



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC NO 792 OF 2017

GEORGE MATIKO CHACHA.....PLAINTIFF

VERSUS

GATI WAMBURA.....1ST DEFENDANT

LAND REGISTRAR KEHANCHA.....2ND DEFENDANT

JUDGMENT

A) INTRODUCTION

1. The instant suit involves the following two (2) parcels of land;

a) Title Number Bugumbe/Mabera/1173 measuring approximately zero decimal three nine hectares (0.39 Ha) in area registered in the name of the plaintiff, George Matiko Chacha (The plaintiff's land herein), and

b) Title Number Bugumbe/Mabera/1174 measuring approximately zero decimal eight three hectares (0.82 Ha) in area registered in the name of the 1st defendant (Hereinafter referred to as the 1st defendant's land).

2. The plaintiff's land and the defendants' land are contained in Registry Map Sheet numbers 26 and 37 and located in Kuria west sub county within Migori County. They are sub-divisions of the original land, LR. Bugumbe/Mabera/113 measuring approximately ten decimal four hectares (10.4 Ha) in area.

3. The plaintiff is represented by learned counsel, Mr. Malenya instructed by Chimei and Company Advocates further to a notice of change of advocates dated 8th October 2018 filed on even date. Initially, Agure Odero and Company Advocates represented him.

4. The 1st defendant is represented by learned counsel, Mr. Olao instructed by P.K Mtange and Company Advocates.

5. The 2nd defendant, Land Registrar Kuria, is unrepresented herein.

B) THE GIST OF THE PLAINTIFF'S CASE

6. The plaintiff generated this suit by way of a plaint dated 14th August 2017 duly filed in court on 15th August 2017 seeking the following reliefs;

a) An order of permanent injunction preventing the 1st defendant, agents, servants, assigns from encroaching into parcel LR No. Bugumbe/Mabera/1173.

b) An order directing the 2nd defendant to confirm the actual measurement viz:- the plaintiff's land and the 1st defendant's land and make necessary correction, amendments, rectifications on the boundaries and on the title deeds and further give a report thereof, which report shall be adopted as the judgement of this honourable court.

c) Cost of the suit be in cause.

7. The plaintiff's claim per the plaint is that his (the plaintiff) land borders the defendant's land. That the latter eats part of the former by approximately 5 metres on one of its widths. That at the time of subdivision of the original land, there was apparent error in terms of the defendant's land mutation showing measurement of 52 metres by 115 metres by 70 metres, hence The same is different from the actual

measurement on the ground. The plaintiff reported the error to the 2nd defendant who visited the plaintiff's land as well as the defendant's land and confirmed the discrepancies. As a result, it precipitated the present suit.

8. On 25th July 2019, the plaintiff(PW1) gave oral testimony referred to and relied on his statements dated 14th August 2017 and 23rd May 2019 as part of his evidence. He also referred to and relied on his list of documents dated 14th August 2017(PEXhibits 1 to 6) and a supplementary list of documents dated 23rd May 2019(PEXhibits 7 to 11).

9. On 30th July 2020, PW1 was recalled and presented his evidence by way of video play. He stated, inter alia, that on 16th November 2017 and 20th September 2018, he carried out Audio CD Recording(PEX10) which shows errors during the exercise mounted by the 2nd defendant further to the court order of 23rd July, 2018. He also referred to PEXhibits 8 and 9 herein.

10. PW2, Florence Osebe testified that she is a widow of Murimi Marwa alias Muniko (Deceased), who sold the defendant's land to the 1st defendant(DW1) in the year 1990 and sold the plaintiff's land to PW1 in the year 1998. That there was a clear natural boundary made of sisal plants between the plaintiff's land and the 1st defendant's land.

11. By 11-paged submissions dated 30th August 2020 and duly filed in court on 1st September 2020, learned counsel for the plaintiff made reference to the orders sought in the plaint, the evidence of PW1,PW2, the 1st defendant(DW2) as well as the 2nd defendant(DW1) and framed three (3) issues for determination compressed to whether this court should grant the three (3) reliefs sought in the plaint. In analyzing the issues in favour of the plaintiff, counsel cited Sections 79 and 80 of the Land Registration Act, 2016(2012), the Court of Appeal decisions in *Azzuri Limited vs Pink Properties Ltd (2018) eKLR*, and *Esther Njoki Rurigi vs Patrick Gathenya(2005)eKLR*, alongside persuasive authorities of *Elias Joseph Waburi Wamunyu vs Joseph Mwangi Njoroge(2017)eKLR*, and *Rahab Mumbi Kimani vs Damaris Wanjiku Gachoka(2018)eKLR*.

12. Counsel submitted that there is imminent threat of encroachment of the plaintiff's land hence need for the court to uphold the physical boundary of the plaintiff's land and the defendant's land and order rectification sought in the plaint. That therefore, the plaintiff is entitled to move the court under Article 22 of the Constitution of Kenya, 2010.

