ft** which plot was comprised in **L.R. No. West Pokot/Siyoi/805**. The second defendant is the wife of the late **Benedicto Maisiba** who had initially been sued by the plaintiff. The second defendant was brought into this suit for burying her husband on the suit land.

2. The plaintiff seeks orders of eviction against the two defendants and their agents as well as an order of exhumation of the remains of **Benedicto Maisiba** from the suit land. The second defendant who had been duly served with summons to enter appearance neither entered appearance nor filed defence. The hearing therefore proceeded in the presence of the first defendant who had filed defence and was present during the hearing.

PLAINTIFF'S CASE

3. The plaintiff testified that he is the registered owner of the suit land. He produced a copy of title deed after the court viewed the original and returned it to him. The suit land is **0.5 of an hectare** and the title was acquired on 10/12/1979 [**Exhibit 1**]. The plaintiff contends that the defendants have encroached onto the suit land by about one quarter of the entire suit land. He testified that he had been having problems with the defendants regarding the encroachment. He brought in surveyors who determined the extent of the encroachment but that the defendants have refused to move out of the encroached area.

4. The plaintiff caused the second defendant's husband to be charged in **Criminal Case No. 174 of 2012** with the offence of forcible detainer. The accused was convicted for the offence and fined but he never moved out of the suit land. When the second defendant's husband died, he came to court and obtained an injunction restraining his relatives from burying his remains on the suit land but they defied the order and went ahead to bury the remains on the suit land. The plaintiff further testified that the first defendant was not charged together with the husband of the second defendant as she promised to move out of the encroached portion but she never moved out.

5. The plaintiff called **PW2 Augustine Nyongesa Wamalwa** a Deputy District Surveyor at West Pokot. This witness testified that he was asked to carry out a survey in respect of **L.R. West Pokot/Siyoi/725**. He went to the ground and carried a survey which confirmed that the two defendants had occupied the suit land whereas they bought their plots from a neighbouring land. He prepared a report as well as a sketch which he produced as **Exhibit 3** and **4** respectively.

FIRST DEFENDANT'S CASE

6. The first defendant testified that she first saw the plaintiff in the year 2011 when he came accompanied by surveyors. The plaintiff claimed that she was residing on his land. She testified that she is not staying on the plaintiff's land. The land on which she stays was bought by her husband in **1986**. Her husband bought a plot measuring **100ft x 82ft**. She produced a copy of sale agreement [**Defence Exhibit 1**]. The plot was bought from **Moses Tobe Daudi** who was owner of **L.R. West Pokot/Siyoi "A"/805** as per copy of title deed produced as [**Defence Exhibit 2**]. The first defendant took possession of the land in **1986**. She put up a house and planted bananas in **1987**. She has since been on the land. She contends that even if the plaintiff has any claim against her, the same is not maintainable as it is statute barred.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

7. The plaintiff's contention is that the defendants have encroached into about one quarter of the suit land. The first defendant on the other hand contends that she is occupying her own land which her husband bought from **Moses Tobe Daudi** owner of **L.R. No. West Pokot/Siyoi "A"/805**. The first issue which arises for determination is whether there is any encroachment on the suit land by either the first or the second defendant. The Plaintiff called **PW2 Augustine Nyongesa Wamalwa**, a surveyor from West Pokot. This witness produced what he called his report [**Exhibit 3**] and a sketch map [**Exhibit 4**]. The report is dated 31/8/2012 and is addressed to the Senior Principal Magistrate, Kapenguria. This report appears to have been prepared for use in Criminal Case No. 174 of 2012 where the husband of the second defendant had been charged with the offence of forcible detainer and creating disturbance in a manner likely to cause a breach of the peace. The report states as follows:-

"The proprietor of the above mentioned parcel No. 725 Mr. Michael K. Kwambai requested this office for acreage confirmation for parcel No. 725 which was carried out on 31st August, 2012 and it measures 0.5 Ha. Further more, the registered acreages for the same parcel is 0.5 Ha. No boundary adjustment was done during the time of acreage confirmation. The ground measurement was in agreement with R.I.M. However, Mr. Benedicto Maisiba bought a plot from adjacent parcel No. 805 some years back but instead of developing on parcel No. 805, he settled on parcel 725 of Mr. Michael Kwambai. According to the land purchase agreement Mr. Benedicto Maisiba claims land [50ft x 100ft] from parcel No. 805 but not 725.

