



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 90 OF 2010

PIUS KANDA KILIMO PLAINTIFF

VERSUS

ERNEST KEMBOI CHELIMODEFENDANT

J U D G E M E N T

INTRODUCTION

1. The Plaintiff is the owner of Parcel No. 1329 at Milimani Settlement Scheme. The plaintiff bought the said parcel of land from John Kibet Kemboi who was the original allottee from the Government. The land measures 5 acres.
2. The defendant is the owner of LR No.1328 at Milimani Settlement Scheme. This land which is about 5 acres borders that of the plaintiff. The defendant bought this land from Hellen Chesumbai who was the original allottee.
3. The plaintiff brought this suit against the defendant for an order of eviction on allegations that the defendant had trespassed on to his land and that the defendant has since remained on the land.

PLAINTIFF'S CASE

4. The plaintiff testified that he bought LR No. 1329 from John Kibet Kemboi in 2003 at a consideration of Kshs.210,000/=. He produced a sale agreement between himself and John Kemboi as exhibit 1. He took possession and planted maize on it. He also planted some trees. In 2006, the defendant came and fenced half of his land claiming that he had an allotment letter in respect of the same land.
5. The plaintiff testified that the defendant had encroached his land by 40 metres on one side and 25 metres on the other side. The plaintiff contends that the defendant has fenced part of his land despite the surveyor having visited the land and pointed out the position as regards plot 1328 and 1329.

DEFENDANT'S CASE

6. The defendant denied that he had encroached on to the plaintiff's land. The defendant testified that he bought his land LR NO. 1328 from Hellen Chesumbai. He produced a sale agreement between him and Hellen Chesumbai (exhibit 1). The land was about 5 acres. He produced an allotment letter given to the allottee who sold the land to him (exhibit 2).
7. In 2006 there arose a dispute between the defendant and the plaintiff. The plaintiff alleged that the defendant had no land in the area. The two parties went before the OCS Cherangani Police Station. The OCS referred them to the Land's office. The lands office wrote a letter addressed to the OCS indicating the position of the two plots on the ground. The defendant produced a copy of the letter addressed to the OCS exhibit 4(a) as well as a map of the area exhibit 4 (b).
8. The letter from the lands office indicated that Surveyors were to be sent to the ground to ascertain the position. The surveyors went to the ground and ascertained the position. The plaintiff was not satisfied with the work done by the surveyors. He moved to Eldoret and filed a case against the defendant. The suit was finally struck out at the instance of the defendant. The defendant produced the survey report of 2008 as exhibit 6 (a) and a sketch map as exhibit 6 (b).

ANALYSIS OF EVIDENCE

9. There is no contention that plot Nos 1328 neighbours plot No 1329. There is also no contention that plot No. 1329 belongs to the plaintiff and plot No. 1328 belongs to the defendant. The issue which emerges for determination is whether the defendant has encroached into the plaintiff's land.
10. In the plaintiff's statement of claim, the plaintiff alleges that the defendant had moved on to his land and occupied it. In his evidence, the plaintiff alleged that the defendant had fenced half of his land. Again in his evidence he alleged that the defendant had encroached on to his land by 40 metres on one side and 25 metres on the other side. The plaintiff's evidence is contradictory and does not support his pleadings.
11. It was upon the plaintiff to adduce evidence to show that the defendant had indeed encroached on to his land to a certain extent. He did not do this. Contrary to the plaintiff's claim, it is clear from the survey report of 2008 which was produced in a case which the plaintiff had filed in Eldoret against the defendant that it is the plaintiff who is occupying 5.6 acres whereas the defendant is occupying 4.2 acres.
12. The plaintiff did not want this evidence to come out clearly. The plaintiff filed the Eldoret Case where the court ordered for a survey. The survey revealed that the plaintiff's claim was unfounded. This is why he tried to obtain an exparte judgement in his favour which he did but the same judgement was set aside when it was discovered that the plaintiff's lawyer in the Eldoret case served the defendant's lawyer for hearing in November, 2009 when the actual date taken for hearing was in August, 2009.
13. The survey report produced as exhibit by both the plaintiff and the defendant shows that the plaintiff's land is 5.6 acres whereas the defendant's land is 4.2 acres. The letter from the lands office as well as allotment letters for each of the two plots is about 5 acres. Even the sale agreements held by both the plaintiff and the defendant show that what they bought was land measuring 5 acres. It is therefore difficult to understand on what basis the plaintiff is seeking to have 5.6. acres when he bought only 5 acres.

DECISION

14. I find that the plaintiff has failed to prove his case on a balance of probabilities. The same is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this 17th day of July, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for Mr Kaosa for plaintiff and Mr Chebii for defendant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

17/7/2014