C) THE GIST OF THE DEFENDANTS' CASE

13. In his statement of defence dated 20th September 2017 filed on even date, the 1st defendant admitted ownership of the plaintiff's land and the defendant's land save that they did not originate from LR No. Bugumbe/Mabera/1171 as alleged in the plaint. She denied the plaintiff's claim and termed it frivolous, vexatious and an abuse. The 1st defendant further avers that the plaintiff's suit is frivolous, vexatious and an abuse of court process intended to threaten, harass, and intimidate the 1st defendant off her private property, and deny her quite enjoyment.

14. The 1st defendant therefore, prays that;-

a) The plaintiff's suit be dismissed as it does not disclose a cause of action.

b) Permanent injunction do issue as against the plaintiff from interfering and disturbing the quite enjoyment of the said parcel.

c) That mandatory order do issue against the plaintiff herein to erect a permanent fence around parcel number Bugumbe/Mabera/1173 under the strict supervision of the Surveyor and the OCS Isebania.

d) That the 1st defendant be at liberty to cut down any and all erections by the plaintiff herein encroached on her parcel number Bugumbe/Mabera/1174.

e) Cost of the suit and also costs of the application.

15. In her oral testimony, the 1st defendant(DW2) referred to and relied on her statement dated 20th September 2017 and list of documents of even date (2nd DEXhibits 1 to 9). She stated, inter alia, that in the year 1999, the plaintiff (PW1) destroyed sisal boundary between the plaintiff's land and her land (defendant's land). That she had not been having any problem with PW1 until the seller of the said two (2) parcels of land died.

16. The 1st defendant's submissions dated 11th September 2020 and filed in court on even date opposed the contents of the plaint giving the background facts of the case, the evidence adduced and framed two (2) issues for determination namely whether the 1st defendant's land trespassed into the plaintiff's land and whether the plaintiff's claim has merit. Her counsel analysed the issues in favour of the 1st defendant.

17. To fortify the said submissions, counsel cited the Trespass Act Cap 403 Laws of Kenya, The Holy Bible in Exodus 22-21-24 and the Halsbury's Laws of England 4th edition volume 45 at paragraph 26, 1503. Counsel further relied on a list of authorities of even date including *Nakuru Industries Ltd v S.S Mehta and sons (2010)eKLR*, *Trust Bank Ltd v Amin Company Ltd and another (2000)KLR 164 and DT Dobie and Company v Muchina (1982)KLR1*, and argued that the plaintiff's conduct does not endear him to equitable remedies.

18. The 2nd defendant Lamech Mochache (DW1), relied on a report dated 5th October 2018 and filed in court on 24th October 2018(PEXh1) in his evidence. He testified inter alia, that the plaintiff's land on the ground is bigger than what is on the map and has not encroached into the 1st defendant's land which is smaller on the ground compared to its map.

19. The 2nd defendant did not file and serve further document and submissions or at all in this suit.

D) ISSUES FOR DETERMINATION

20. It is settled law that the issues for determination in a suit flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Ltd v Falcon Grounds Ltd (2000)2EA 381*.

21. I have duly considered the parties' respective pleadings, evidence and submissions including all the authorities cited therein. On that score, I think, the issues that emerge therefrom for determination herein are compressed to whether:

a) The defendant's land borders the plaintiff's land.

b) The 1st defendant trespassed into the plaintiff's land in error by way of physical measurement

c) The plaintiff and 1st defendant are entitled to orders sought in their respective pleadings.

E) ANALYSIS AND DETERMINATION

22. As regards the first issue, PW1 asserted in paragraphs 4,5, 8 and 10 of the plaint that he is the registered proprietor of the plaintiff's land which borders the defendant's land. That both parcels of land resulted from the original land, LR No. Bugumbe/Mabera/1171.

23. The statement of PW1 dated 14/8/2017 and forming part of his evidence, shows that the owner of the plaintiff's land measuring 35 by 153 by 148 metres. That he has lived, cultivated and even leased out the same to other people since the year 2000.

24. , At paragraph 3 of his further statement dated 23rd May 2019, filed in court on 29th May 2019, PW1 stated;

“Our two parcels are demarcated by old physical features consisting of trees and the same have been in existence for ages”

25. During examination in chief, PW1 stated that 1st defendant's land neighbours the plaintiff's land. When he was recalled on 30th July 2020, he stated that:

“The trees along the boundary were planted by the 1st defendant as shown in clip No. 4”

26. In cross examination, PW1 testified in part:

“...I have one common boundary between my land and the 1st defendant's land...”

27. Quite clearly, the existence of the boundary is undisputed as the evidence of DW2 was that PW1 destroyed sisal boundary between the plaintiff's land and the 1st defendant's land. That the two parcels of land had a marked boundary made of sisal plants. She testified further that:

“...PW1 and his family destroyed common boundary...”

28. The second issue is whether the 1st defendant (DW2) trespassed into the plaintiff's land. I take into account paragraphs 6,7,8,9 and 10 of the plaint and the two (2) statements of PW1 and his oral testimony that the 1st defendant's land extends into the plaintiff's land by approximately five (5) metres.

29. The 1st defendant's statement of defence including the prayers sought therein and her oral testimony show that PW1 destroyed the common live boundary between the defendant's land and the plaintiff's land. As such, did the 1st defendant trespass into the plaintiff's land?

30. According to DW1, the findings in the 2nd DEXhibit 1 show that the plaintiff's land on the ground is bigger than what is on the map. That he has encroached into the land of the original owner. That the 1st defendant may wish to claim the land from the plaintiff's land.

31. The observation/conclusion especially No. 4 in 2nd DEXh1 reads:

“We cannot change as it is on the ground because it will affect other parcels that is parcel No 112 and parcel 1172. The existing boundary is adopted as the common boundary between parcel 1173 and 1174 and parties were asked to maintain in good order the fence/hedge along this common boundary.”

32. The testimony of DW1 as per 2nd DEXhibit 1 is partly as follows;-

“After the ground survey we realized that the ground measurements do not tally with what is in the map.....”

33. In the words of DW1, may this court adopt 2nd DEXhibit 1 in terms of its findings. Clearly, 2nd DEXh1 was carried out pursuant to Sections 18 and 19 of the Land Registration Act, 2016(2012). The same is opinion evidence under Sections 48 to 54 of the Evidence Act (Cap 80 Laws of Kenya).

34. In the case of *CD Desouza v BR Sharma (1953)26 KLR 41 at 42*, it was observed that generally, opinion evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances; see also *Amosam Builders Developers Ltd v Gachie and 2 others (2009)KLR 628* and this court's decision in *Registered Trustees, Legio Maria Africa Church Mission v Simeon Nyamweya Obwocha (2018)eKLR*.

35. It is pretty clear from 2nd DEXhibit 1 that DW1 visited the disputed site on 20th September 2018 to establish and fix boundaries of the plaintiff's land and the defendant's land as ordered by the court. They carried out the exercise and prepared 2nd DEXhibit 1. Having reviewed and considered the facts and circumstances herein as per DEXhibit 1, I find no reason to interfere with the same as held in *Andrew Mariywa v Josephat Ondieki Kebati (2017) eKLR*, which I approve without any reservation. In the obtaining scenario, DW1 did determine the position of the common boundary between the plaintiff's land and the 1st defendant's land, in accordance with Sections 18 and 19 of the Land Registration Act, 2016(2012).

36. *Clerk and Lindsell on Torts (18th Edition) paragraph 18-01* defined "Trespass" thus:

"An unjustifiable entry by one person upon the land of another."

37. Similarly, I am aware of the meaning of "Trespass" as per the Black's Law Dictionary 10th Edition at page 1733. Moreover **section 152A of the Land Act,2016 (2012)** provides; -

"A person shall not unlawfully occupy private community or public land"

38. Article 40(1) of the Constitution of Kenya, 2010 anchors the protection of right to property. I also bear in mind Sections 79 and 80 of the Land Registration Act,2016(2012) on rectification of the register by Registrar and order of the court respectively. In view of 2nd DEXhibit 1, this is not the appropriate case to invoke the powers under the said legal provisions.

39. The tort of trespass is actionable per se. Generally, it attracts general damages depending on the entire case and circumstances thereof as observed by the Court of Appeal in *Eric Adome and another v Pauline Kasumba Osebe and another (2014) eKLR*. It is evident that the 1st defendant has not trespassed into the plaintiff's land.

40. On the 3rd issue, applying the foregoing authorities including *Nakuru Industries Ltd, Esther Rurigi and Azzuri Ltd cases (supra)* to the entire facts and circumstances of this case, the plaintiff's suit is devoid of merits. His claim has not been proved on a balance of probabilities as the defendant's case thwart's the same. He is not entitled to the reliefs sought in the plaint.

41. Thus, my considered view is that the report of DW1,(2nd DEXhibit 1) has finally determined the present dispute. I approve the report as the Judgment of this court and direct that the observation or conclusion therein be implemented accordingly and in terms of the prayers (a), (b),(c), (d) and (e) sought in the 1st defendant's statement of defence dated 20th September 2017 duly filed in court on 20th September 2017.

42. It is so ordered.

Delivered, Signed and Dated at Migori in open Court and 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 22nd day of OCTOBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of :-

Mr. B. Achola learned counsel holding brief for Chimei learned counsel for the plaintiff

Plaintiff – Present in person

Defendant – Present in person

Court Assistant – Tom Maurice