- Attached here are the support documents showing the actual status on ground.

- A sketch map indicating the dimensions in metres on the ground.

- A title deed for parcel No. 725.

Also it is noted that the same parcel No. 725 was visited by the surveyor from this office severally on 30th November, 2011 and 10th February, 2012 but the defendant is decertified (dissatisfied) with the findings. Please provide the way forward to the complainant to end this matter.

Signed

A.N. Nyongesa

For District Surveyor

West Pokot District

8. The report which has been referred to hereinabove did not establish the extent of the alleged encroachment. The plaintiff claims that both the first and second defendants have encroached into the suit land. The said report has nothing to do with any encroachment as alleged. It does not mention the first defendant at all. The sketch which the surveyor produced only showed the dimensions of the suit land. It did not show any of the alleged encroached area. The surveyor also produced a letter dated 16/11/2011 [**Exhibit 2**] from District Survey Office West Pokot. This letter was addressed to the Assistant Chief of Tilak Sub-location. It required him to inform those who had plots adjacent to the suit land to be available on 30/11/2011 so that the extent of the boundaries of the suit land could be identified in relation to the adjacent ones. There is no evidence whether the surveyors visited and carried out the exercise. If the visit would have been carried out, it would have shown whether there was any encroachment and its extent if any. The visit which was supposed to be on 30/11/2011 was mentioned by PW2 in his report. It was just mentioned in passing but its findings were not there if it was ever carried out.

9. There were proceedings and judgment in Kapenguria Principal Magistrates Court Criminal Case No. 174 of 2012 produced as **Exhibit 6**. PW2 in this case was also PW2 in the criminal case. This witness produced his report which I have quoted hereinabove. In his evidence in the criminal case this witness talked of a report which was prepared and dated 25/1/2012. This report was never produced in this case. The trial magistrate in her judgment stated that she visited the scene on 14/8/2013 but the record of proceedings shows that she visited the scene on 12/8/2013. She did not make any notes on what she observed on the ground. The observations on what she observed on the ground are only mentioned in her judgment. She merely observed that she noticed that the accused was occupying part of L.R. No. 725. Since the trial magistrate was in the company of the surveyor, she would have at least recorded the findings of the surveyor. She appears to have relied on the survey report produced by PW2 which showed that the second defendant's husband who was the accused in the criminal case was wholly on the suit land.

DECISION

10. I do find that the plaintiff has failed to prove that there was encroachment by either the first defendant or the second defendant. An order of exhumation would have only been issued if it were found that the place where the husband of the second defendant was buried actually fell on the plaintiff's portion. This has not been proved.

11. The issue of limitation was raised by the first defendant. The Law of Limitation of Actions Act is clear that no action to recover land can be brought after expiry of a period of 12 years. There is evidence from the first defendant that the plaintiff started claiming that she was on part of the suit land in the **year 2011**. This evidence is supported by the documents produced by the plaintiff which show that the boundary dispute began in the **year 2011**. There is also evidence that the first defendant settled on her land in **1986**. The husband of the second defendant is said to have bought his plot in **2004**. This is according to proceedings in the criminal case at Kapenguria against him. If there was to be any encroachment established, the plaintiff's claim as against the first defendant would not have succeeded because it was brought 27 years later. I find that the plaintiff has failed to prove his case against both defendants on a balance of probabilities. His suit is hereby dismissed with costs to the first defendant.

Dated, signed and delivered at Kitale on this **13th** day of **July, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Bungei for M/s Arunga for Plaintiff.

Court Assistant – Isabellah

E. OBAGA

JUDGE

13/7/2015