



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 240 OF 2014

OUMA OYAGI PLAINTIFF

VERSUS

JULIUS AUMA DEFENDANT

JUDGMENT

1. The plaintiff filed the instant suit vide a plaint dated 24th June 2014 and seeks judgment against the defendant for orders that:-
 - a. **An order of permanent injunction restraining the defendant by himself and/or through his agents/servants/assigns from encroaching part of the plaintiff's parcel of land measuring approximately 1.44ha in land parcel known as South Mugirango/Nyataaro/579.**
 - b. **An order of eviction, to evict the defendant by himself and/or his assigns, agents from the plaintiff's parcel known as South Mugirango/Nyataaro/579.**
 - c. **Costs of the suit together with interest at court rates.**
2. The plaintiff by the plaint claims to be the registered owner of land parcel title number **South Mugirango/Nyataaro/579** measuring 5.26ha approximately while the defendant is the registered owner of land parcel title number **South Mugirango/ Nyataaro/1796** which borders the plaintiff's land. The plaintiff claims the defendant sometime in 2010 without any colour of right and/or consent of the plaintiff encroached onto the plaintiff's said parcel of land thereby damaging the boundary features and presently occupies a portion approximately measuring 1.44hectares. The plaintiff seeks an order for the defendant to vacate from the portion of the plaintiff's land that he occupies failing which an eviction order should issue.
3. The defendant was served with the summons to enter appearance together with plaint and all the documents accompanying the plaint by one **William Morara Ogwara** a process server on the 27th June 2014 as per the affidavit of service made on 7th July 2014 and filed in court on 9th July 2014. The defendant did not enter appearance and/or file a defence. The matter was fixed for formal proof hearing on 30th June 2015 and though served with a hearing notice the defendant did not attend court although the matter could not be heard as it could not be reached. The suit was fixed for formal proof hearing before me on 21st September 2015 but as there was no evidence the defendant had been served with a hearing notice I adjourned the matter for hearing on 10th November 2015 and directed that the defendant be served with a hearing notice.
4. On 10th November 2015 although the defendant had been served with a hearing notice only the plaintiff attended court and the court allowed the plaintiff to proceed with the hearing ex parte. The plaintiff testified as PW1 in support of his claim reiterating the contents of the plaint and his witness statement dated 24th June 2014. The plaintiff repeated that the defendant has encroached onto his parcel of land title number **South Mugirango/ Nyataaro/579** and is occupying a portion

measuring approximately 3 acres as verified by a surveyor. The plaintiff relied on the documents contained in his bundle of documents as per the list of documents dated 24th June 2014. These documents include:-

- i. A copy of title deed for land parcel South Mugirango/ Nyataaro/579 which shows the plaintiff to be the registered owner.
 - ii. A report by Juliko Geospatial Consultants – being a report by a surveyor dated 16/5/2014 which indicated a portion of about 3.6acres (1.44ha) of the plaintiff’s land is occupied by the defendant.
 - iii. A sketch plan prepared by the surveyor dated 16th May, 2014 showing the portion of the plaintiff’s land occupied by the defendant.
 - iv. Copy of certificate of official search dated 30th April 2014 which confirms the plaintiff to be the registered owner of land title **South Mugirango/Nyataaro/579** and that its area is 5.26Hectares.
 - v. Copy of Registry Index Map which shows that the plaintiff’s land parcel **South Mugirango/Nyataaro/579** borders and shares a common boundary with the defendant’s land parcel **South Mugirango/Nyataaro/1796**.
5. On the basis of the evidence tendered by the plaintiff I am satisfied there is proof that the defendant has encroached onto the plaintiff’s parcel of land. The report by **Aggrey K. Chacha** a surveyor of the firm of Juliko Geospatial Consultants tendered as part of the evidence by the plaintiff proves this fact. The evidence adduced by the plaintiff has not been controverted and I accept it. I find the assertion by the plaintiff that the defendant has encroached onto his parcel of land as proved on a balance of probabilities.
6. As the plaintiff’s and the defendant’s plots border each other it is necessary that their respective boundaries be reestablished and fixed. Although this is not a case of a boundary dispute perse but rather whether the defendant who is a neighbour of the plaintiff has encroached and trespassed onto the plaintiff’s parcel of land and I have found that the defendant has indeed encroached onto the plaintiff’s land, it is my view that in order to determine the extent of such trespass/encroachment, it is essential to re-establish and fix the boundary between the plaintiff’s and the defendant’s parcels of land.
7. Under section 18 and 19 of the **Land Registration Act, No. 3 of 2012**, it is the mandate of the Land Registrar to have boundaries fixed and I consider this to be an appropriate case to direct that he exercises that mandate as per the Act in respect of the parties land parcels herein. It is not lost to the court that the plaintiff herein was not represented by counsel in the matter and thus may not have appreciated the functional role of the Land Registrar. Pursuant to the overriding objective for the courts to do and administer justice expeditiously, I am persuaded that justice in this matter demands that the court intervenes to do justice to the parties. Hence the reason for directing action by the Land Registrar.
8. In the circumstances I enter judgment in favour of the plaintiff and make the following orders:-
- i. **That the Land Registrar Kisii and the County Surveyor do within the next 60 days from the date of this judgment re-establish and fix the common boundary of land parcels South Mugirango/Nyataaro/579 and South Mugirango/ Nyataaro/ 1796.**
 - ii. **The defendant to vacate land parcel South Mugirango/ Nyataaro/579 within 30 days of the boundaries being established in terms of (i) above failing which an eviction order to issue against the defendant.**
 - iii. **The plaintiff is awarded the costs of the suit.**
 - iv. **The land registrar, Kisii to be served with a copy of this judgment forthwith for compliance with order (i) above.**
 - v. **Matter to be mentioned in court on 16th March 2016 to confirm compliance with the above order.**

Judgment dated, signed and delivered at Kisii this 4th day of December, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE